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THE LAW OF THE
DOMESTIC RELATIONS.



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THE LAW OF THE DOMESTIC RELATIONS.

INCLUDING

HUSBAND AND WIFE: PARENT AND CHILD:

GUARDIAN AND WARD: INFANTS:

AND

MASTER AND SERVANT.

BY

WILLIAM PINDER EVERSLEY, B.C.L., M.A.

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

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TO
SIR EDWARD CLARKE, K.C.

This Book

IS DEDICATED

AS A TOKEN OF SINCERE REGARD

BY HIS

FRIEND AND FORMER PUPIL,

THE AUTHOR.

PREFACE TO THE THIRD EDITION.

IN this edition the endeavour has been made to keep the text abreast of the latest decisions of the Courts; but it is difficult to say that since the last edition any new principles of law affecting the subject-matters of this treatise have been laid down either in the Statute-book or in the judgments of the Courts. The subjects that lend themselves most readily to changes are the law of Husband and Wife, and that of Infants; and even in these there has been little alteration during the last ten years. It is true that the theory of the merged existence of husband and wife is being gradually effaced, and especially in the direction of making them competent witnesses for and against each other in criminal proceedings. Since the year 1896 the House of Lords has laid down authoritatively that where a married woman restrained from anticipating her property contracts a debt in respect of which a judgment is obtained against her, the judgment creditor may attach the income accrued due (whether paid to her or no) up to the date of the judgment; in other words, the material date for fixing the liability of her property to satisfy the claims of her creditors is that of the judgment. This important ruling may be said to be the outcome of the protracted Hood-Barrs litigation. In other respects married women subject to this artificial fetter are as free as ever to commit frauds and shirk their liabilities (and some of them avail themselves of their opportunities). One eminent law lord has laid it down that a married woman cannot get rid of the restraint by hook or by crook—not even by her fraud. It is really time that the Legislature should intervene and allow the Courts to make orders removing the restraint and reaching her property where it is shown that she has been guilty of fraud in dealing with her creditor, and there has been no collusion between herself

and her husband or other person to get rid of the effect of the restraint.

One of the commonest forms of fraud practised by married women is the carrying on nominally in their own names the trades of their bankrupt husbands, who, under the shelter of the contractual powers of their wives, defy the provisions of the Bankruptcy and Debtors Acts. This form of fraud should be rendered more difficult by legislative interference, by throwing on the husband the burden of proving that a debt incurred by a wife carrying on his late trade was one taken up on her own behalf and not on behalf of himself. The converse state of things is also an engine of chicanery—where the wife carries on a business through her husband; when creditors press, the impecunious husband is put forward as the debtor; but the property of the business is claimed as the wife's separate estate.

As to Infants, the tendency that was observed upon in the last edition of this work is still most marked, viz., the interference with the parental and tutorial control of young persons. During the last ten years several Acts of Parliament have been passed for the purpose of depriving of the custody of a child a parent or guardian whose conduct might be deemed to set a bad example, or tend to corrupt its morals; indeed, it is now a punishable offence for a person to be drunk whilst in charge of a child apparently under seven years of age (the Licensing Act, 1902). Again, where a Court thinks the example or conduct of a parent has conduced to the commission of an offence by a young person who is fined for it, the parent or guardian may be ordered to pay it. This principle of vicarious punishment is new to the English system of criminal jurisprudence. In one small point of practice the disability of infancy has been removed; for now discovery in an action may be obtained against an infant and his guardian or next friend.

The author puts forward this third edition with the expression of his hope that it may to some degree subserve the needs of the profession.

W. P. EVERSLEY.

PREFACE TO THE SECOND EDITION.

IN the second edition of this work it is hoped that the Profession will recognize an improvement on the first. The ground-work of the book generally remains the same ; but in Part I., dealing with the law of Husband and Wife, much alteration and modification have been effected. A chapter is now devoted to the Contracts of Married Women, which subject (perhaps more logically and scientifically) was previously discussed under various sub-headings in different chapters. For convenience of reference, it is now set forth as a matter for separate treatment. In the interval between the publication of the first edition and the present time, a large amount of case law has been decided, interpreting the effect of the important piece of legislation known as the Married Women's Property Act, 1882. The tendency of our courts of law was quite observable in the interpretation put upon it, viz., a reluctance to extend the scope of legislation one jot further than is warranted by the words of the statute, and the general principles of law in vogue at the time. An instance of this tendency may be found in the necessity for passing the Married Women's Property Act, 1893, which now, for the first time, renders the contract of a married woman, in her sole and personal capacity, efficacious and valid, though at the time of its inception she is not possessed of any free property of her own. The Act has not been altogether an unmixed blessing, for creditors have suffered at the hands of unscrupulous spouses, who have employed its privileges as an engine of fraud. A married woman, so far as her proprietary rights and contractual powers are concerned, is now, in nearly every particular, on the same level as her unmarried sister or a man. The Legislature should further

remove the few differences that exist by cutting down the effect of the restraint upon anticipation, and rendering a married woman, though not a separate trader, amenable to the bankruptcy law, and liable to be committed (if possessed of means) for her post-nuptial liabilities.

In the domain of Parent and Child, a very important Act was passed in 1886, which puts a mother in a most favourable position in the matter of the guardianship of her children, giving her practically co-ordinate rights with the father, and rendering her title to their control and custody not only effective, but easily enforced. A curious feature of modern philanthropy (so called) is the dead set made by the courts at the parental authority, especially as exemplified in the case of *Reg. v. Gyngall* (1893), 2 Q. B. 242.

This philanthropy is still further visible in the number of statutes passed for the health and morals of very young persons—Acts passed with the best intentions, but liable to be abused unless enforced with discretion.

A reference once for all to the different reports of the decided cases is now given in the Table of Cases. I must acknowledge the valuable assistance rendered to me by my clerk, Mr. James Berry, in the preparation of the Table of Cases. It has been sought to make the Index full and complete.

This second edition is put forward with every wish that it may prove of use to the Profession, and meet with the same kindly treatment that was afforded to the first.

W. P. EVERSLEY.

6, KING'S BENCH WALK, TEMPLE,
June 1896.

PREFACE TO THE FIRST EDITION.

Down to the present time there has been no one work published in England comprehensively treating of the legal relations of the various units that comprise the family or domestic group. Blackstone, it is true, touches upon them in his Commentaries, but only by way of an outline sketch. There are three considerable works on the subjects; one Scotch, by Mr. Patrick Fraser (now Lord Fraser), and two American, written respectively by Mr. Reeve and Mr. Schouler. Lord Fraser's work has long since been split up into separate volumes dealing with the component subjects. The hope that a combined treatment of these varied and important relations might be acceptable to English students of the law has prompted the penning of these pages.

This book has been the result of rather over three years' labour. No small portion of that time has been consumed in rewriting or recasting those chapters in Part I. dealing with the law of Husband and Wife, in consequence of the passing of the Married Women's Property Act, 1882, for most of them had been written before that Act was so quickly despatched through both Houses of Parliament. The full effect of this Act is as yet but dimly seen.

In the first part of this work a divergence from the ordinary beaten tracks of the text writers has been ventured upon. There are chapters devoted to a short consideration of the marriage laws of Scotland and Ireland, and the international aspect of marriage and divorce. These have been added, because it was deemed of sufficient moment to notice the marriage laws, in so far as they differ from the English, of those countries which form an integral part of this empire,

and between the peoples of which frequent intermarriages take place. Knowledge, too, of the effect given to the status of marriage and divorce by the tribunals of the various civilized nations is rendered not only useful but even necessary by reason of the many intermarriages of British subjects and foreigners which have been the direct outcome of modern facilities of intercourse and travelling.

Infancy by itself cannot, of course, be properly styled a "domestic relation." On the one hand, it is intimately connected with the parental and tutorial relations; on the other, a large part of the law dealing with it lies outside of those relations; but because of its importance it has been deemed advisable to discuss it in this treatise, though separately and apart.

The chief aim in this work has been to give the general principles underlying the subjects discussed; to enter fully upon all their bearings and details would have been impossible; but, at the same time, when the importance of any particular subject demanded it, a more thorough and comprehensive treatment of it will be found.

I am much indebted to Lord Fraser for that portion of the book which deals with the Scotch law of marriage; and to Mr. Schouler generally, for many valuable hints of arrangement, and for his accurate research into English case law. I have striven to show both in the text and notes the sources from which I have derived my information; and passages cited verbatim are marked as such. Mr. L. G. Robbins, of Lincoln's Inn, was good enough to read over some of the chapters in Part IV.; and Mr. H. T. Banning, of the Inner Temple, rendered me assistance in revising the chapter on Marriage Settlements. I am also under obligations to Mr. W. E. Hartopp, of the Midland Circuit, for his kindly aid in preparing the Table of Cases.

W. P. EVERSLEY.

7, KING'S BENCH WALK, TEMPLE.

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ADDENDA ET CORRIGENDA.

A COVENANT by a wife or a husband and wife on marriage to settle her after-acquired real estate does not affect an estate tail because of the peculiar nature of such an estate.—*Hilbers v. Parkinson*, 25 Ch. D. 200; *Re Dunning's Settlement*, *Nott v. Dunning*, [1906] 1 Ch. 578.

Page 6, n 2, for 1 H. L. Cas. read 2 H. L. Cas.	Page 591, n 4, for [1901] 2 Ch. 578 read [1902] 2 Ch. 542.
„ 115, last line, for Wilson read Williamson.	„ 594, n 8, for 3 & 4 read 4 & 5.
„ 118, n 3, for Cl. read Q. B.	„ 603, n 5, for Reg. v. Thompson, 12 Q. B. D. 261 read Berkley v. Thompson, 10 App. Cas. 45.
„ 136, n 3, for Currie read Currey.	„ 670 line 15. The Clause beginning “A trust to accumulate” should not be printed as part of sub-s. 3 of sect. 43 of the Conveyancing and Law of Property Act, 1881.
„ 156, n 3 and 163 n 1 for Re Tetley, W. N. [1886] 86 read Re Tetley, Ex parte Jeffery, 66 L. J. Q. B. 111.	„ 710, n 2, for Bronskill read Brunskill.
„ 230, n 7, for 38 & 39 Vict. c. 57 read 37 & 38 Vict. c. 57.	„ 717, n 9, for Dowie read Dowse.
„ 382, n 2, for Ireford read Tréfond.	„ 731, n 10, for Harker read Haskin.
„ 438, n 4, for Ch. read Q. B.	„ 758, n 16, for Walker read Wallace.
„ 443 line 4, for “brought” read “signed.”	„ 760, n 4, for 55 read 8.
„ 469, n 1, delete 2 Edw. VII. c. 28.	„ 847, n 2, for Grimes read Groves.
„ 518, n 3, for 2 Car. II. c. 23 read 12 Car. II. c. 24.	„ 885 n 3 and 886 n 12, for L. R. 10 Q. B. 124 read L. R. 10 Q. B. 224.
„ 538, n 7, for sect. (7) read sect. 4 (5).	
„ 570, n 5, for L. R. 5 Ch. App. read 7 H. L. Cas. 53.	

THE LAW OF THE DOMESTIC RELATIONS.

PART I.

HUSBAND AND WIFE.

CHAPTER I.

THE LEGAL CHARACTER OF MARRIAGE.

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WHATEVER may have been the most early form of human society, it is now generally accepted that the Family is the parent of social and political life, as it has existed from remote historic times down to the present period. The fundamental conception of the term "Family" is the union of man and woman, the weaker protected by the strong, but ministering to his wants; and from this union spring other lives, which are bound together by their common origin and affection. To this social nucleus were added in process of time strangers serving as slaves, whose services the

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tasted sweets of softer life made necessary, till little by little was built up that social structure which found its widest development in the patriarchal life of the East and its severest in the stern *patria potestas* of ancient Rome. This union was no mere temporary consorting together of man and woman, but one lifelong bond; and it is difficult to imagine any other condition between the two, when it is remembered that the wife was deemed but little more than a personal chattel of the husband, over whom he had the fullest power. It is only in the later stages of civilization, when woman has taken a more equal rank with man, that this bond is more easily dissolved. Polygamy, or the taking of more wives than one, in no way affected the duration of the tie. This union, then, from the distant time when human life began to crystallize into ordered shape and form, has among all the higher races been permanent and life-long, and is called Marriage. Marriage signifies both the acts which create the tie, and the state of those who are bound by it.

The term "contract" has in modern times been generally applied to the relationship of those who enter the state or condition of matrimony, because, no doubt, of the essential element of consent and agreement between the parties intending to become man and wife; but marriage is more than a contract, it is a *status*, the conditions of which are regulated *for* and not *by* those who enter it. After the marriage is perfected, the semblance of a true contract is at an end. Thus, the Roman jurists did not discuss it under the head of Obligations, but under *Status*, or the law of Persons. For convenience, and in imitation of eminent authors who have dealt with this subject, the term contract will be used to designate this relationship.

Marriage has been defined in various ways by various authors: as a status or institution; as a real or a consensual contract;¹ as a religious bond; and as a purely civil engagement. In fact, it has been regarded from the lofty sacramental view of the Church of Rome down to a mere agreement for the propagation of the species.

"Marriage has been well said to be something more than a contract—either religious or civil—to be an Institution."²

"Marriage is a state or relation, depending for its existence upon the fact of parties competent to contract the relation, and their legally voluntary present consent to do so, with such formalities as the law of the place requires for its valid solemnization."³

¹ There has been much discussion among commentators on Roman law as to whether marriage was a real or consensual contract, but the modern opinion (based on that of Savigny) is, that it is neither the one nor the other; and that under the Roman law it was a conveyance operating upon the status of at least one of the parties.

² Per Lord Penzance in *Hyde v. Hyde and Woodmansee*, L. R. 1. P. & D. 130, 133.

³ Story, Conf. of Laws, s. 112 a.

“Marriage is the civil status of one man and one woman A status. united in law for life, under the obligations to discharge to each other, and the community, those duties which the community by its laws holds incumbent on persons whose association is founded on the distinction of sex.”¹

The following is put forward as a description pointing to the condition of the parties subsequent to their entering upon the marriage state: “The voluntary social union of man and woman for an unlimited time, entailing certain mutual rights and duties, evidenced by some legal form or ceremony—religious or secular—expressive of the consent of the parties to enter such union.”

The next step is shortly to discuss what is the true character of this contract: whether it be a contract pure and simple, or a mixture of contract and status; and whether it is a religious or civil contract in relation to the State. The legal character of marriage.

“According to juster notions of the nature of the marriage contract, it is not *merely* either a civil or religious contract, and at the present time it is not to be considered as originally and simply one or the other.”²

Again: “Marriage in its origin is a contract of natural law; it may exist between two individuals of different sexes, although no third person existed in the world, as happened in the case of the common ancestors of mankind. It is the parent, not the child, of civil society, *principium urbis et quasi seminarium rei-publicæ*. In civil society it becomes a civil contract, regulated and prescribed by law, and endowed with civil consequences. In most civilized countries, acting under a sense of the force of sacred obligations, it has had the sanctions of religion super-added. It then becomes a religious as well as a natural and civil contract; for it is a great mistake to suppose that because it is the one, therefore it may not likewise be the other. Heaven itself is made a party to the contract, and the consent of the individuals pledged to each other is ratified and consecrated by a vow to God.”³ Marriage a civil contract to be sanctioned by religion.

Mr. Justice Story also holds it to be more than a mere contract, for he says: “I have throughout treated marriage as a contract, because this is the light in which it is ordinarily viewed by jurists, domestic as well as foreign. But it appears to me to be something more than a mere contract. It is rather to be deemed an institution of society founded upon the consent and contract of the parties; and in this view it has some peculiarities in its nature, character, operation, and extent of obligation, different from what belong to ordinary contracts.”⁴ The “married

¹ Bishop, Law of Marriage and Divorce, s. 3.

² Per Lord Stowell in *Lindo v. Belisario*, 1 Hag. Con. 216, 230.

³ Per Lord Stowell in *Dalrymple v. Dalrymple*, 2 Hag. Con. 54, 63.

⁴ Conf. of Laws, s. 108 n.

state" is not itself a contract, but before that "married state" can be entered into, those who are about to enter it must agree or contract to do so; thus, while the "state of marriage" is not a contract, yet it is founded on a contract. Over the contract the parties have complete control (subject to each other's rights arising from it); but over the status they have no control, but must invoke the authority of the tribunals of their domicile to abrogate it or import any modification into it.

"Marriage is a contract *sui generis*, and differing in some respects from all other contracts, so that the rules of law which are applicable in expounding and enforcing other contracts may not apply to this. The contract of marriage is the most important of all human transactions. It is the very basis of the whole fabric of civilized society. The status of marriage is *juris gentium*, and the foundation of it, like that of all other contracts, rests on the consent of parties; but it differs from other contracts in this, that the rights, obligations, or duties arising from it are not left entirely to be regulated by the agreement of parties, but are to a certain extent matters of municipal regulation, over which the parties have no control, by any declaration of their will. It confers the status of legitimacy on children born in wedlock, and with all the consequential rights, obligations, or duties thence arising; it gives rise to the relations of consanguinity and affinity; in short, it pervades the whole system of civil society. Unlike other contracts, it cannot in general, amongst civilized nations, be dissolved by mutual consent; and it subsists in full force even although one of the parties should be for ever rendered incapable, as in the case of incurable insanity or the like, from performing his part of the mutual contract."¹

The matrimonial law of this country is adapted to the marriage of Christians, and is inapplicable to polygamous connections;² and while an English subject retains his English domicile he cannot contract a valid marriage with the subject of a foreign country which permits polygamy, the marriage being carried out according to the forms and ceremonies (if any) of that country.³ It would seem to be doubtful, according to the law of this country, whether a marriage between a domiciled Englishman and a native of such foreign country would be good on the ground of "necessity," where it was impossible for the marriage to be celebrated by a recognized English minister or official.⁴ But

¹ Per Lord Robertson (Primus) in the *Edmonstone, Levett, Forbes, and Ferguson* divorce cases, p. 397. This judgment was delivered in a Scotch case, but is equally descriptive of English marriages.

² Per Lord Penzance in *Hyde v. Hyde and Woodmansee*, L. R. 1 P. & D. 133.

³ *Re Bethell, Bethell v. Hildyard*, 38 Ch. D. 220.

⁴ See Basuto and British Bechuanaland Marriage Act, 1889 (52 & 53 Vict. c. 38), assented to validate marriages celebrated in those territories between parties (one or both being British subjects) by any minister of religion of any denomination of

a "Christian marriage" does not mean strictly only a marriage between Christians, but monogamous, that is, a marriage excluding the taking of more than one spouse; thus, where a marriage was had between a British subject and a Japanese woman, and it was proved that they were validly married according to the laws of Japan, and by those laws the husband was excluded from taking more than one wife; the marriage was held good.¹

Of late years a great change has taken place in English law in this matter. Formerly the religious element in matrimony was more prominent, but since the year 1836,² it would be more correct to say that in the eye of the law the civil aspect has predominated. The consensual nature of the marriage contract remains untouched; but while the offices of the clergy of the Established Church are no doubt retained, a religious ceremony of marriage is no longer an obligation in the eye of the law, and marriage is treated as a civil contract. The priest and registrar, and, more lately, an "authorized person" appointed by recognized Nonconformist bodies, are on the same level, and a State or official witness is now appointed of the consent of the parties, and to be a guarantee of propriety and regularity. By the law of England, then, the legal character of marriage as the inception of the matrimonial union is a consensual civil contract. But, as before pointed out, the effect of marriage is not confined to that of ordinary contracts, for a new status is created between the contracting parties, which affects not only themselves but the society at large in which they have taken up their matrimonial abode. In other words, marriage in its widest sense is an Institution. From this fact that the social union of the spouses is a status and not a mere contract flows one important result, namely, that the State or legislature has it in its power to cure an invalidity arising from mere defects in form where the parties marrying had a matrimonial intent: so, too, on the contrary, it can render null and void marriages already contracted if it thinks fit so to do.

The marriage state being the chief foundation on which the superstructure of society rests, it follows naturally that the law, which is the expression of the sentiments prevailing among organized communities, assumes a favourable attitude towards the state. The presumption of the law is clearly in its favour. *Semper præsumitur pro matrimonio* is an invariable legal maxim.³ This presumption of law must prevail unless broken in upon, and is much stronger than any ordinary legal presumption in the case of any other fact to be proved or disproved. The burden

Christians, duly appointed or ordained or reputed to be so, if properly registered within three years of celebration.

¹ *Brinkley v. Att.-Gen.*, 15 P. D. 76.

³ *Steadman v. Powell*, 1 Add. 58.

² 6 & 7 Wm. IV. c. 85.

Marriage contract a consensual civil contract.

Semper præsumitur pro matrimonio.

of disproof not only lies on those impeaching the marriage, but the fact of marriage is not to be treated as any other fact, to be proved or disproved by the balance of testimony;¹ and the presumption of law is not lightly to be repelled or broken in upon by a mere balance of probability, but the evidence for the purpose of repelling it must be strong, distinct, satisfactory, and conclusive.²

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ur.

Every intendment shall be made in favour of a marriage *de facto*; and where an act appears to have been done by proper persons, the law will intend that everything was done in a proper manner—*omnia rite acta præsumuntur*. This legal presumption requires strong and satisfactory evidence to displace it; and mere absence of proof of the regularity of the marriage rites and ceremonies will not displace it.³ The more distant the date of the marriage the more readily will the maxim *omnia rite acta præsumuntur* be applicable. Accordingly, where a marriage was proved to have been solemnized *de facto* over a hundred years back by parties who intended that it should be a good marriage, and it was celebrated *bond fide* and openly, this maxim was held applicable.⁴ Again, mere irregularity in the form of the ceremony is not fatal to the validity of a marriage;⁵ and it is a rule that has pervaded the law of marriage, that directions as to the manner, and even prohibition, under a penalty *other than nullity*, do not necessarily imply a nullity,⁶—that is, where the parties do not set at naught the rules dealing with the essentials of the contract. The force of this presumption is much heightened where it is proved that the parties (whose marriage is in question) distinctly intended to marry, and went through a form of marriage with that intent.⁷ A marriage celebrated between

¹ *De Thoren v. The Attorney-General*, 1 App. Cas. 686. This was a Scotch case in the House of Lords; but the strong presumption in favour of marriage is common to the legal systems of England and Scotland.

² Per Lord Lyndhurst in *Morris v. Davies*, 5 Cl. & Fin. 163, 265. In *Piers v. Piers*, 1 H. L. Cas. 331, Lord Brougham (p. 370) objected to the use of the word “conclusive.”

³ *Piers v. Piers*, 2 H. L. Cas. 331. In this case the fact that no evidence was forthcoming of the granting of a special licence by the Bishop of Sodor and Man at a considerable time after the marriage alleged to have been had on the special licence, and celebrated in the Isle of Man, was held not to displace the presumption that there had been one granted, and that the parties had validly married in pursuance of it.

⁴ *The Lauderdale Peerage*, 10 App. Cas. 692.

⁵ *Cutterall v. Cutterall*, 1 Robert. 580.

⁶ Per Willes, J., in *Beamish v. Beamish*, 9 H. L. Cas. 274, 331; *The Lauderdale Peerage* (*ubi sup.*). In the course of his speech in this case Lord Blackburn said (p. 748): “The burden rests strongly upon those who deny the validity of a marriage to show that the enactment clogged marriage with a condition precedent, and did not merely establish a penalty upon the persons who did what was irregular and improper, is, I think, quite clear.” Again: “Marriage existed before statutes, it is of natural right, it is favoured by the law. Hence, in reason, any commands which a statute may give concerning its solemnization should, if the form of words will permit, be interpreted as mere directions to the officers of the law and to the parties, not rendering void what is done in disregard thereof. Consequently the doctrine has become established in authority that a marriage good at the common law is good notwithstanding the existence of any statute on the subject, *unless the statute contains express words of nullity*.” Bish. Mar. & Div. s. 283.

⁷ *Piers v. Piers* (*ubi sup.*).

British subjects according to the rites of the Roman Catholic Church in British dominions abroad where the Established Church does not exist is valid.¹

The presumption of marriage arising from cohabitation and repute can only be rebutted by clear and satisfactory evidence.² Presumption from cohabitation.

Thus, where a man and a woman have lived together as man and wife, the law will presume, unless the contrary be clearly proved, that they were living together by virtue of a legal marriage, and not in concubinage.³ In a recent case it has been held that where a man and woman intended to be married and lived afterwards together as man and wife their cohabitation was matrimonial and not concubinage, though the facts showed that it was impossible for a valid marriage or any part of a ceremony in a valid marriage to have taken place between them.⁴ Again, where the parties have lived and cohabited together as man and wife for a long time after having gone through a form of marriage, intending to contract a valid marriage, and believing⁵ that they had done so, and facts are not brought forward to prove the contrary; thus, cohabitation for thirty years as man and wife has been held sufficient evidence of marriage upon which to found an order of removal of a pauper;⁵ and general reputation has been held sufficient evidence of marriage.⁶ Indeed the Courts are astute to presume marriage where the matrimonial intent can be shown to exist.⁷ But this presumption of law in favour of marriage does not hold good under all circumstances. Thus, in criminal matters, as on a charge of bigamy, or in suits for dissolution of marriage, judicial separation, and restitution of conjugal rights, and the like, the fact of marriage must be strictly proved. Exceptions to the rule.

The policy of the law of England is also in other matters eminently in favour of marriage; accordingly, conditions and contracts in respect of property which tend generally to restrain marriage, are, broadly speaking, treated as "unfavourable and contrary to the common weal and good order of society";⁸ for such encourage licentiousness and tend to depopulation.⁹ The restraint need not be an absolute one, but will be void if only it Conditions in restraint of marriage invalid.

¹ *James v. James and Smith*, 51 L. J. P. 24.

² *Piers v. Piers* (*ubi sup.*).

³ *Sastry Velaidar Aregonary v. Sembecutty*, 6 A. C. 364.

⁴ *Re Shephard, George v. Theyer*, [1904] 1 Ch. 456. But this case goes further than any other authority, and can scarcely be deemed rightly decided.

⁵ *Rex v. Stockland*, Burr. Sett. Cas. 508; see also *St. Devereux v. Much Dew Church*, 1 Wm. Bl. 366.

⁶ *Doe dem. Fleming v. Fleming*, 4 Bing. 266. See Starkie on Evidence, p. 45. "The circumstance that the parents cohabited as husband and wife, acknowledged and addressed each other in society as such . . . afford[s] the strongest presumption that the parties really did stand in the relative position of husband and wife."

⁷ See *Wigley v. Solicitor to the Treasury*, [1902] P. 233.

⁸ Per Lord Thurlow in *Scott v. Tyler*, 2 Dick, 712, 718.

⁹ *Peers v. Lowe*, 4 Burr. 2225.

has a probable tendency to check marriage.¹ These restraints are void both by the common law and the ecclesiastical law, and the courts hold them to be *in terrorem* only, and refuse to give effect to them. The rule of the common law is that where the conditions are not illegal they shall be binding; and this is the principle governing conditions annexed to the devise of lands.² The courts of equity, on the other hand, borrowing from the canon or ecclesiastical law,³ have held conditions affecting pure personal property to be void which would be deemed valid at common law. The effect of this is that conditions affecting devises of lands, with which the canon law never had any concern, when dealt with in the courts of equity, follow the rules of the common law, while pecuniary legacies, having formerly been administered by the ecclesiastical courts, in which the rules of the canon law prevailed, were governed by the rules of the latter. Thus, it was quite possible that where a testator annexed certain conditions to a devise of lands, and to a legacy of personalty, the court would have been constrained to hold that the conditions annexed to the gift of realty were valid and binding, while the gift of personalty was pure and unfettered by the conditions and restraints. However, the ancient rule of the civil law has been much modified and relaxed, and conditions which do not directly or indirectly import an absolute injunction to celibacy are valid;⁴ and the reasonable conditions annexed by testators to their gifts which are contrary neither to law nor to morals are allowed to prevail. Thus, conditions restraining marriage under twenty-one, or other reasonable age, without the consent of executors, guardians, or the like,⁵ or requiring or prohibiting marriage with particular persons,⁶ or a native of any particular country,⁷ or of a particular religious denomination,⁸ are valid and legal. This restraint applies to men as well as to women.⁹ The law, too, has imposed statutory restraints to check early and improvident marriages, and in former days a marriage which had been contracted without the consent of the proper parties was null and void; but this terrible punishment has been commuted for the milder penalty of forfeiting the advantages accruing from the marriage.¹⁰

¹ *Bellairs v. Ermine*, 1 Ch. Cas. 27; *Hicks v. Pendarves*; Eq. Cas. Abridg. 212; *Peyton v. Bury*, 2 P. Wms. 626; *Reynish v. Martin*, 3 Atk. 330; *Keily v. Monck*, 3 Ridg. P. C. 205.

² *Jones v. Jones*, 1 Q. B. D. 279.

³ This in its turn was derived from the civil law, which in this matter was based upon the circumstances of social life prevailing at Rome at the beginning of the Empire. See the enactments, *lex Julia* and *lex Papia Poppaea*.

⁴ *Scott v. Tyler*, 2 Bro. C. C. 431.

⁵ *Hemmings v. Munchley*, 1 Bro. C. C. 303.

⁶ *Jerrois v. Duke*, 1 Vern. 19.

⁷ *Perrin v. Lyon*, 9 East, 170.

⁸ *Duggan v. Kelly*, 10 Ir. Eq. Rep. 295.

⁹ *Allen v. Jackson*, 1 Ch. D. 399.

¹⁰ 26 Geo. II. c. 33; 4 Geo. IV. c. 76. See *post*, chap. vi. p. 87.

In the next place it is to be observed that there is a marked difference between terms annexed to a gift which operate as conditions precedent and such as operate as conditions subsequent. Where the condition affecting land is precedent, as creating an estate, it is generally held to be beneficial, and to be construed favourably, as, for instance, a devise of land conditioned on marrying with consent will not take effect until the condition is complied with,¹ for it is the compliance with the condition that vests the estate. So, also, where a legacy of pure personalty is bequeathed to a person upon marriage under twenty-one or other reasonable age (*ex. gr.*, twenty-eight²), upon the condition of obtaining the consent of a particular person, it will not vest until the consent has been first obtained, and the condition is no longer held to be merely *in terrorem* and void;³ for these conditions do not import, directly or indirectly, an absolute injunction to celibacy.⁴ At any rate, such condition precedent is valid in the case of a personal legacy where it is accompanied by a bequest over on marriage without consent.⁵ Where the consent of trustees or executors is to be obtained, that of all must be obtained;⁶ though it would seem that where one or more had died the consent of the survivors would suffice.⁷ The above principles apply to portions as well as to legacies.⁸

Where the condition is subsequent, as it operates by way of destruction of an estate already in existence, and is of a penal nature, it should be construed strictly. If a legacy depends upon a condition which tends towards a *general* restraint of marriage, and is subsequent in its operation, it remains good, and is purged of the condition, which is void, even though there is a gift over.⁹ The result is the same where the gift is of a mixed fund arising from the proceeds of a sale of realty and of pure personal estate, and possibly of a fund resulting from a sale of realty;¹⁰ so, also, where the restraint is not general, but directed against marriage with a particular person, or against the marriage of a particular person, where there is no gift over of the legacy. Thus, it has been decided that a condition subsequent without a devise over is *in terrorem* only and not enforceable, but that a like condition attached to a legacy that if a woman (over twenty-one)

¹ *Fry v. Porter*, 1 Ch. Cas. 138; *Harvey v. Aston*, 1 Atk. 361; *Stackpole v. Beaumont*, 3 Ves. 89.

² *Crommelin v. Crommelin*, 3 Ves. 227.

³ *Stackpole v. Beaumont* (*ubi sup.*). See also *Jerrois v. Duke* (*ubi sup.*); *Perrin v. Lyon* (*ubi sup.*); *Jenner v. Turner*, 16 Ch. D. 188; *Yonge v. Furze*, 26 L. J. Ch. 352.

⁴ *Scott v. Tyler*, 2 Bro. C. C. 303.

⁵ *Gardiner v. Slater*, 25 Beav. 509; *Creagh v. Wilson*, 2 Vern. 572.

⁶ *Clarke v. Parker*, 19 Ves. 17.

⁷ 1 Rep. Leg. (3rd ed.) 691.

⁸ *Harvey v. Aston* (*ubi sup.*).

⁹ *Morley v. Rennoldson*, 2 Ha. 570, and [1895] 1 Ch. 449. See *Gray v. Gray*, 23 L. R. (1r.) 399, and *Re Howard*, *Taylor v. Howard*, [1901] 1 Ch. 412.

¹⁰ *Bellairs v. Bellairs*, L. R. 18 Eq. 510.

married without the consent of trustees, such legacy should fall into the testator's residuary estate is a good one and enforceable; the direction that it should fall into the residue operating as a gift over.¹ The like principle is equally applicable to a gift over intended to reduce the amount of a legacy as to a gift affecting the entire bequest.² But where on non-compliance with a condition subsequent there is a gift over, but not of a mere residue, the condition is considered good and valid, and the rule of the common law rather than of the civil is followed.³ The gift over is held to be a clear proof that the donor or testator intended the conditions he imposed should be complied with, and which intention the courts feel themselves constrained to effectuate.⁴ The age of restraint is not limited to minority.⁵ Though a condition subsequent may be in effect a restraint upon marriage, yet it will be held good in the case of persons who have been already married, and if accompanied by a gift over will take effect; thus, a condition annexed to a gift to a widow that it shall cease on her second marriage, if accompanied with a gift over, is valid;⁶ so, too, a condition in restraint of the second marriage of a man is not void; and where property was given to a woman and her husband during their joint lives, and to the survivor during his or her life, with a proviso that if the husband survived his wife and married again, the property should go over, and the husband survived his wife and married again, it was held by the Court of Appeal that the proviso was valid, and that the gift over took effect.⁷ As before shown, conditions which do not directly or indirectly import an absolute injunction to celibacy are clearly lawful, as a condition annexed to a testamentary gift to ask the consent of a particular person,⁸ or not to marry a widow; and a conditional annuity to a widow *durante viduitate* is good;⁹ so is an additional but conditional annuity or legacy not to marry without consent, where the testator has already provided for the annuitant or legatee.¹⁰

A limitation of a gift to a donee to take effect until marriage is different from a condition subsequent which operates to destroy an interest already created, and is held good and valid;¹¹ that

Difference between limitation until marriage and condition subsequent.

¹ *Lloyd v. Branton*, 3 Mer. 108.

² *Re Bellamy, Pickard v. Holroyd*, 48 L. T. 212.

³ *Stratton v. Grymes*, 2 Vern. 357; *Malcolm v. O'Callaghan*, 2 Madd. 349; *Newton v. Marsden*, 2 J. & H. 356; *Allen v. Jackson*, 1 Ch. D. 399.

⁴ *Aston v. Aston*, 2 Vern. 452; *Dashwood v. Bulkeley*, 10 Ves. 230; *Lloyd v. Branton* (*ubi sup.*); *Re Whiting's Settlement*, *Whiting v. De Rutzen*, [1905] 1 Ch. 96.

⁵ *Ibid.*

⁶ *Newton v. Marsden* (*ubi sup.*).

⁷ *Allen v. Jackson* (*ubi sup.*).

⁸ *Scott v. Tyler*, 2 Bro. C. C. 431.

⁹ *Tricker v. Kingsbury*, 7 W. R. 652; *Craven v. Brady*, L. R. 4 Ch. App. 296; *Charlton v. Coombes*, 11 W. R. 1038.

¹⁰ See *Creagh v. Wilson*, 2 Vern. 572; *Re Nourse*, *Hampton v. Nourse*, [1899] 1 Ch. 63.

¹¹ See *Morley v. Rennoldson*, 2 Ha. 570; [1895] 1 Ch. 449.

is, marriage may be made the ground of a limitation ceasing or commencing.¹ Thus, where there was a covenant to pay to E. C. during her life an annuity of £40, subject to the proviso that in case E. C. should at any time thereafter happen to marry, the annuity should be reduced to £20, which sum should in such case be paid and payable to E. C. from the time of her marriage for the remainder of her life, it was held (reversing the decision below²) to be in effect a covenant to pay an annuity of £40 until marriage, and afterwards an annuity of £20 only; the proviso for reducing the annuity being part of the original gift itself, and not operating as a condition subsequent so as to be void as in restraint of marriage.³

On like principles contracts in restraint of marriage, whether general,⁴ or restricted against marriage with a particular person who is not correspondingly bound,⁵ are void. But a covenant not to revoke a will made for good consideration is not necessarily against public policy as being in restraint of marriage and void.⁶ On grounds of public concern and welfare, and that marriage should be free and unfettered, and for the benefit of society, the courts will likewise refuse validity to underhand bonds, whether entered into for the purpose of defrauding parents or those who stand in the place of parents,⁷ or for the purpose of promoting marriages (marriage brokerage contracts), for such tend to deceit and fraud.⁸ An illegal marriage brokerage contract is a bargain by one person for pecuniary reward to procure marriage for another, and it is immaterial whether such procurement is directed towards one particular individual or is intended to be general in its operation.⁹

Contracts in restraint of marriage.

Marriage brokerage contracts.

Upon similar principles of public policy, gifts providing for a future separation between husband and wife have been from early times held utterly void;¹⁰ because such gifts may tend to promote a separation of the married couple, and so cause scandal, and offend against the feelings of society; accordingly, where a testator bequeathed a legacy of £2 10s. a week to be paid to his sister during such time as she should live apart from her husband before his son attained the age of twenty-one for her maintenance whilst so living apart from her husband, it was held that such

Gifts providing for future separation of husband and wife.

¹ Per Lord Cottenham in *Webb v. Grace*, 2 Ph. 701, 702. For the difference between a limitation and a condition see *Re Moore, Trufford v. Maconochie*, 39 Ch. D. 116.

² 16 L. J. Ch. 113.

³ *Webb v. Grace* (*ubi sup.*).

⁴ *Baker v. White*, 2 Vern. 215.

⁵ *Key v. Bradshaw*, 2 Vern. 102.

⁶ *Robinson v. Ommaney*, 216 L. D. 780.

⁷ *Woodhouse v. Shepley*, 2 Atk. 535.

⁸ *Hall v. Potter*, Show. P. C. 76; *Turton v. Benson*, 2 Vern. 764; *Cole v. Gibson*, 1 Ves. Sen. 503. See the converse case of *Nerille v. Wilkinson*, 1 Bro. C. C. 543, as modified by *Roberts v. Roberts*, 3 P. Wms. 66.

⁹ *King v. Burr*, 3 Mer. 693; *Hermann v. Charlesworth*, [1905] 2 K. B. 123.

¹⁰ *Brown v. Peck*, 1 Ed. 140; *Wren v. Bradley*, 2 De G. & Sm. 49.

gift was altogether void, as its commencement and duration were contrary to the policy of the law.¹ It has, however, been suggested that since the Divorce Acts a covenant in a deed of separation between husband and wife not to sue each other for a divorce grounded on future misconduct is not valid and enforceable.² Again, an ante-nuptial settlement of land in favour of the proposed wife, but with a proviso that if a separation should take place by reason of any disagreement between the proposed husband and wife that the rents and profits of the settled land should be paid to the husband, was held to be void as to the proviso on the ground that the latter was in the nature of a condition and contrary to public policy;³ but an arrangement providing for one of the spouses which does not contemplate or lead to a separation is enforceable though it lasts only during cohabitation and ceases upon separation.⁴ The arrangements between husband and wife on mutual separation will be discussed in a subsequent chapter.⁵

¹ *Re Moore, Trafford v. Maconochie*, 39 Ch. D. 116.

² Per Lindley, L. J., in *Bishop v. Bishop*, [1897] P. 164. This expression of opinion would seem hardly to be correct, for as the right of either spouse to petition for judicial separation or dissolution of marriage on the ground of a matrimonial offence is personal and a privilege, the party in whose favour the privilege is granted may waive it if so minded. Such a covenant cannot be held to be one promoting matrimonial incontinence, and so *contra bonos mores*, for it must not be assumed that the parties to the deed intend by such a covenant to lead unchaste lives. To provide for a future dissolution of marriage amounts to a scandal; but if the spouses choose to deprive themselves of a legal remedy, and both are aware of their rights and are free agents, such conduct concerns them alone, and not society at large.

³ *Cartwright v. Cartwright*, 3 D. M. & G. 982.

⁴ *Re Hope Johnstone, Hope Johnstone v. Hope Johnstone*, [1904] 1 Ch. 470. But there is a doubt whether this case was rightly decided on the wording of the deed of settlement. *Cartwright v. Cartwright* (*ubi sup.*) was distinguished.

⁵ See *post*, chap. xvii.

CHAPTER II.

A SHORT HISTORY OF THE MARRIAGE LAWS OF ENGLAND.

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IN this chapter a short sketch will be presented of the origin and growth of the laws of this country respecting marriage, and a summary of the leading enactments embodying the various changes. The tendency in England, as far as legislation has hitherto progressed, has been to regard marriage less as a religious obligation and more as a civil contract, for matrimony with all its requirements was formerly looked upon as a spiritual act within the province of the courts Christian;¹ and the spirit in which modern legislation affecting it has been conceived, clearly evinces that its temporal and civil nature is to be held paramount, and the basis of present and future change.

A long series of patristic writings, of papal and episcopal rescripts and constitutions, of statutes and ordinances of the early Christian emperors and kings, makes it indubitable that it was the desire of the Church and her ministers that marriage should be celebrated openly, and in the presence of responsible witnesses, and the ecclesiastical authorities regarded with much disfavour secret unions (*occultæ conjunctiones*).² As time went on the

Aim of the Church to have open and not clandestine marriages.

¹ The promise, however, to contract marriage, and the loss consequent upon the breach, was considered temporal, and under the jurisdiction of the civil courts. *Dickison v. Holcroft*, 3 Keb. 148.

² Tertullian, *De Pudicitia*, iv. (editio Nich. Rigaltii, p. 557).

Consensus of the parties the essential element of the contract.

Intervention of priest not necessary.

Irregular marriages, *sponsalia per verba de presenti*, and *sponsalia per verba de futuro*. Lord Stowell on irregular marriages.

Church clothed this contract more and more with the character of a religious ceremony, and treated it less and less as a civil contract affecting the state in which the parties lived. But the *consensus* of the parties was the vital and essential portion of the contract, and those who had no impediment barring their union might by agreeing to take each other as man and wife contract a good and effectual marriage. This, it is submitted, is due to the influence of the Roman law, which was the law of the majority of the countries governed by the Church. The effect of the *consensus* of the parties being the important and essential element in forming the *vinculum*, and the ceremonies attending the formation but accidents, was, that frequent marriages were made in which the consent of the parties was expressed, but not by any outward manifestation of religious rites. "The canon law, possibly through the force of circumstances, was obliged to admit that it is a present and perfect consent which alone maketh matrimony, without public solemnization or carnal copulation."¹ These irregular marriages are now known by the name of *sponsalia per verba de presenti*, and *sponsalia per verba de futuro cum copulâ*,² In discussing these marriages, Lord Stowell said, in one of his most celebrated judgments,³ "Different rules prevailed relative to their respective effects in point of legal consequence to the cases of regular marriages, irregular marriages, and of mere promises and engagements. In the regular marriage everything was presumed to be complete and consummated in substance, but not in ceremony; and the ceremony was enjoined to be undergone as a matter of order. In the *promise* or *sponsalia de futuro*, nothing was presumed to be complete or consummated either in substance or in ceremony; mutual consent would release the parties from their engagements, and one party, without the consent of the other, might contract a valid marriage regularly or irregularly with another person; but if the parties who had exchanged the promise had carnal intercourse with each other the effect of that carnal intercourse was to interpose a presumption of present consent at the time of the intercourse, and to convert the engagement into an irregular marriage, and to produce all the consequences attributable to that species of matrimonial connection." Previously to the Marriage Act in this country, when such a contract of marriage was proved, the Ecclesiastical Court would compel the reluctant party to solemnize the marriage in the Church.⁴

¹ Swinburne on Spousals, p. 14.

² In the first, some such words were used as, "I take you to be my wife"; "I marry you"; "You and I are man and wife." In the second, "I will marry you"; or "I will take you to be my wife." These marriages will be treated more fully in the next chapter on the marriage laws of Scotland.

³ *Dalrymple v. Dalrymple*, 2 Hag. Con. Rep. 54, 65.

⁴ See *Bastar v. Buckley*, 1 Lee. 42.

There is no lack of evidence that from the thirteenth to the middle of the sixteenth century these marriages were held by the Popes and the Canonists to be perfectly good.¹ The abuses and scandals arising from what can only be called this laxity of discipline, compelled the Council of Trent to introduce the necessity of marriages among Roman Catholics being celebrated in the presence of the parish priest, after due proclamation of banns, or the obtaining of an episcopal licence. But the marriages not celebrated in the presence of the Church, and with the intervention of a duly ordained minister, were distinguished from those which were so celebrated; they were deemed irregular, were discountenanced, and visited with punishments and ecclesiastical censures; and in certain cases, where the parties were within the prohibited degrees, such irregular marriages were annulled, while those that were regular were upheld. Broadly speaking, however, they were good as far as they went, in the eyes both of Church and State, and the issue was legitimate. In a word, "the general law of Western Europe before the Council of Trent seems clear. The fact of marriage, viz., the mutual consent of competent persons to take one another for man and wife during their joint lives, was alone considered necessary to constitute true and lawful matrimony."²

Marriages per verba de presenti valid by the canon law. The Council of Trent.

Distinction between regular and irregular marriages.

The ecclesiastical law of England is not a foreign law;³ it is one of "those laws which the people have taken at their free liberty, by their own consent to be used amongst them, and not as laws of any foreign prince, potentate, or prelate":⁴ but its source is chiefly foreign, namely, the canon.

Ecclesiastical law of England not foreign.

Now the canon law did not obtain with equal force throughout Christendom, but subsisted under different modifications in different countries, according as it was affected by the municipal laws of the countries in which it had been introduced. Now the full effect of the principles of the canon law was never allowed in England; and it has been declared to be law that the intervention of a priest was always necessary in England to make a marriage, whether regular or irregular, valid and good for all purposes.⁵

English marriage law different from the Continental.

Intervention of a priest necessary to a valid marriage.

¹ A good illustration of the nature of this contract is to be found in "Measure for Measure"; and the success of the scheme for unmasking the villainy of the Lord Angelo is based upon the fact that a contract of espousal ("*some speech of marriage*") had, five years before the opening of the play, been entered into between him and the "dejected Mariana" of the moated grange; for in the language of Duke Vincentio, describing Angelo to her, "he is your husband on a pre-contract.—Act iv. sc. i.

² Per Willes, J., in *Beamish v. Beamish*, 9 H. L. Cas. 274, 306. The decrees of the Council of Trent never obtained in this country, as the claim of the Pope to spiritual supremacy had been repudiated by Henry VIII. nearly thirty years previous to their signature.

³ Per Lord Blackburn, in *Mackonochie v. Lord Penzance*, 6 App. Cas. 424, 446.

⁴ 25 Hen. VIII. c. 21.

⁵ *Queen v. Millis*, 10 Cl. & F. 534, not following Lord Stowell in *Dalrymple v. Dalrymple*, 2 Hag. Con. Rep. 54; *Cuthbertson v. Caslon*, 13 L. J. Ex. 433; *Beamish v. Beamish* (*ubi sup.*); *Culling v. Culling and Nicholson*, [1896] P. 116. On the other hand, it has been held in India, where the common law prevails, that the intervention

"At one period it seems to have been held that a scrupulous observance of the prescribed forms in the solemnization of matrimony was essential. In Fitzherbert's *Natura Brevium*¹ it is said that "a woman married in a chamber shall not have dower by the common law. *Quere* of marriages made in chapels not consecrated, for many are by licence of the bishops married in chapels, &c.; and it seemeth reasonable that in such cases she shall have dower." So in *Foxcroft's Case*:² a man, shortly before his death, and while infirm and in his bed, was privately married to a woman then *enceinte* by him. The marriage was performed by the bishop, but without the celebration of the mass. It was held to be void, and the issue adjudged a bastard. A similar case is mentioned as having occurred in 10 Edward IV.³ But the strictness of these rules was relaxed, and it was afterwards generally agreed that the ministration of a priest alone was sufficient to give the contract the essentials of a marriage *in facie ecclesiæ*, and to confer the privileges of lawful matrimony. Thus, it is laid down, that if a man and woman are married by a priest in a place which is not a church or a chapel, and without any solemnity of the celebration of mass, yet it is a good marriage, and they are *baron* and *feme*.⁴ In *Weld v. Chamberlayne*⁵ the marriage was by a priest, but a ring was not used, according to the Book of Common Prayer. It was doubted whether this formality might not vitiate the marriage, and a case was ordered to be made upon the point; but the Chief-Justice Pemberton inclined to think it a good marriage, there being words of contract *de presenti* repeated after a parson in orders.⁶ Down to a comparatively recent period there were three methods of celebrating marriage in England:—

Solemnization
in facie ec-
clesiæ.

(1) *By solemnization in facie ecclesiæ*.—The requisites of this kind of marriage were: publication of banns or the obtaining of an episcopal licence dispensing with banns; the performance of a religious ceremony; and, where the marrying couple were minors, the consent of the proper parties.

Clandestine
celebration.

(2) *By clandestine celebration*.—Clandestine marriages entered into without banns or licence, consent of guardians, or regard to time or place; all that was necessary was the presence of a priest (before the Reformation) or person in holy orders (after the Reformation).

Celebration by
mere consent.

(3) *By mere consent*.—"Herein lies the peculiarity of the old English law when viewed in contradistinction to the ancient Con-

of a clergyman in holy orders is not necessary. *Maclean v. Cristall*, Perry's Oriental Cases, 75.

¹ 150 a.

² 10 Edw. I.; 4 Vin. Abr. 218, pl. 18.

³ 4 Vin. Abr. 38, pl. 21.

⁴ 4 Vin. Abr. 38 pl. 21; and see Perk. 306.

⁵ 2 Show. 300.

⁶ 2 Rop. H. & W. 448. The above is a passage cited from the first of the addenda (by Jacob) to that work.

tinental law. By the general law of Europe, prior to the Council of Trent, a consensual marriage was in all respects absolutely perfect. By the law of England a consensual marriage was good only for certain purposes. It did not give the man the right of a husband in respect of the wife's property, nor impose on her the disabilities of coverture, nor render her dowable, nor confer on the issue legitimacy, nor did it make the marriage of either of the parties (living the other) with a third person void, though it did make it voidable. Nevertheless, consensual marriages in England were indissoluble.¹ The parties could not release each other, and either could compel solemnization *in facie ecclesie*.² The contract, too, was so much a marriage—so completely *verum matrimonium*—that cohabitation before solemnization was regarded not as fornication, but simply as an ecclesiastical contempt. An act of matrimonial infidelity was an act of adultery; and if either party entered into a second marriage, although in the most open and regular manner, it might be set aside even after cohabitation and after the birth of children, and the parties might be compelled to solemnize the first marriage *in facie ecclesie*. Such marriages were regarded by the ecclesiastical courts as complete in substance, but not in ceremony; and the ceremony was enjoined to be celebrated as a matter of discipline, whereas they were not so regarded by the temporal courts unless celebrated by some one in episcopal orders. If so celebrated, the temporal courts would adopt the marriage and hold it to be good *ab initio*, though the effect might be to annul a second marriage regularly contracted *in facie ecclesie*";³ that is, the regularly performed ceremony carried back with it all the attributes of a valid marriage to the original promise which had been duly enforced. Again, Sir William Blackstone says on this point: "Any contract made *per verba de præsenti*, or in words of the present tense, and in case of cohabitation *per verba de futuro* also, between persons able to contract, was before the late Act (26 Geo. II. c. 33) deemed a valid marriage to many purposes, and the parties might be compelled to celebrate it *in facie ecclesie*."⁴ The mutual consent of the parties, the *sponsalia per verba de præsenti*, constituted the *vinculum* and made the contract *verum matrimonium*; but the civil tribunals did not recognize it as complete and carrying with it all the legal incidents of marriage, because it lacked the perfecting religious ceremony; but when that had been added the tribunals gave effect to the transaction as though originally the parties had

Difference between Continental and English law on this point.

Full and complete results of marriage did not flow from it.

Both parties could compel solemnization *in facie ecclesie*.

¹ *Jesson v. Collins*, 2 Salk. 437; S. C. 6 Mod. 155. *Wigmore's Case*, 2 Salk. 437, is not inconsistent with this, but simply lays down that by the canon law a contract *per verba de præsenti* is a marriage.

² *Bunting v. Lepingwell*, 4 Rep. 29 a.

³ Macq. Div. p. 7, citing *Queen v. Millis*, 10 Cl. & F. 534.

⁴ 1 Com. 439.

had recourse to it, and it was immaterial into what other matrimonial engagements they had in the meanwhile entered.

The Statute of
Pre-contracts.

There is a most important statute known as the Statute of Pre-contracts which amply shows that the foregoing was the state of the law at the time of its passing,¹ and its preamble is most instructive. It runs as follows :—

“Whereas heretofore the usurped power of the Bishop of Rome hath always entangled and troubled the mere jurisdiction and regal power of this realm of England, and also unquieted much the subjects of the same, by his usurped power in them, as by making that unlawful which by God’s Word is lawful, both in marriages and other things. . . . As where heretofore divers and many persons, after long continuance together in matrimony, without any allegation of either of the parties, or any other, at their marriage, why the same matrimony should not be good, just, and lawful, and after the same matrimony solemnized and consummate by carnal knowledge, and also sometime fruit of children ensued of the same marriage, have nevertheless, by an unjust law of the Bishop of Rome, which is, that upon pretence of a former contract made and not consummate by carnal copulation (for proof whereof two witnesses by that law were only required), been divorced and separate, contrary to God’s law, and so the true matrimony, both solemnized in the face of the Church and consummate with bodily knowledge, and confirmed also with the fruit of children had between them, clearly frustrate and dissolved.”

Section 2 enacted that after July 1, 1540,

All lawful marriages celebrated *in facie ecclesie* good, notwithstanding any pre-contract.

“All and every such marriages as within this Church of England shall be contracted between lawful persons . . . such marriages being contract and solemnized in the face of the Church and consummate with bodily knowledge, or fruit of children, or child being had therein between the parties so married, shall be deemed, judged, and taken to be lawful, good, just, and indissoluble, notwithstanding any pre-contract or pre-contracts of matrimony not consummate with bodily knowledge which either of the parties so married or both shall have made with any other person or persons before the time of contracting that marriage which is solemnized and consummate, or whereof such fruit is ensued, or may ensue as afore, and notwithstanding any dispensation, prescription, law, or other thing granted or confirmed by act or otherwise.”

Repealed by
2 & 3 Edw. VI.
c. 23.

This statute, so far as pre-contracts were concerned, was repealed by 2 & 3 Edw. VI. c. 23, which restored the ancient law. This latter statute was on this point repealed by Lord Hardwicke’s Act.²

Though the presence of a priest was necessary, the entire ceremony of a regular marriage was not for a long period celebrated in the body of a church, but a portion was gone through at the porch (*ostium ecclesie*) in the presence of the neighbours and the

¹ 32 Hen. VIII. c. 38.

² 26 Geo. III. c. 33. See *post*, p. 20.

priest. The old kind of dower *ad ostium ecclesie* originated in this ceremony. The bridegroom was wont to point to his lands, doubtless often visible from the porch, and called—after “affiance and troth plighted between his bride and himself”—those present to witness that he dowered her of a third of them. The presence of a “mass priest,” who was probably the only man of learning and education in the neighbourhood, was deemed not only necessary for the sacerdotal benediction, but very advisable as securing a witness of the contract, and as a pledge for the notoriety and certainty as well as the legality of the transaction.¹ During the time of the Commonwealth marriages were frequently celebrated by justices of the peace; these were deemed invalid, and at the Restoration an Act was passed validating them.²

Dower *ad ostium ecclesie*.

Presence of a priest requisite for (1) benediction, (2) as a witness and pledge.

The necessity for the intervention of the sacerdotal presence to render marriages in every respect valid and good by no means secured the ends for which it was originally intended; and the greatest scandals prevailed, and were rendered of easy and frequent occurrence from the very fact. In the lax and reckless times immediately succeeding the rigid proprieties of the Commonwealth, ecclesiastical discipline suffered equally with all forms of decency and order; and the members of the Church broke away from the restraints she was powerless to enforce. From this state of affairs sprung the numerous marriages celebrated by the “Fleet” and “hedge” parsons. Profligate, degraded, and abandoned, socially and morally, as these clergymen were, yet they remained in holy orders, and that was enough to make marriages celebrated by them regular and valid. The clergyman need not have been in the orders of the Church of England.³ The ecclesiastical courts recognized as a binding contract that which was entered into by competent parties in the presence of one in holy orders, and would enforce it by their spiritual machinery, and so give it the effect of a valid marriage, though the inception of such contract did not conform to the rules and regulations laid down by the common law of the land.⁴ The marriage was good, though the parties might be visited with censures and penalties. Further, “it had come to be considered as law, that before Lord Hardwicke’s Act a marriage might be valid though it departed from the rubric in respect of being celebrated in a private house instead of the church; with no witness other than the clergyman, instead of in the face of the

State of the law before Lord Hardwicke’s Act.

“Fleet” marriages.

Marriage need not have been celebrated in a church.

¹ M. Walter, of Bonn, in his *Manuel du Droit Ecclesiastique* (translated from the German by Roquemont, edit. 1840), s. 293, says the object of the presence of the *parochus*, or parish minister, is to secure a trustworthy witness of the contract (*un document positif sur le caractère de l’union contractée*). Sanchez of Cordova, the Jesuit commentator on the decrees of the Council of Trent, expresses the same opinion.

² 12 Car. II., c. 33, confirmed by 13 Car. II. (stat. 1), c. 11.

³ *Beau Fielding’s Case*, Howell’s State Trials, vol. xiv. p. 1327.

⁴ *Scrimshire v. Scrimshire*, 2 Hag. Con. Rep. 395.

congregation; with no person to give the bride away; without banns or a licence; without the use of a ring; without the repetition of the whole service; provided the parties took one another for man and wife by words in the present tense before a priest, and, since the Reformation, a deacon.”¹

Society at this time was so demoralized that there were many more clandestine than regular marriages, and matters came to such a pass that the Legislature deemed it necessary to intervene and check the abuses; and not without considerable difficulty and bitter opposition did Lord Hardwicke's measure, “An Act for the better preventing of clandestine marriages,”² pass into law. Blackstone styled this Act “an innovation upon our ancient laws and constitution.”³ The necessity for the presence of a clergyman is taken for granted in this Act; and its only aim and scope was to prevent and discountenance clandestine and improvident marriages. Its chief provisions were: Mere consensual marriages should not be compelled by writ in the ecclesiastical courts to be celebrated *in facie ecclesiæ*.⁴ All marriages celebrated in any other place than a church or public chapel of the parish in which the parties dwelt, unless by special licence, or without publication of banns, or the ordinary's licence, should be null and void; and the parties celebrating should be liable to fourteen years' transportation.⁵ Marriages were to be celebrated openly in church in the presence of at least two witnesses,⁶ after publication of banns on three consecutive Sundays,⁷ unless dispensed with by special licence,⁸ or upon the ordinary's licence;⁹ and where the contracting parties were minors, consent of parents or guardians was necessary to the validity of the marriage.¹⁰ A marriage not had with a licence properly obtained, or banns duly published, or the ceremony solemnized in a church or chapel or celebrated by a person in holy orders, was null and void.¹¹ The marriages of members of the royal family,¹² and of Jews and Quakers,¹³ were not affected by this Act. The validity or invalidity of the latter marriages seems to have been purposely left to the operation of the old law; and the balance of authorities seems clearly in favour of their validity even before the passing of this Act. The operation of the Act was confined to England.

Marriage, like many other institutions, has been affected by

Lord Hardwicke's Marriage Act, 1753.

General scope and effect of the Act.

Some change in the law imperative.

¹ Per Willes, J., in *Beamish v. Beamish*, 9 H. L. Cas. 274.

² 26 Geo. II. c. 33.

³ 1 Com. 438. This Act was extended to Ireland by 58 Geo. III. c. 81. It is said that a Bill of similar import was prepared for Scotland, but met with such opposition that it never came to anything. There are, however, no records extant of any such Bill ever having been introduced, or even prepared.

⁴ 26 Geo. II. c. 33, s. 13.

⁵ 26 Geo. II. c. 33, s. 15.

⁶ Sect. 8.

⁷ Sect. 17.

⁸ Sect. 8.

⁹ Sect. 1.

¹⁰ Sect. 11.

¹¹ Sect. 18.

¹² Sect. 6.

¹³ Sect. 18.

the requirements of modern society. Method, precision, and symmetry in the ordering of affairs are deemed more necessary in the present day than in olden times; that which suited former men is insufficient, and a haphazard style of proceeding is becoming repugnant to the present notions of social order. The increase of the population has been a large factor in this change, and the unseemly circumstances connected with clandestine marriages appeared at first but few and isolated instances, which chiefly concerned the parties themselves; but in time their frequency became a scandal and an injury to the State, and so demanded new legislation to remove the abuses caused by them. For these reasons it is suggested that in 1753 the open proclamation of banns (under ordinary circumstances), and the residence of a statutory period in the parish in which the marriage was to be celebrated, were made compulsory. Before that year flagitious dealings and chicanery were rendered easy by the state of the law. Persons were enabled to contract marriage *per verba de præsenti*, without any witnesses other than the officiating clergyman, or proof of sanction of proper parties, and became man and wife, though not cohabiting. Instead, an ordained minister of the Church of England in the parish church was now made the necessary responsible and official witness of the consent of the parties, which was to be publicly given. He was also the witness of the regularity of the service, and of the sanction of those interested in the marriage; he was to be the medium of publishing the fact of the intended nuptials, and was required to keep a proper and accredited record of the celebration. This Act, though introducing praiseworthy certainty in the formation of the marriage tie, and reducing the possibility of clandestinity to a minimum, went, as was natural, to the opposite extreme of harshness, and was productive of much hardship and injustice. Nullity was procurable with a terrible facility, and members of non-conforming denominations were compelled to come to the churches of the Establishment if they desired to contract a valid marriage. Illegitimate children, too, were hardly treated, for if, as minors, they desired to marry, they were obliged to go to the Court of Chancery for the appointment of guardians to give the necessary consent, for they had no parents who in the eye of the law could either give their consent or appoint guardians for them. There was no provision regulating marriages contracted out of the country, and persons to avoid the irksome restraints imposed upon them went across the border, and so brought about the scandals of Gretna Green.

Harsh operation of the Act

It was, therefore, thought necessary, after a lapse of seventy years, to institute fresh legislation, viz., the important Act of 4 Geo. IV. c. 76 (repealing Lord Hardwicke's Act and 3 Geo. IV. The Marriage Act, 4 Geo. IV. c. 76.

Its chief provisions.

c. 75); and this statute, save where it has been altered and modified by subsequent enactments, governs the majority of marriages in England. Its more important provisions are as follows: Clergymen who have duly solemnized marriage, after publication of banns, between persons both or one of whom shall be under age, without the consent of the proper parties, are to be no longer punishable unless they have had notice of dissent of such proper parties; and if such dissent is openly and publicly expressed at the time of publication, the marriage is to be null and void.¹ Banns are to be republished if the marriage is not celebrated within three months of their publication.² In the case of unmarried minors, the father, or guardians, or mother (if unmarried), are the proper parties to give consent;³ and if such be *non compotes mentis*, or beyond seas, application for consent must be made to the Lord Chancellor, &c.⁴ Instead of the former penalty of nullity, the punishment for procuring a marriage by licence, or after publication of banns without the consent of proper parties, by one of the parties to the marriage where both or one of them shall be under age, by perjury or fraud, is forfeiture by the guilty party of all advantages of property accruing from such marriage.⁵ The most important alteration affected by this Act is the limiting of void marriages to those cases in which any person shall knowingly and wilfully intermarry in any other place than a church, &c., wherein banns may be lawfully published, unless by special licence, or shall knowingly and wilfully intermarry without due publication of banns, or a licence obtained from the proper person, or shall knowingly and wilfully consent to or acquiesce in the solemnization of such marriage by any person not being in holy orders.⁶ This Act, like that of Lord Hardwicke, does not extend to the marriages of the royal family,⁷ or of Quakers, or Jews.⁸

In what cases only marriage is void.

Marriage (Lord John Russell's) Act, 1836, 6 & 7 Wm. IV. c. 85.

This enactment was most useful in its reform, but left untouched the hardship (and one much complained of) of requiring persons not in communion with the Church of England to have recourse to her churches in order to contract a valid marriage. Thirteen years after its passing, by 6 & 7 Wm. IV. c. 85, this grievance was partially removed; and for the first time in the history of English law, whether ecclesiastical or civil, the purely temporal and civil element of marriage is recognized.⁹ Now no longer is the intervention of a priest or parson in holy orders necessary; now no longer is episcopal licence or publication of banns an essential element; and now no longer are the parties required to attend the churches of the Establishment to make

¹ 4 Geo. IV. c. 76, s. 8.

² Sect. 9.

³ Sect. 16.

⁴ Sect. 17.

⁵ Sect. 23. For a fuller treatment of forfeiture under this section, see *post*, chap. vi.

⁶ 4 Geo. IV. c. 76, s. 22.

⁷ Sect. 30.

⁸ Sect. 31.

⁹ The details of this statute will be given more fully in chap. vi.

their unions regular and valid. It is enough if the parties go before the appointed civil officer—the registrar—give the requisite notices, and procure his licence or certificate, and be married before him and two other witnesses at his office, or in places properly registered for the solemnization of marriage (except churches and chapels of the Church of England), with or without any form or ceremony;¹ or they are married before a properly authorized person other than the registrar in the presence of at least two witnesses under the provisions of the Marriage Act, 1898.² This last-mentioned Act does remove the grievance which pressed heavily on the Dissenting bodies.

And Marriage Act, 1898.

The more important provisions of these statutes are as follows: Notice of all marriages (except those intended to be solemnized according to the rights of the Church of England after publication of banns or by special or ordinary licence³) must be given to the superintendent registrar of the district in which each party lives, if in more than one.⁴ The registrar may, after the expiration of twenty-one days after the entry of such notice, grant his certificate, and after seven days grant his licence;⁵ and the certificate or licence is to be given to the officiating minister (if any) at the time of the solemnization of the marriage.⁶ If the parties intending to be married object to a religious service they can be married at the registrar's office.⁷ If the marriage is intended to be solemnized with religious rites other than those of the Church of England it must be celebrated in a properly registered building before the authorized person.⁸ The parties can always require the attendance of the registrar if they please.⁹ The parties must, during the ceremony, declare in the presence of the authorized person that they take each other as husband and wife.¹⁰ Proper register books and returns must be made.¹¹ The Act of 1898 does not apply to marriages of Quakers and Jews.¹²

Chief provisions.

Registrar's certificate.

Licence.

Registrar's presence necessary where ceremony civil; optional where religious.

Expression of matrimonial consent necessary.

If any authorized person refuses or fails to comply with the regulations of the Marriage Act, 1898, or the enactments or regulations for the time being in force with respect to the solemnization and registration of marriages, he shall be guilty of a statutory offence and liable to certain punishments.¹³ If the certificate or licence has been fraudulently obtained, and marriage follows, the guilty persons are visited with the penalties inflicted by 4 Geo. IV. c. 76, s. 23.¹⁴

¹ The registration of places of worship not belonging to the Established Church for solemnizing marriages is provided for by section 18.

² 61 & 62 Vict. c. 58, ss. 4, 6 (2) (3).

³ 6 & 7 Wm. IV. c. 85, s. 11. The consent of the clergy of the Church of England to marry on the registrar's certificate or licence is not obligatory, but optional; 19 & 20 Vict. c. 119, s. 11.

⁴ 6 & 7 Wm. IV. c. 85, s. 4.

⁵ Sect. 7. *One whole day*, by 19 & 20 Vict. c. 119, s. 9.

⁶ 6 & 7 Wm. IV. c. 85, s. 16.

⁷ Sect. 21.

⁸ 61 & 62 Vict. c. 58, s. 4.

⁹ Sect. 10.

¹⁰ Sect. 6.

¹¹ Sect. 7.

¹² Sect. 13.

¹³ Sect. 12.

¹⁴ 6 & 7 Wm. IV. c. 85, s. 43.

CHAPTER III.

THE MARRIAGE LAWS OF SCOTLAND.

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THE laws of Scotland affecting marriage differ in a marked degree from those of England. The basis of Scottish jurisprudence is the Roman law; and the influence of the canon law, in its turn derived from the Roman, has left clear and unmistakable marks upon the social system of Scotland. The marriage law of Christian countries over which the See of Rome had influence, was considerably modified and altered by the decrees of the Council of Trent. These decrees obtained and were put in force in Ireland, but were never recognized in Scotland. The principles of the canon law have never been altered or modified by legislation in Scotland. Thus, these exist there in force and vitality even now. Public opinion, it is true, does not approve of

Decrees of the
Council of
Trent did not
obtain in Scot-
land.

the laxity of their regulation in matrimonial matters, or of the opportunities they offer for clandestine, improvident, and secret unions; yet marriages celebrated in Scotland which are recognized by the canon law are, for the most part, good and valid. Thus, side by side with the strict requirements for regular marriages—more strict than those of English law—exists the facile code of the irregular or in orderly marriages.

This chapter will be devoted to the essential preliminaries of a valid marriage, whether regular or irregular, and the order of discussion of subjects is as follows:—

Section 1. Regular marriages.

- „ 2. Irregular marriages.
- „ 3. Declarator of marriage.
- „ 4. Registration of marriages, regular and irregular.
- „ 5. Divorce.¹

SECTION I.

Regular or Public Marriages.

Regular or public marriages may be celebrated in a church, or private house, on any day of the week, and at any hour of the day; (1) after due proclamation of banns; (2) or on production of the registrar's certificate, under 41 & 42 Vict. c. 43; (3) by a minister of religion.

(1) Down to the year 1878, when the Act of 41 & 42 Vict. c. 43, was passed, the publication of banns in the parish church of at least one of the parties was absolutely necessary to the contracting of a regular marriage, whether by the minister of the Established Church, to whom the solemnization of the marriage was originally confined, or by the ministers of the other denominations, against whom the rigour and severity of the laws were gradually relaxed. The requisite formalities to be gone through in the proclaiming of banns are as follows:—

(a) *Where the parties are members of the Established Church of Scotland.*

The proclamation is made by leaving with the session-clerk of the parish or parishes where each of the parties intending to marry has his or her domicile, their names and descriptions. The session-clerk cannot proclaim banns until the parties have resided six weeks in the parish; otherwise they must be proclaimed in the church of the parish where their ordinary residence is. If the session-clerk does not know the parties—does not know that they have been resident six weeks in his parish—or

Regular or public marriages.

After proclamation of banns.

Parties members of the Established Church of Scotland.

Banns: residence of six weeks necessary.

¹ The subject of divorce will be treated very shortly on those points only in which the Scotch law mostly differs from the English.

that they are unmarried, and not within the forbidden degrees, they must bring him a certificate signed by two householders, or by an elder, certifying these facts.¹ The proclamation is not made by the session-clerk, but by the precentor, who reads over the necessary description of the parties with an audible voice in the parish church, while the congregation are assembled for public worship, and immediately before divine service.² The proclamation should properly take place on three successive Sundays; but the general practice, in fact, is to make all the three publications on the same Sunday, on payment of fees considerably larger than those which would be payable if the more correct practice were observed.³ Though the precentor actually reads the proclamation, it is the minister who in law is regarded as making it; and the ministers of the *quoad sacra* parishes, or new ecclesiastical districts, are to proclaim the banns of those residing in such districts.⁴

Parties members of the
Episcopalian
Church.

(b) *Where the parties are members of the Episcopalian Church.*

Banns to be
published both
in Episcopalian
and parish
churches.

The banns of Episcopalians must be published three times both in the churches attended by them as worshippers, and also in the churches of the Establishment to which they belong as parishioners. The privilege of having their banns published in their own churches was granted them by the statute 10 Anne, c. 7, s. 6, which further enacted that "the ministers of the parish churches are hereby obliged to publish the said banns; and in case of neglect or refusal it shall be sufficient to publish the said banns in any Episcopal congregation alone."

Banns of other
dissenters
published in
parish church
only.

(c) *Other dissenters.*

Other dissenters (including Quakers and Jews) cannot have their banns published in their own churches or chapels, but only in the Established Church of their parish.

Banns of parties domiciled
in Scotland,
marrying in
England or
Ireland, to be
proclaimed in
parish church.
Certificate of
proclamation.

When both or either of the parties, domiciled in Scotland, contract or contracts a marriage celebrated in England or Ireland, their banns must be proclaimed in the parish church of their domicile, to avoid the penalties inflicted by the Act of 1661, c. 34.

After proclamation has been duly made, the session-clerk issues a certificate testifying the fact, and on its production the minister is bound to celebrate the marriage.⁵ If he refuse, except for valid reason, to celebrate the marriage, he may be compelled by the Court of Session to do so.

On production
of the registrar's
certificate.

(2) By an Act passed in 1878, called the Marriage Notice (Scotland) Act,⁶ a considerable modification in the ideas of

¹ Fraser H. & W. 285.

² The proclamation runs: "There is a purpose of marriage between A. B., residing in —, and C. D., residing in —, of which proclamation is hereby made for the first, [second, or third] time."

³ Fraser, H. & W. 284; also Rep. Com. Mar. Laws, p. xvii.

⁴ *Hutton v. Harper*, 1 App. Cas. 464.

⁵ 17 & 18 Vict. c. 80, s. 76.

⁶ 41 & 42 Vict. c. 43. It came into operation on January 1, 1879.

marriage prevalent in Scotland has been introduced. For the first time it is acknowledged by legislative enactment that it is no longer necessary to have recourse to the Established Church of the country as a witness to the desire of the contracting parties to take each other for man and wife in regular marriage, but that a secular official is able to supply that necessary imprimatur of approval which was long denied to ministers of congregations of religious bodies other than those of the Established Church. The new law has been regarded as a breaking down of one of the barriers between regular and inregular marriages.

The following are the chief provisions of the Act:—

Ministers, clergymen, or priests in Scotland may celebrate marriage after the proper and prescribed publication of an intention of the parties to marry, and upon production of a proper certificate or certificates; and such marriages shall be deemed to be as regular as if celebrated after the usual proclamation of banns.¹ Quakers and Jews are not affected by this Act, provided that both parties belong to the same persuasion, are married according to the usages of their communion, and notice to the registrar of an intention to marry shall have been given, and his certificate issued.²

Clergymen may celebrate marriage on production of a certificate.

Quakers and Jews not affected.

A registrar's certificate of the publication of a notice of marriage shall have the same force and effect as a session-clerk's certificate of proclamation of banns, and its production will authorize a minister, clergyman, or priest in Scotland to celebrate a regular marriage, whether both or only one of the parties have or has procured the registrar's certificate. No minister of the Church of Scotland shall be obliged to celebrate a marriage not preceded by the due proclamation of banns.³

Registrar's certificate of equal force as that of a session-clerk.

Kirk minister not bound to marry on certificate.

If the marriage do not take place within three months from the date of the registrar's certificate, the certificate will be void.⁴ Persons desirous of contracting a regular marriage without the proclamation of banns, shall, if living in different parishes or districts, each give notice of the intended marriage to the registrar of the parish or district in which he or she shall have resided for not less than fifteen days before the giving of such notice; and such notice is to be entered in the registrar's "Marriage Notice Book." After the expiration of seven days from the receipt of such notice of the intended marriage, and in the event of no objection to the marriage appearing on the face of the notice, the registrar shall issue a certificate of the due publication of the notice.⁵

Certificate good for three months only.

(3) For a long period of time the ministers of the Established Church of Scotland were the only persons who could celebrate

By a minister of religion other than that of the Established Church.

¹ 41 & 42 Vict. c. 43, s. 4.

² Sect. 5.

³ Sects. 6 and 11.

⁴ Sect. 11.

⁵ Sects. 7, 8, and 9. For the lodging of objections, and on what grounds, see the Act, which is based on the English Registration Acts.

10 Anne, c. 7,
and 4 & 5
Wm. IV. c. 28.

10 Anne, c. 7.

4 & 5 Wm. IV.
c. 28, repealed
the old penal
statutes.

Minister must
marry on the
production of
certificate of
proclamation
of banns;
may do so on
production of
registrar's
certificate.

Marriage need
not be cele-
brated in a
church, &c.

Clandestine
or in disorderly
marriages.

marriage without running the risk of being punished. Before the statutes 10 Anne, c. 7, and 4 & 5 Wm. IV. c. 28, the solemnization of marriage by any person other than a minister of the Established Church of Scotland was prohibited under severe penalties, and deemed clandestine and irregular. The Act of Queen Anne was passed in favour of the Protestant Episcopalian communion only, whose ministers, duly ordained by Protestant bishops, were thereby permitted to celebrate marriage between parties whose banns should be published on three several Sundays in the Episcopal congregations attended by both of them, as well as in the parochial churches. By 4 & 5 Wm. IV. c. 28, the penalties imposed by the older statutes upon the celebration of marriages in Scotland by Roman Catholic priests, or other ministers not belonging to the Established Church of Scotland, were repealed; and it was declared lawful for all persons in Scotland, "after the proclamation of banns there," to be married by any priests or ministers not of the Established Church.¹

The minister, clergyman, or priest must marry the parties coming before him with that intent, provided they produce a certificate of the proper proclamation of their banns from the session-clerk of the parish or parishes in which they reside. He may also, but cannot be compelled, marry those who produce to him a registrar's certificate of the due publication of the notice of marriage under the provisions of 41 & 42 Vict. c. 43. The publication of banns according to the Scotch method of a party resident in Scotland but to be married in England renders the marriage in England valid, if not otherwise invalid.²

The presence of a clergyman is necessary to a regular marriage, but he need not celebrate it within the walls of a sacred building, or at any particular place or time. Indeed, it may be said to be the practice among the members of the Scotch Church not to be married in church. The presence of any lawfully appointed minister (and proper officer in the case of Quakers and Jews) seems to entitle such marriages to the character of being celebrated *in facie ecclesiæ*. The Episcopalians and Roman Catholics celebrate, as a rule, their marriages openly in their own churches.

SECTION 2.

Irregular Marriages.

Irregular, clandestine, or in disorderly marriages are those which are celebrated or entered into without due proclamation of banns, or the registrar's certificate. The fact that these marriages are

¹ Re. Com. Mar. Laws, p. xvii.

² 49 & 50 Vict. c. 3, s. 1.

not only capable of being contracted, but are to all intents and purposes good and valid, is a blot on Scottish jurisprudence, the removal of which would be conducive to the best interests of society. There are three classes of irregular marriages, namely:—

- (1) *Sponsalia per verba de presenti.*
- (2) *Sponsalia per verba de futuro cum copulā.*
- (3) *Marriage by Habit and Repute.*¹

Before passing on to discuss these classes of marriage, it may be of advantage to mention that certain learned writers strenuously hold that these *sponsalia* do not by the law of Scotland constitute complete and very marriage. Thus it has been held by some Scotch writers, notably the late Lord Fraser, that the law of Scotland never acknowledged as valid marriages the union of parties as described by Lord Stowell in *Dalrymple v. Dalrymple*,² which case was followed by the House of Lords in *MacAdam v. Walker*;³ and that the only clandestine marriages held to be valid were those *celebrated by a priest*, in other words, the presence of a priest was always necessary to constitute *verum matrimonium*,⁴ and that mere private interchange of consent was a thing unknown to the law or practice of the Scotch people.⁵ His lordship was also of opinion that, even assuming that the Roman canon law prevailing in Continental Europe acknowledged such marriages (which he disputes), such canon law never really prevailed in Scotland; but that the ecclesiastical law of the country was its Consistorial law, which law in its turn was derived from the decisions of the Provincial Councils. Whether the arguments and accuracy of statement are on his side or not, it is not within the province of this treatise to determine. The law as laid down by competent authority must be followed and

Dispute as to whether *sponsalia* constitute complete marriage.

¹ Habit and repute do not really constitute marriage; they only afford a strong presumption and evidence of a marriage having taken place between the parties.

² 2 Hag. Con. Rep. 54, 64, 65. Lord Fraser contends that the judgment of Lord Stowell, that the contract *per verba de presenti* between Dalrymple and Miss Gordon was a valid and perfect marriage, was a mere dictum, and not necessary to the decision of the case; for the engagement between them was clearly a pre-contract, which entitled her to insist on a decree ordaining solemnization, and so annulling the second marriage, and such decree would have had the effect of making the inordinerly and clandestine engagement a valid marriage.

³ 1 Dow, Rep. H. L. 148.

⁴ See *Reg. v. Millis*, 10 Cl. & F. 534.

⁵ Lord Fraser (Husb. & W. p. 232) gives a list of what were considered clandestine or inordinerly marriages from the date of the Reformation (1560) down to the *Dalrymple* decision:—

- (a) Marriage celebrated by an Episcopalian minister, when Presbytery was established.
- (b) Marriage celebrated by a Presbyterian minister, when Episcopacy was established.
- (c) Marriage celebrated by a Popish priest.
- (d) Marriage celebrated without proclamation of banns.
- (e) Marriage celebrated on any other day than Sunday.
- (f) Marriage not celebrated in church.
- (g) Marriage celebrated by Scotch people elsewhere than in Scotland, they having gone abroad merely to marry.
- (h) Marriage without consent of parents.

treated as binding; and since the decisions of *Dalrymple v. Dalrymple*¹ and *MacAdam v. Walker*,² it is clear that the law of Scotland now recognizes as valid (though irregular) marriages *per verba de præsenti* and *per verba de futuro cum copulâ*.

Gretna Green marriages,

The opportunity for effecting valid marriages in Scotland without the necessary requirements and preliminaries essential by the law of England had some considerable effect and importance. Many ardent couples, disdainful of the restraints of their home law, many designing persons desirous of possessing the fortunes of heiresses, many who could never have got the consent of parents, or guardians (whether the Court of Chancery or private individuals), hurried northward over the border to celebrate their rapid nuptials, which needed but the openly expressed consent of the parties to take each other as man and wife in the presence of a witness. It was this facility for speedy and clandestine marriage that rendered Gretna Green so notorious.³ This small village, situated a short way over the border, on the main road from the south, afforded a likely spot where those who came to avoid the fetters of their own laws might, in the presence of the well-known blacksmith or others, repeat a few simple words, and thereby contract a valid marriage, and from which they might return home with ease.⁴ This state of affairs was altogether altered, and the matrimonial trade of the blacksmith⁵ destroyed, by Lord Brougham's short but important Act of 1856,⁶ which required for a valid marriage in Scotland a residence of at least twenty-one days in that country preceding the marriage.⁷

put an end to by Lord Brougham's Act, 1856.

Sponsalia per verba de præsenti.

(1) *Sponsalia per verba de præsenti* :

These are a contract in which the parties mutually express their intention in words of present time to take each other as man and wife. This mutual consent may be expressly declared :

Before a clergyman without banns ; or a magistrate.

(a) Before a clergyman without banns, or before a layman.

(b) Before a magistrate. The parties exchange their matrimonial consent before the magistrate, who grants them his certificate of the fact. The magistrate is not liable for any penalties so long as he does not give the pro-

¹ 2 Hag. Con. Rep. 54.

² 1 Dow, Rep. H. L. 148.

³ It is said that many thousands of marriages were wont to be celebrated in the course of a year.

⁴ The validity of these marriages has been upheld in a petition under the Legitimacy Declaration Act, 1857, *Gardner v. Gardner*, 60 L. T. s. 39.

⁵ The blacksmith did not act in the capacity of celebrator, but only witness of the marriage.

⁶ 19 & 20 Vict. c. 96. See *post*, p. 37.

⁷ By the law of Scotland, these must be clear days preceding the marriage; accordingly, where two persons domiciled in England arrived in Scotland about 4 A.M. of July 1st, 1870, remained there until the 21st of the same month, and between 11 and 12 A.M. of that day were married by declaration before a registrar, the marriage was held invalid, as they had not lived in Scotland for twenty-one days next preceding the marriage. *Lawford v. Davies*, 4 P. D. 61.

ceeding a religious character; but not so the parties, who, therefore, are wont to go before a justice and get themselves fined a nominal sum (the fine being recorded), and so preserve evidence of their marriage.¹

Conviction and registration of marriage.

- (c) It may also be declared in the presence of witnesses; or by private declarations; or by writings for the purpose of expressing consent, or, in point of fact, disclosing such consent.

A marriage may be constituted, according to the law of Scotland, by declarations made by the man and the woman that they presently do take each other for husband and wife. No sacerdotal benediction is required to make this a valid marriage. The declarations may be emitted on any day, at any time, and without the presence of witnesses. Such a marriage is as effectual to all intents and purposes as a public marriage solemnized *in facie ecclesiæ*. The children of it would be legitimate, and the parties to it would have all the rights in the property of each other given by the law of Scotland to husband and wife.² Lord Lyndhurst, in the case of *The Queen v. Millis*,³ thus sums up the result of this contract: "Such a contract (*sponsalia per verba de præsentî*) entered into between a man and a woman was indissoluble. The parties could not by mutual consent release each other from the obligation. Either party might, by a suit in the spiritual court, compel the other to solemnize the marriage *in facie ecclesiæ*. It was so much a marriage that if they cohabited together before solemnization they could not be proceeded against for fornication, but merely for a contempt. If either of them cohabited with another person the parties might be proceeded against for adultery. The contract was considered to be of the essence of matrimony, and was therefore, and by reason of its indissoluble nature, styled in the ecclesiastical law *verum matrimonium*, and sometimes *ipsum matrimonium*. Another and most important effect of such a contract was that if either of the parties afterwards married with another person, solemnizing the same *in facie ecclesiæ*, such marriage might be set aside even after cohabitation and birth of children, and the parties compelled to solemnize the first marriage *in facie ecclesiæ*. Such were the effects of a marriage *per verba de præsentî*." The consent must be mutual, and to a present marriage,⁴ and must not be qualified by a condition of something further to be done, or to a future time,

How contract constituted.

Effects of this species of contract.

Consent must be mutual and absolute.

¹ Since 19 & 20 Vict. c. 96 s. 3, there can be no conviction for, or registration of, an irregular marriage without proof other than the acknowledgment of the parties that one of them had resided in Scotland for twenty-one days. See *post*, Penalties on the Parties, p. 35, and Declarator of Marriage, p. 36.

² Fraser, H. & W. 294.

³ 10 Cl. & F. 534, 832.

⁴ *Anderson v. Fullerton*, Hume, Decisions, 365.

otherwise the contract is nothing but *sponsalia de futuro*.¹ The consent may be given either verbally or in writing.

Verbally.

Verbally.—The parties must in clear, unambiguous language declare themselves to be man and wife, though no particular form of words is necessary. The words, "This is my lawful married wife, and the children by her are my lawful children" (the woman curtsying in token of assent), have been held sufficient.² Such acknowledgment will not have the effect of marriage if given in suspicious circumstances.³ The consent or acknowledgment may be proved by witnesses.⁴

In writing.

In writing.—When the acknowledgment or declaration is in writing the language must be clear, and accepted by the other party.⁵ A letter containing these words, "I hereby declare you to be my lawful wife," was held to constitute a marriage.⁶ Such acknowledgment and declaration of marriage will be disregarded if the conduct of the parties shows that they could not have meant what the document says.⁷ That the writing is that of the party pursued must be proved; but after proof, the onus of showing that it does not mean what it says lies on the defender. Marriage may also be proved between the parties by their conduct towards each other, and the first consent need not be proved; it is sufficient if the facts of the case are such as to lead to satisfactory evidence of such a contract having taken place; the acknowledgment of the parties, their conduct towards each other, and the repute consequent upon it, may be sufficient to prove a marriage.⁸ Whether marriage can be contracted *per verba de presenti*, in a letter sent through the post, is not yet a decided point; but Lord Fraser was of opinion that the authorities in the law of Scotland are against such a contention.⁹

Marriage may be proved by the conduct of the parties.

(2) *Sponsalia per verba de futuro cum copulâ.*

A mere promise to marry is not marriage. *Copulâ* necessary.

A mere promise to marry does not constitute marriage in Scotland, any more than a similar promise would in England. But under certain circumstances a promise to marry, followed by *copula*, or carnal intercourse, though not very marriage itself, yet constitutes a pre-contract, the fulfilment of which the woman can enforce while both the promiser and herself are alive (but not after the man's death) so as to obtain a decree of declarator of marriage against him.¹⁰

¹ *Stewart v. Menzies*, 2 Rob. App. 547.

² *MacAdam v. Walker*, 1 Dow, Rep. H. L. 148. In this case the man shot himself immediately after he had spoken the words.

³ *Furrel v. Barrie and others*, 1 Feb. 1828, 6 S. 472.

⁴ *MacAdam v. Walker* (*ubi sup.*).

⁵ *Hamilton v. Hamilton*, 1 Bell's Appeals, 736.

⁶ *Richardson v. Irving*, Hume, Decisions, 361 (1765). See also *Dalrymple v. Dalrymple*, 2 Hag. Con. Rep. 54.

⁷ *Anderson v. Gill*, 3 Macq. 180.

⁸ *Craigie v. Hoggan*, MacLean and Rob. App. 965.

⁹ H. & W. 315.

¹⁰ *Ibid.* 322

Lord Stowell, in his celebrated judgment in the case of *Dalrymple v. Dalrymple*,¹ thus sums up the effects of this species of contract: "In the *promise* or *sponsalia de futuro*, nothing was presumed to be complete or consummated either in substance or in ceremony; mutual consent would release the parties from their engagements, and one party, without the consent of the other, might contract a valid marriage regularly or irregularly with another person; but if the parties who had exchanged the promise had carnal intercourse with each other, the effect of that carnal intercourse was to interpose a presumption of present consent at the time of the intercourse, and to convert the engagement into an irregular marriage, and to produce all the consequences attributable to that species of matrimonial connection."

Effects of *sponsalia per verba de futuro cum copulâ*.

Difference between the mere promise, and

the promise *cum copulâ*.

The following are some leading principles dealing with this pre-contract, taken from Lord Fraser's work:—²

(a) After *sponsalia de futuro cum copulâ* are entered into, an action for declarator of marriage and adherence must be brought by the woman.³

Action for declarator and adherence must be brought by the woman.

(b) The pre-contract of promise *cum copulâ* is not dissolvable at the consent of the parties, and the judge who tries the action may refuse to make a decree, but may dissolve the contract. A ground for dissolution is the incontinence of the woman after the promise and *copula* with the defender.⁴

Power of the judge to refuse the decree and to dissolve the contract.

(c) Where one of the parties dies before decree or litigation, an action of declarator of marriage is incompetent, and the survivor and the issue are not entitled to claim the civil rights flowing from a lawful marriage. In particular, the woman is not entitled to *terce* or *jus relictæ*, nor the man to courtesy, and the children are not legitimate.⁵ In order that the full effect of a valid marriage should be given to this pre-contract, an action for a decree of declarator must be commenced by the woman in the lifetime of herself and the man with whom she has entered into the contract; though it does not appear necessary that both parties shall be alive at the time of the decree, or that the decree itself shall be pronounced if the woman has used due diligence in enforcing her rights.⁶

Effect of death before decree.

Action for declarator of marriage must be brought in the lifetime of both parties.

(d) It would not constitute bigamy so as to be punishable under the criminal law of Scotland if a man promised marriage and followed it up by *copula*, and thereafter again promised marriage to another, which he also followed up by *copula*.⁷

Two promises *cum copulâ* to two different women not bigamy.

¹ 2 Hag. Con. Rep. 54, 65.

² It is due to say that some of the above principles have not been judicially decided and confirmed as undisputed law; and there are many who hold the contrary doctrine that promise *cum copulâ* constitutes "very marriage" without more. The balance of opinion and authority seems to favour Lord Fraser's views.

³ Fraser, H. & W. 331.

⁴ *Ibid.* 342.

⁵ *Ibid.* 344.

⁶ *Ibid.* 348. *Wauchope v. Sandilands*, 3 Mar. 1607, MSS. Rec. Com. Court, vol. xxxvii.

⁷ Fraser, H. & W. 357.

Proof of *copula* permitted by woman on faith of a promise of marriage.

The promise in these *sponsalia* must be mutual, and it must be clearly proved that the *copula* was permitted by the woman on the faith of the promise of the man to make her his wife; accordingly, the period of time that elapses between the promise and the *copula*, and the behaviour of the woman subsequent to the promise, are relevant facts to be inquired into. This is not a presumption *juris et de jure*, but may be rebutted, and proof to the contrary is not excluded.¹ The proof of such promise must be in writing under the hand of the defender, or his confession upon oath; and a mere promise to marry given in the presence of witnesses could not be proved by their testimony so as to constitute the subsequent *copula* a marriage.² It is not necessary that the promise should be in writing if there be an acknowledgement in writing of the fact of the promise forthcoming.³ The *copula*, on the other hand, may be proved by parol evidence.

Promise and *copula* must take place in Scotland.

The promise given and the intercourse following upon it must take place in Scotland; and on this point Lord Chelmsford in *Yelverton v. Longworth*⁴ said: "As this description of marriage is peculiar to Scotland, it is obvious that everything which is essential to the contract, viz., both the promise and the *copula* must have taken place there, and must be distinctly proved, either directly or by written acknowledgment, to have each of them this local requisite."

Marriage by Habit and Repute.

(3) *Marriage by Habit and Repute.*

Habit and repute evidence of, rather than marriage itself.

Some authorities have held that marriage by "habit⁵ and repute" is a separate form of marriage, that is to say, marriage is created by habit and repute. Habit and repute do not, as a matter of fact, constitute marriage, but serve only as evidence and presumption of a marriage having been celebrated between parties competent to enter into it.⁶ This presumption is not confined to Scotland, but it is acted upon in England, America, and nearly all other countries, with the notable exception of France.⁷

¹ *Morrison v. Dobson*, 8 Court Sess. Cas. 3rd series, 347.

² See, however, *Sawers v. Forrest*, cited in Fraser, H. & W. 377.

³ *Yelverton v. Longworth*, 4 Macq. H. L. Cas. 745.

⁴ 4 Macq. H. L. Cas. 879.

⁵ Habit is equivalent to "cohabitation."

⁶ *De Thoren v. The Attorney-General*, 1 App. Cas. 686. This was a very strong case; the parties were married in Scotland at a time when a legal impediment to their marriage existed, but of which they were then ignorant. On the impediment being removed, and believing themselves to be validly married, they lived together continuously for years as husband and wife, and were regarded as such by all who knew them. The marriage was held valid, as it was to be inferred that the matrimonial consent was interchanged as soon as the parties were enabled by the removal of the impediment to enter into the contract. Such a marriage would not, however, be upheld in England. See also the *Breadalbane Peerage Case*, 4 Macq. H. L. Cas. 711.

⁷ The Code Civil (Art. 194) requires the production of an extract from the register of the act of celebration, though by Art. 197 it allows a relaxation of this rule in favour of children under certain circumstances.

In Scotland the presumption rests upon the statute passed in James IV.'s reign for the protection of widows against allegations of interested parties that they were not the lawful wives of their deceased husbands.¹ As the marriage can only exist as the result of mutual agreement, the facts relied on must be such as to lead to the inference that the matrimonial consent was interchanged.² Mere cohabitation is not enough; there must be repute as well; and both together will not suffice unless coupled with matrimonial cohabitation, that is, among neighbours and friends, who from the nature of the behaviour of the parties might infer that they were man and wife. If the repute or opinion preponderate against the connection of the parties being marriage, or even be equally divided, marriage is not established, for such repute is held to be no repute at all;³ so also the repute must be constant, uniform, and unvarying. Where the connection between the parties is at first illicit (*e.g.*, living in adultery), but afterwards, from the removal of impediments, becomes capable of being lawful, those who challenge the marriage have the onus of proving that the connection remained illicit cast upon them, for their subsequent cohabitation and reputation as man and wife afford strong evidence of a lawful and formal matrimonial tie having been formed between them.⁴

Act of 1503, c. 77.

Matrimonial consent must be clearly proved.

Matrimonial cohabitation must be open and public.

Repute must be general, not singular opinion.

Irregular marriages, while held good and valid, yet expose the contracting parties, the witnesses, and the celebrator, to pains and penalties.⁵ In former days these penalties were severe and stringent, and expressive of the disfavour with which these marriages were regarded by the Church.

Penalties inflicted for irregular marriages.

By the Act of 1661, c. 34, the contractors of an irregular marriage with a religious ceremony were liable to imprisonment for three months, and to heavy fines, varying with the quality and degree of the offenders, and in some instances corporal punishment was added.⁶ Where there has been no religious ceremony no prosecution can be maintained under the above-mentioned statute.

Penalties on the contracting parties.

The witnesses to an irregular marriage celebrated with a religious ceremony were liable to smaller fines than the parties, but if they could not pay them corporal punishment might be

On the witnesses.

¹ 1503, c. 77, Acts of the Parliament of Scotland, vol. ii. p. 243.

² *Campbell v. Campbell*, L. R. 1 Sc. App. 182, 5 Court Sess. Cas., 3rd series, 115. In this case Lord Westbury (p. 211) said of it: "Perhaps it may not be strictly correct to say that it (cohabitation with habit and repute) is a mode of contracting marriage. It is rather a mode of making manifest to the world that tacit consent which the law will infer to have been already interchanged."

³ *Cunningham v. Cunningham*, 2 Dow, Rep. H. L. 482.

⁴ *Campbell v. Campbell* (*ubi sup.*). In this case *Cunningham v. Cunningham* (*ubi sup.*) and *Lapsley v. Grierson*, 1 H. L. Cas. 498, were commented upon.

⁵ These penalties are seldom exacted, though they are occasionally enforced against trafficking priests, and persons assuming a clerical character.

⁶ The punishments inflicted by the Act cannot be enforced by justices of the peace.

inflicted.¹ If a case should occur for prosecution under the statute, it is not probable that corporal punishment would be inflicted, though the fines might be enforced.

On the celebrator.

Under the act of 1661, c. 34, the penalty for celebrating an irregular or clandestine marriage, by an unauthorized person, or by an authorized person without proclamation of banns, was banishment from the kingdom. Formerly any person not authorized by the Kirk—in other words, not regularly called to the exercise of pastoral functions within Scotland—who celebrated a marriage otherwise regular, was within the Act;² but now the different classes of persons against whose celebration of marriages the Act was directed have since been allowed by legislation to celebrate, after the contracting parties have satisfied the proper legal requirements.³

The other mode of infringing the statute is, when marriage is celebrated without proclamation of banns; and this holds alike whatsoever be the quality of the person officiating.⁴ To the absence of the proclamation of banns must now be added that of the registrar's certificate, which is now made equivalent to the certificate of the session-clerk of proclamation of banns, so far as concerns the regularity of the marriage celebrated upon it;⁵ and if "any person otherwise entitled to celebrate a marriage, who shall celebrate a marriage in Scotland with a religious ceremony without having produced or exhibited to him a certificate or certificates of the due publication of bann's, or a registrar's certificate, &c., applicable to both parties, or a certificate of due proclamation of banns in the case of one of the parties, and a registrar's certificate in the case of the other, shall be guilty of an offence under this Act, and shall, on conviction thereof, be liable to a penalty not exceeding £50."⁶

If a minister be indicted under the statute, a forged or false certificate of publication of banns produced to him at time of marriage forms a good defence, if his ignorance of the forgery or falseness of the document be proved.

SECTION 3.

Declarator of Marriage.

Declarator of marriage.

Those who wish to preserve in some formal shape unquestionable evidence of their irregular marriage are wont to obtain from the procurator-fiscal a petition (which is in printed form), purporting to proceed, at the instance of that officer, against the parties for entering into an irregular marriage, and craving the magistrates to impose the statutory penalties upon them. The

¹ Act 1698, c. 6.

² Hume, 464.

³ See 10 Anne, c. 7; and 4 & 5 Wm. IV. c. 28.

⁵ 41 & 42 Vict. c. 43, ss. 6 & 11.

⁴ Hume, 466.

⁶ Sect. 12.

parties then make a declaration confessing the fact, are fined, and obtain an extract of the sentence, to be kept as the evidence of the marriage.

Fine, and extract of sentence evidence of marriage.

By Lord Brougham's Act¹ it was enacted that, after December 31, 1856, it shall not be lawful to convict any parties of having irregularly contracted marriage, unless there shall be adduced to the justice or justices of the peace, magistrate or magistrates, before whom the complaint against such parties has been brought, sufficient proof other than the acknowledgment of such parties, that one of them had, at the date thereof, his or her usual residence in Scotland for twenty-one days next preceding such marriage.²

Lord Brougham's Act.

Residence of twenty-one days in Scotland necessary.

The rôle played by the magistrate is virtually that of a reputable witness only of the act and civil contract of the parties. He is not committing an illegal act if he simply confine himself to the character of a witness; if he were to attempt to pronounce the nuptial benediction and officiate as a clergyman, he would at once violate the Act of 1661.³

Magistrate a witness of consent of parties.

SECTION 4.

Registration of Marriages.

Regular marriages are required to be registered much in the same way as in England. Before irregular marriages can be registered, certain procedure and formalities must be followed and complied with. On this subject but little more need be given than the more important sections of the Acts dealing with marriage registration.

Registration of marriages.

(1) *Regular marriages.*—In every case of regular marriage a copy of Schedule C of 17 & 18 Vict. c. 80, shall, upon the production of the certificate of proclamation of banns, be procured by the parties contracting the marriage, previous to its solemnization, from the registrar of the parish or district within which such marriage is intended to be solemnized, who shall be bound as far as possible to fill up the said schedule;⁴ and upon the solemnization of the marriage, such schedule having all the information thereby required inserted therein, shall be produced to the minister solemnizing the marriage, or to the person solemnizing any marriage according to the rites and forms respectively observed by Jews and Quakers, or shall be filled up in the presence of such minister or person, and shall be signed by the parties contracting the marriage, and by

Regular marriages.

¹ 19 & 20 Vict. c. 96, s. 3.

² See *Lawford v. Davies*, 4 P. D. 61, ante, p. 30.

³ Fraser, H. & W. 253-54. See ante, Penalties on the Celebrator, p. 36. He would also render himself liable to the penalty under sect. 12 of 41 & 42 Vict. c. 43.

⁴ 23 & 24 Vict. c. 85, s. 15.

the witnesses present thereat, not being less than two, and also by the minister¹ or person officiating, and be delivered to the parties contracting the marriage, who shall within three days thereafter deliver or send by post such schedule to the registrar of the parish wherein the marriage was solemnized; and the husband, and failing the husband the wife, shall in case of failure so to deliver or send such schedule be liable to a penalty not exceeding £10.²

Registration of mixed marriages.

In the case of a mixed marriage, which is celebrated according to two ecclesiastical forms in different parishes (and perhaps also at different dates), only the first marriage ought to be registered, a reference being made on the margin of the entry to the place and date of the subsequent ceremony. When the schedule is transmitted after the expiry of the statutory period the marriage must nevertheless be recorded.³

Attendance of the registrar not compulsory, and is rarely required.

It is competent to the persons intending to contract marriage to require the registrar of the parish to attend at the solemnization thereof, at any place within such parish; and such registrar is required, upon a written notice of forty-eight hours given to him to that effect, to attend with the register book accordingly, and to make the proper entry therein.⁴ As a matter of fact, the attendance of this officer is scarcely or ever required.

Irregular marriages. Convictions before a magistrate.

(2) *Irregular marriages.*

(a) In the event of any person being convicted before any justice of the peace or magistrate of having irregularly contracted a marriage, it shall be lawful for either of the parties to such irregular marriage, and they are severally required to register such marriage in the parish in which such conviction shall have taken place.⁵

Marriages established by decree of declarator.

(b) In any case of a marriage being established by a decree of declarator of any competent court, it shall be lawful for either of the parties to the action in which such decree was pronounced to register such marriage in the parish of the domicile of such parties, or the parish of their usual residence.⁶

Registration on sheriff's warrant on

(c) If any persons who shall have contracted an irregular marriage in Scotland (on and after January 1, 1857)

¹ The word "minister" includes ministers or pastors of Christian congregations of all denominations. 17 & 18 Vict. c. 80, s. 76.

² Sect. 46.

³ Fraser, H. & W. 479.

⁴ 17 & 18 Vict. c. 80, s. 47. The registrar is entitled to demand a statutory fee for his attendance and expenses.

⁵ Sect. 48. The magistrate before whom, or the clerk of court in which any such conviction has taken place, shall upon such conviction give information to the registrar of the parish in which it took place by notice of the import of the conviction in the proper form. Sect. 49.

⁶ Sect. 48. The clerk of court in which any such decree of declarator has been pronounced establishing the marriage, shall give information to the registrar of the parish of the domicile, or of the parish of the usual residence of the parties to the action of declarator. Sect. 49.

shall within three months after present a *joint* application for a warrant to register such marriage to the sheriff or sheriff-substitute of the county where such marriage was contracted, and shall prove to his satisfaction that they have been married to one another, and that one of them had lived in Scotland for twenty-one days next preceding such marriage, or had his or her usual residence in Scotland at the date thereof, such sheriff or sheriff-substitute shall certify the same under his hand, and shall thereupon grant a warrant to the registrar of the parish or burgh in which the marriage was contracted, who shall forthwith enter such marriage in the register of marriages kept by him.¹

Where parties irregularly married are subsequently married *in facie ecclesie*, and the first irregular marriage has been recorded, it would appear to be necessary that the second regular marriage should also be so recorded.²

The production to the registrar of an extract of a conviction, or decree of declarator, shall be sufficient evidence and warrant for the registration of such marriage, provided it purports to show that sufficient proof (other than the acknowledgment of the parties) was adduced to the justice or magistrate before whom such parties were brought, and that one of them at the date of the conviction had his or her usual residence in Scotland for twenty-one days immediately preceding the marriage.³ Every extract of any entry in the register books, properly kept, and duly authenticated and signed by the Registrar-General, if such extract shall be from the registers kept at the General Registry Office, and by the registrar, if from any parochial or district register, shall be admissible as evidence in all parts of Her Majesty's dominions without any other or further proof of such entry.⁴

SECTION 5.

Divorce.

As the Scotch law of divorce differs in some respects from the English, it was thought not quite out of place to append a few sentences on this branch of the subject; to enter into details, to give the effects of it as regards the spouses and the children both as to their personal and proprietary relations, would be far beyond the scope and necessities of this chapter.

Whether divorce, or dissolution of marriage on the ground of adultery, was permitted in Scotland before the Reformation has been a moot question; but it is undisputed that immediately

¹ 19 & 20 Vict. c. 96, s. 2.

² Fraser, H. & W. 480.

³ 17 & 18 Vict. c. 80, s. 49; and 19 & 20 Vict. c. 96, s. 3.

⁴ 17 & 18 Vict. c. 80, s. 58.

after that epoch divorce *a vinculo matrimonii* was recognized.¹ According to Lord Fraser,² divorce for adultery is part of the common law of Scotland, and not the creature of statutory enactment.

The Scotch courts recognize two grounds for divorce:—

Adultery.

(1) *Adultery*. This ground is open to either husband or wife; and where the wife is the guilty party, the co-defender may be cited, and if found *particeps criminis*, may be found liable for all the costs of the husband. If the courts have jurisdiction over the defender, it is immaterial that the adultery was committed out of Scotland.

Desertion, or
Non-adher-
ence.

(2) *Desertion*. Desertion for a period of four years is a ground *per se* for procuring a decree of divorce; and in this point the law of Scotland differs from that of England. The technical and more accurate expression is "*non-adherence*." It was formerly necessary to commence proceedings with an action of adherence, but by the Conjugal Rights Act, 1861,³ it is no longer necessary prior to any action for divorce to institute against the defender any action of adherence, nor to charge the defender to adhere to the pursuer. This now enables the complaining party to commence the action for divorce immediately on the expiry of the four years' desertion. Mere separation is not desertion, which must be a withdrawal from cohabitation and companionship against the pursuer's will; thus, absence of the husband on necessary business, or imprisonment in a foreign land, would not be deemed desertion; but if the wife refused to accompany her husband abroad, and he left her, her act and not his would constitute desertion.

Separation not
desertion.

References to a
suit for
divorce.

The Scotch courts (like the English) recognize three defences to a suit for divorce for adultery:—

Condonation.

(1) *Condonation*, or *remissio injuriæ*, is the forgiveness after knowledge of the adultery by the injured spouse. It may be either *express*, as by words, or *tacit*, as by continued cohabitation.⁴

Connivance.

(2) *Connivance* as to the commission of the adultery. If a husband has been actively instrumental in exposing his wife to temptation or thrown her in its way, if he encourages another to solicit her chastity, or leads her into such society as is likely to cause her virtue to fail, he cannot successfully maintain a suit for divorce. Passive acquiescence on his part is equally fatal to the husband's claim for relief.

¹ *Collins v. Collins*, 9 App. Cas. 205.

² H. & W. 1141. It received statutory recognition soon after the Reformation. Per Lord Watson in *Collins v. Collins* (*ubi sup.*, p. 246).

³ 24 & 25 Vict. c. 86, s. 11.

⁴ Full condonation of adultery, followed by cohabitation as man and wife, is a *remissio injuriæ* absolute and unconditional, and affords an absolute bar to any action of divorce founded on the condoned acts of adultery. Condonation of adultery—cohabitation following—cannot be made conditional by any arrangement between the spouses. *Collins v. Collins*, 9 App. Cas. 205.

(3) Collusion, or a deliberate arrangement between the parties to facilitate proceedings for divorce, is a ground when brought to the knowledge of the court for refusing the divorce sought by the pursuer. With a view of checking collusion, all suits for divorce are preceded by an oath, called the "oath of calumny," administered to the pursuer. In this action, the taking the oath calls upon the pursuer to declare that the defender has been guilty of adultery, and that the libel is true, and that there has been no collusion between them, or them and other parties, to procure the divorce. A false oath of calumny, is not, however, visited with the pains and penalties of perjury.¹

It is impossible to discuss Scotch divorce without adverting to the most important question whether domicile or residence gives jurisdiction to the Scotch courts in matters of divorce. This point has been hotly contested; and at one time where the defender resided for forty days in Scotland and was cited in Scotland before he or she left it the Scotch courts claimed jurisdiction, and divorces were granted in consequence of the jurisdiction so founded, although the real domicile of the defender was out of Scotland. But since the case of *Pitt v. Pitt*, in the House of Lords² there has been a series of cases³ that clearly decide that mere casual residence in Scotland has no effect in founding divorce jurisdiction so as to constitute any decree of divorce as of avail beyond the jurisdiction of the Scotch courts. The domicile must be *bonâ fide* and not merely colourable.⁴

¹ As a matter of fact, it does not seem to have any beneficial effect in furthering the ends of justice.

² 4 Macq. H. L. Cas. 627, which was decided by the House of Lords, as a Scotch Court of Appeal, who reversed the decision of the Court of Session, which had upheld the judgment of the Lord Ordinary.

³ *Carswell v. Carswell*, 8 Court Sess. Cas. 4th series (Rettie), 901; *Starert v. Starert*, 9 Court Sess. Cas. 4th series (Rettie), 519; *Watts v. Watts*, 12 Court Sess. Cas. 4th series (Rettie), 894.

⁴ See *Bonaparte v. Bonaparte*, [1892] P. 402.

CHAPTER IV.

THE MARRIAGE LAWS OF IRELAND.

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THE laws of Ireland affecting the marriages of those persons now called Protestant Episcopalians (formerly members of the United Church of England and Ireland), and of the members of the various denominations, Roman Catholics excepted, are not in many essential points different from those of England dealing with the same subject. There are, of course, differences, and only such differences will be discussed. The law affecting Roman Catholic marriages will also be set forth.

The foundation of the marriage laws of Ireland, as of England, is the canon law, based more or less on the civil. The canon law was the law of the Church of Rome; and when by degrees the Church arrogated to herself power over all matters

Canon law the foundation of Irish marriage law.

which might by any ingenious twisting be made to concern the spiritual welfare of the people—*e.g.*, wills, intestacy, and especially matrimony—its own peculiar legal system governed and regulated these affairs. The recognized canons existing before 1603, and those enacted in that year, formed the standard rules for the governance of the Churches of England and Ireland; and the marriage law of the two countries (as affecting the members of those churches) was the same previously to the passing of 26 Geo. II. c. 33.¹ In 1844 the Act of 7 & 8 Vict. c. 81, was passed.² The marriage of Presbyterians and other nonconforming bodies were chiefly affected. Its more important provisions, so far as they mark a difference between the laws prevailing in the two countries are as follows:—

Clergymen of the United Church of England and Ireland were bound to solemnize marriage on the production of a registrar's certificate, as though it had been a certificate of due publication of banns.³ Marriages between parties, one or both of whom were Presbyterians, might be solemnized according to the proper forms in a meeting-house certified by the minister (or ministers) appointed so to certify.⁴ Such minister so appointed might grant licences for marriages in any Presbyterian meeting-house, after having given security by bond in the sum of £100.⁵ Roman Catholic marriages were not in any way affected by the Act,⁶ neither were those of Jews and Quakers, provided both parties were of the same persuasion.⁷ The Act imposed on the dissenting bodies other than Presbyterians certain conditions necessary to the celebration of a valid marriage by their ministers, namely, the presence of the registrars at their marriages⁸ and the notification of the intended marriage by the registrar to the Board of Guardians, before whom the notices were to be read.⁹ These restrictions were deemed great grievances and hardships, especially as they had only been recently introduced by the Act, and were removed by 26 Vict. c. 27,¹⁰ except that the presence of the registrar was indispensable when the marriage was celebrated in his own office. This Act of 1844, together with the more recent enactments of 33 & 34 Vict. c. 110, and

Validation of marriages celebrated by Presbyterian ministers.

Act did not affect marriages of Roman Catholics, Jews, or Quakers.

Notice to poor-law guardians, and presence of registrar abolished.

¹ *Steadman v. Powell*, 1 Add. 58. One important difference remained after 1753, viz., in Ireland suits founded on pre-contract could be entertained until 1818 (58 Geo. III. c. 21, s. 3), when they were abolished.

² This enactment is directly traceable to the decision of the House of Lords in *Reg. v. Millis*, 10 Cl. & F. 534. This decision settled the law until it was altered by the Act of 1844. Notwithstanding the solemnity of the argument and the elaboration of the judgment, this decision has been much questioned (and rightly so), both on account of the law laid down and the circumstances of the judgment. See *Cutterall v. Cutterall*, 1 Rob. 582; *Beamish v. Beamish*, 9 H. L. Cas. 336; *Reg. v. Mainwaring*, 26 L. J. M. C. 10.

³ 7 & 8 Vict. c. 81, s. 1.

⁴ Sect. 4.

⁵ Sect. 8.

⁶ Sect. 3.

⁷ Sect. 12. The provision that both parties must be of the same persuasion has been repealed by 35 Vict. c. 10.

⁸ Sect. 45.

⁹ Sect. 15.

¹⁰ Sect. 2 abolished the publishing the notice before the poor-law guardians; and sect. 8 the necessity for the registrar's presence.

34 & 35 Vict. c. 49, now form the statutory basis of the Irish marriage laws.

It now remains to set forth those points in which the marriage laws of Ireland differ from those of England, and the subject-matter of this chapter will be divided into the following sections:—

Section 1. Marriages of Protestant Episcopalians.

- „ 2. Marriages of Roman Catholics.
- „ 3. Marriages of Presbyterians.
- „ 4. Marriages of Quakers and Jews.
- „ 5. Marriages of those belonging to other denominations.
- „ 6. Marriages in the presence of the registrar.
- „ 7. Mixed marriages.
- „ 8. Divorce.

SECTION I.

*Marriages of Protestant Episcopalians.*¹

Marriages of
Protestant
Episcopalians.

Marriages between Protestant Episcopalians in Ireland, as in England, may be celebrated either (1) after publication of banns; (2) or by special licence; (3) or by ordinary licence; (4) or on production of the registrar's certificate.

After publica-
tion of banns.

(1) The publication of banns between persons both of whom must be Protestant Episcopalians, must take place either after the reading of the Nicene Creed, or immediately after the second Lesson.² It does not appear that publication on three successive Sundays is necessary, but any holy-day on which divine service is performed is equivalent to a Sunday. Where parties are desirous of being married by banns, and one is resident in England and the other in Ireland at the time of publication, the publication in the respective countries of their residence, if in accordance with the legal requisites in each country, is now sufficient, and renders the marriage that takes place on it good and valid.³ The Act of Parliament which brought about this alteration also validated marriages that had been previously celebrated under such circumstances.⁴

Special licence;

may be issued
by any bishop
of the Protes-
tant Episco-
palian Church.

(2) The Archbishop of Armagh was in former days alone entitled to grant special licences; but since the Irish Church Act of 1870, every bishop of the Protestant Episcopal Church may grant special licences to marry at any convenient time in any place within his episcopal superintendence.⁵ Both parties must be members of the Protestant Episcopal Church. The

¹ 7 & 8 Vict. c. 81; 33 & 34 Vict. c. 110. Protestant Episcopalians are defined to include members of the Church of Ireland, of the Church of England, of the Episcopal Church of Scotland, and any other Protestant Episcopal Church.

² Statutes of the Irish Church, chap. xvii.

³ 62 & 63 Vict. c. 27.

⁵ 33 & 34 Vict. c. 110, s. 36.

⁴ *Ibid.*

proper certificate must be produced to the clergyman celebrating the marriage, and it must be forwarded by the *husband* to the Registrar-General of Marriages within three days after the marriage, under a penalty not exceeding £10.¹

(3) Licensed persons nominated by the bishops² may issue licences authorizing marriages in any churches or chapels within their respective districts in which marriages may lawfully be solemnized, to persons who must have dwelt at least seven days in the respective districts named in the notices requisite on application for the licences. A residence of at least fourteen days in the district of the church or chapel in which the marriage is intended to be solemnized is necessary on the part of at least one of the persons seeking marriage. One of the parties must be a Protestant Episcopalian.

Ordinary
Licence.

Residence of at
least fourteen
days in district
of church or
chapel by one
or both of the
parties.

(4) The difference between the law prevailing in England and Ireland on this point is, that in the latter the clergyman is bound to celebrate a marriage on production of the registrar's certificate, provided his church is within the district of the registrar issuing the certificate,³ whereas in England he is not so bound. The registrar's certificate is necessary where a marriage is intended to be solemnized in Ireland, but one of the contracting parties resides in England or in Scotland. If the party reside in England, he must give the proper and usual notice to the superintendent registrar of the district in which he had resided at least seven days.⁴ If the party reside in Scotland he must produce a certificate of due publication of banns from the minister of the congregation of which he has been a member not less than a month.⁵ The production of the English registrar's and Scotch minister's certificate will authorize the Irish registrar to issue his certificate. In the case of mixed marriages, the ceremony of marriage must be preceded by the production of the registrar's certificate.⁶ A duly certified copy of an entry of a marriage between Protestant Episcopalians, according to their rites and ceremonies, is a sufficient proof of the validity of the marriage.⁷

On production
of registrar's
certificate
clergyman
bound to
marry.

Notice if one
party resides
in England ;

in Scotland.

¹ 34 & 35 Vict. c. 49, s. 22. The bishops of the Irish Church, immediately after the passing of the Irish Church Act, 1870, were in the habit of issuing special licences for "mixed marriages," but have discontinued to do so, after high legal opinion had been taken, which was opposed to the practice. See *post*, Mixed Marriages, p. 52.

² 33 & 34 Vict. c. 110, s. 35.

³ 7 & 8 Vict. c. 81, s. 1.

⁴ 9 & 10 Vict. c. 72, s. 1.

⁵ Sect. 2. For due publications of banns in Scotland, see preceding chapter, p. 25. It is suggested that a registrar's certificate issued in accordance with the provisions of 41 & 42 Vict. c. 43, would be now equivalent to the Scotch minister's certificate of the proclamation of banns.

⁶ 33 & 34 Vict. c. 110, s. 38. See *post*, pp. 53, 54.

⁷ *Whitton v. Whitton*, [1900] P. 178.

SECTION 2.

Marriages of Roman Catholics.

Marriages of Roman Catholics governed by the common law.

Decrees of Council of Trent of vigour in Ireland, but only *in foro conscientie*.

In strictness the law which regulates the marriages of Roman Catholics in Ireland is the common law, or old canon law, which would permit them to be celebrated publicly or privately, at any time or place, and in any form or manner the celebrating priest (if any) might deem fit, without banns, licence, consent of proper parties, or any safeguard of regularity. The decrees, however, of the Council of Trent obtain in Ireland, which enjoin the observance of certain disciplinary regulations; and while it is true that the Roman Catholic hierarchy are strenuous in preserving decency and order, and in insisting upon regularity, and in discouraging clandestinity, the decrees of a foreign Council, unless formally adopted by the Sovereign of the country in which they are to prevail, cannot *per se* have any binding force; and so the Tridentine decrees bind those who obey them only *in foro conscientie*. The only enactments affecting Roman Catholic marriages are 26 & 27 Vict. c. 90, which for the first time provided for their registration, and 33 & 34 Vict. c. 110, and 34 & 35 Vict. c. 49, which were passed on the disestablishment of the Irish Church, and (*inter alia*) repealed the penal statutes dealing with mixed marriages, and enabled Roman Catholic clergymen to perform the ceremony of marriage between parties of different denominations, which previously alone could be performed by a clergyman of the Established Church.

Presence of a priest and two witnesses necessary, &c.

By the Tridentine decrees the presence of a priest and two witnesses, and three proclamations of banns, unless dispensed with by episcopal licence, are made necessary. These marriages may be celebrated (1) after publication of banns; (2) by episcopal or special licence; (3) by ordinary licence; (4) on production of the registrar's certificate.

Registration of Marriages (Ireland) Act, 1853, 26 & 27 Vict. c. 90. Monsell's Act.

In order to secure the proper registration of Roman Catholic marriages, an Act was passed in 1863,¹ which provided that such marriages should be preceded by the procuring from the registrar his certificate of the intended marriage, which was to be handed to the clergyman at the ceremony. This certificate properly filled up, must be sent by the *husband* to the district registrar within three days after the celebration of the marriage, under a penalty of £10.²

After publication of banns.

(1) The proclamations should take place on three consecutive Sundays or holy-days. Both parties *must* be Roman Catholics.³

¹ 26 & 27 Vict. c. 90, s. 11. See also 34 & 35 Vict. c. 49, s. 22.

² *Ibid.*

³ See 62 & 63 Vict. c. 27.

(2) An episcopal or special licence is issued by the bishop of the diocese in which both the contracting parties reside. It is procured by the parties going before their parish priest, who makes inquiries as to the freedom of the parties to marry and their knowledge of the doctrine of the Church on the subject of marriage. He gives them a certificate vouching these facts, and on its presentation to the bishop or vicar, a licence is procured. Both parties must be Roman Catholics.¹ The registrar's certificate must be procured beforehand, and produced to the officiating clergyman.²

By special
licence.

(3) Ordinary licences are issued by the persons nominated by the bishop to grant them. Both parties need not be Roman Catholics; where only one is a Roman Catholic, then notice in writing must be given by one of them to the person empowered to issue such licences seven days before the licence is to issue. The person who receives the notice must forthwith send by post a copy of it to the clergyman officiating at the places of worship where the contracting parties have been in the habit of attending.³

By ordinary
licence.

(4) In the cases of Roman Catholics marriages on the registrar's certificate take place only when they are "mixed"; but obtaining the certificate is now a condition precedent.⁴

On the regis-
trar's certifi-
cate.

Under the section of "Mixed Marriages" ⁵ will be found the necessary information. For purposes of registration it is required that all Roman Catholics marrying shall first obtain a formal and legal certificate from the registrar of their district, which on marriage is to be produced to the officiating clergyman, and signed by him, the contracting parties, and at least two witnesses. The parties must within three days after marriage either deliver or send by post the certificate so signed to their district registrar, under a penalty, in the case of the failure to do so on the part of the husband, not exceeding £10, to be summarily recovered.⁶

SECTION 3.

Marriages of Presbyterians.

In the year 1738 Presbyterians and other nonconformists obtained certain privileges in respect to their marriages, which amounted in those days to a considerable recognition of their claims. By the Act called "An Act for giving further ease to Protestant Dissenters with respect to their matrimonial contracts" ⁷ the marriages performed by Presbyterian ministers were not directly legalized, but their celebration was sanctioned, and

Marriages of
Presbyterians.

¹ Faloon, *The Marriage Law of Ireland*, 40.

³ Sect. 25.

⁴ Sect. 27.

² 34 & 35 Vict. c. 49, s. 22.

⁵ See *post*, p. 52.

⁶ 26 & 27 Vict. c. 90, s. 11.

⁷ 11 Geo. II, c. 10.

Toleration of such marriages, and their validity inferred from immunity of minister.

from the protection of the minister from prosecution their validity was inferred, and to a certain extent so treated. The validity, however, of such contracts was from time to time questioned, and it was not until 1842 that an Act¹ was passed to validate marriages which had been celebrated by Presbyterian or other nonconforming ministers or teachers, and to declare them to be of the same force and validity as if celebrated by the clergymen of the Established Church.² But now the marriages of Presbyterians are governed by 7 & 8 Vict. c. 81, which was passed to obviate the decision of the House of Lords in *The Queen v. Millis*.³ A Presbyterian minister cannot perform the ceremony unless one of the parties be a member of his church or congregation, except for sickness, absence, the vacancy of another congregation, or on the request of some other minister of his church.⁴

The marriages may now be celebrated according to the forms of the Presbyterian Church: (1) after publication of banns; (2) special licence; (3) licence of the minister of the Church.

After publication of banns.

(1) Both parties must be Presbyterians who wish to be married after publication of banns.⁵ The banns must be published on three Sundays preceding the solemnization of the marriage in the meeting-house of the congregation, or meeting-houses of the congregations (as the case may be), during the time of divine service.⁶ The parties must, six days before the first publication, deliver a notice of their names, places of abode, &c., to the minister of the congregation (or congregations) of which they happen to be members.⁷ Marriages after publication of banns are of rare occurrence in this communion.⁸

By special licence.

33 & 34 Vict. c. 110, s. 37.

(2) A special licence is granted by the different heads of the Presbyterian bodies mentioned in 33 & 34 Vict. c. 110, s. 37, who have co-ordinate and like jurisdiction with the bishops of the Irish and Roman Catholic Churches, and the heads of certain other religious bodies. The parties seeking this licence must belong to the same Church, assembly, synod, or presbytery as the person granting the licence,⁹ the price of which amounts to about £10 5s.

By ordinary licence.

(3) For a marriage by ordinary licence, it is not necessary that both parties should be Presbyterians. The licence is issued by the ministers appointed by the different presbyteries,¹⁰ who can

¹ 5 & 6 Vict. c. 113, supplemented by 6 & 7 Vict. c. 37.

² Faloon, *The Marriage Law of Ireland*, 17.

³ 10 Cl. & F. 534.

⁴ Faloon, *The Marriage Law of Ireland*, 43.

⁵ 7 & 8 Vict. c. 81, s. 4.

⁶ Sect. 5.

⁷ Sect. 6. For the contents of the notice, see the section.

⁸ See 62 & 63 Vict. c. 27.

⁹ 33 & 34 Vict. c. 110, s. 37. See also the "special licence" granted by the bishops of the Irish Church, *ante*, p. 44.

¹⁰ 7 & 8 Vict. c. 81, s. 7.

grant them for marriages in meeting-houses within their respective jurisdictions.¹ The party applying for the licence must, seven days before its grant, produce to the licensing minister a certificate from the minister of his or her congregation, to the effect that he or she has been a member of such congregation for at least one calendar month next preceding;² and before it is granted one of the parties must appear personally before the licensing minister, and state upon oath or affirmation the matters set out in sect. 9 of the Act.

SECTION 4.

Marriages of Quakers and Jews.

The right of Quakers and Jews to celebrate their marriages according to their own ritual, and before their own proper ministers, has long been conceded to them, and recognized in marriage legislation both in England and Ireland. Marriages of Quakers and Jews.

(1) Quakers can be married according to their own ceremonies, Quakers. either by special licence by the clerk to the yearly meeting of the Society of Friends,³ on the production of a certificate in the form of the schedule to 34 & 35 Vict. c. 49; or by the registrar's licence; or on the production of the registrar's certificate, where one or even neither of the parties is a professed Quaker. This seems now to be the law, for the provision in 10 & 11 Vict. c. 58 and 23 & 24 Vict. c. 18, s. 1, that both or one of the parties must be a member of or professing with the Society, has been repealed by 35 Vict. c. 10, s. 1, which does away with the necessity of either party being a member, if the parties produce to the registrar a satisfactory certificate, signed by a registering officer of the Society, that both or either party giving the prescribed notice are or is duly authorized to proceed to the accomplishment of such marriage according to the usages of the Society.

A person applying to the registrar for a licence or for a certificate of publication must give the notice prescribed by 26 Vict. c. 27, s. 2, after making the necessary statements. The registrar's certificate must be given to the registering officer for the place where the marriage is solemnized after the manner of the Quakers; and such registering officer, whether present or not at the ceremony, must satisfy himself that the usages of the Society have been complied with.⁴ The presence of a registrar is not necessary at the marriage of Quakers in any certified meeting-house.⁵ Presence of a registrar not required.

(2) In most respects the provisions regulating the marriages of Quakers are applicable to those of Jews, and they are usually dealt

¹ 7 & 8 Vict. c. 81, s. 8.² Sect. 10.³ 33 & 34 Vict. c. 110, s. 37.⁴ 7 & 8 Vict. c. 81, s. 64.⁵ 26 Vict. c. 27, s. 8.

with in the same sections of the various Acts. Jews must give the statutory notice to their district registrar of their intended marriage,¹ but it is not any longer necessary that the building stated in such notice as the building in which such marriage is intended to be solemnized, or that the building in which such marriage is solemnized, shall be within the district within which one of the parties shall have dwelt the prescribed period of at least seven days.²

The Secretary
of a Syna-
gogue ;
his duties.

The official and responsible officer connected with the registration of Jewish marriages is styled the "Secretary of a Synagogue," and he is the recipient of the registrar's certificate at the time of the solemnization of the marriage; and if the husband belong to the synagogue of which he is the secretary, the duty of registering in duplicate the marriage devolves upon him. If he is not present at the ceremony he is to satisfy himself that the solemnization of the marriage has been proper and regular according to Jewish usages³ and within the proper hours.⁴ A Jewish marriage on the registrar's licence must conform to the requirements of 7 & 8 Vict. c. 81, s. 22.

Presence of a
registrar not
required.

The presence of a registrar is not necessary at the marriages of Jews celebrated in certified houses of worship.⁵

There is no provision in the Act of 33 & 34 Vict. c. 110, enabling Jews to contract marriage on a special licence; and it does not appear that a marriage can be celebrated according to Jewish usages except both parties belong to the Jewish religion.

SECTION 5.

Marriages of those belonging to other Denominations.

Marriages
of those be-
longing to
other denomi-
nations.

The marriages of other nonconformists may be celebrated either on the registrar's licence, or on the production of his certificate, or by a special licence granted by the head of one or other of the nonconforming bodies (not being Presbyterians) mentioned in 33 & 34 Vict. c. 110, s. 37,⁶ where both parties belong to the same body as the grantor of the licence.

Requisites for
a marriage on
the registrar's
certificate or
licence.

Where the marriage is had on the registrar's certificate or licence it must be solemnized by a minister of the church, denomination, or body to which the parties to the marriage, or either of them, shall belong, in the registered place of public worship named in the notice, between 8 A.M. and 2 P.M., in the presence of at least two witnesses other than the officiating minister or person solemnizing the marriage, and not elsewhere

¹ 26 Vict. c. 27, s. 2.

² 34 & 35 Vict. c. 49, s. 28.

³ 7 & 8 Vict. c. 81, s. 64.

⁴ 26 Vict. c. 27, s. 7; and 34 & 35 Vict. c. 49, s. 22.

⁵ 26 Vict. c. 27, s. 8.

⁶ Amended by 34 & 35 Vict. c. 49, s. 21.

or otherwise. A wilful transgression of these provisions is a felony.¹

The presence of the registrar is not required at such marriages celebrated out of his office.²

Presence of
registrar not
required.

The effect of the three Acts, 7 & 8 Vict. c. 81; 26 Vict. c. 27; and 33 & 34 Vict. c. 110, has been extended by the Marriage Law (Ireland) Amendment Act, 1873,³ to religious communities which are not Roman Catholics and do not style themselves Protestants, and declares marriages celebrated in the past between the members of such communities to be good and valid.

A difficulty has been suggested in cases of notice of marriage to the registrar where the parties have not attended a place of worship, or where there may be no regular minister of the body of worshippers. But it would probably be held sufficient to have the non-attendance specified in the proper column in the notice, and have the notice of marriage advertised as directed by sect. 41 of 33 & 34 Vict. c. 110.⁴

SECTION 6.

Marriages in the presence of the Registrar.

Marriages before registrars were rendered legal in Ireland by the Act of 7 & 8 Vict. c. 81, which enabled persons who objected to be married with any religious observances to go through a valid ceremony of marriage at the office of the registrar, and in his presence. Marriage before a registrar is of course open to all persons, whether belonging to any religious denomination or not. Thus, any person who objects to marry in any registered building belonging to a religious denomination may, after due notice and certificate issued, contract and solemnize marriage on any day except Sunday at the office and in the presence of the registrar of the district, and in the presence of two witnesses, with open doors, and between the hours of 8 A.M. and 2 P.M.⁵ The necessary formalities required before the grant of the registrar's certificate or licence are practically, though not quite, the same as those required in England.⁶ Thus, the notice to be given of an intended marriage contains in addition to those matters required in England an additional statement as to whether the marriage is intended to be celebrated by virtue of the certificate, or the licence of the registrar.⁷ The declaration to be

Marriages be-
fore the
registrar.

Formalities
preceding
grant of certi-
cate or licence
similar to those
in England.

¹ 26 Vict. c. 27, s. 7.

² Sect. 8.

³ 36 Vict. c. 16.

⁴ Faloon, *The Marriage Law of Ireland*, 52.

⁵ 7 & 8 Vict. c. 81, s. 30.

⁶ See *post*, p. 97. The requirements of the Irish law are set out in detail in

26 Vict. c. 27, ss. 2-5, and 33 & 34 Vict. c. 110, s. 41.

⁷ 26 Vict. c. 27, s. 2.

Certificate not issuable for twenty-one days, and licence seven days.

made by the parties is similar to that required in England, and without it no certificate or licence for marriage can issue.¹ The registrar must not in any case issue a certificate until after the expiration of *twenty-one days*, or grant a licence until after the expiration of *seven days* from the day of entry of the notice by him.²

As before pointed out, the presence of the registrar is not necessary at any marriage celebrated in any registered or certified house of worship.³

No provision for religious ceremony in Irish Acts.

The statutory provision in England for enabling persons who have been married at the registrar's office to be afterwards married with a religious ceremony on production of the registrar's certificate,⁴ is altogether wanting in the Irish enactments.

The requisites for a marriage on the registrar's certificate or licence have been thus summed up:—⁵

(1) "A residence by the parties in the registrar's district for seven days immediately preceding the giving notice to the registrar, and should the parties reside in different districts, separate notices must be given to the separate registrars; and on giving this notice the person delivering the same must declare that for one month preceding each of the parties concerned has usually attended some place of worship (if such has been the case), and that no impediment exists to the marriage, and furnish the particulars required by the notice, the form of which is supplied by the registrar. After the expiration of twenty-one days from the entry of the notice, the registrar issues his certificate, and on its production the marriage may be performed. Separate certificates are necessary if the parties reside in different districts.

(2) "If the marriage is to be had on licence from the registrar, one or other of the parties must have resided for fifteen days in the district preceding the giving of notice, and if resident in different districts, the notice is given to the registrar of each district, stating a residence by each of fifteen days before giving the notice. On the expiration of seven days next after the giving of the notice the certificate of the registrar may issue, and thereupon the ceremony may be had."

SECTION 7.

Mixed Marriages.

Definition of a mixed marriage.

A mixed marriage is one that is celebrated by the minister of one denomination between parties who are not of his denomination or who are themselves of different denominations.

¹ 26 Vict. c. 27, s. 4.

³ Sect. 8.

⁵ Faloon, *The Marriage Law of Ireland*, p. 63.

² Sect. 5.

⁴ 19 & 20 Vict. c. 119, s. 12.

This subject is inseparably bound up with the harsh penal laws which were directed with such venom against Roman Catholics in Ireland, and it has been only within the past few years that a repeal of most serious consequences for celebrating a mixed marriage by a Roman Catholic priest was placed upon the statute book. Since the decision of *Reg. v. Millis*,¹ it must be taken as law that previously to 5 & 6 Vict. c. 113, no marriage valid *per se* was ever celebrated except by some duly ordained minister, either of the Church of Ireland or of Rome. The Act of 7 & 8 Vict. c. 81, put matters, as has been seen, on a different footing in respect of marriages of Presbyterians and other nonconformists, recognizing as valid that which previously had been held invalid, or treated as valid only on sufferance, and enabling Presbyterian ministers to celebrate marriages between parties who were not both Presbyterians, provided only they complied with the statutory requirements.² Roman Catholic priests, however, could only validly celebrate marriages between Roman Catholics, for their marriages were left untouched by that statute.

Penal laws
against Roman
Catholics.

By 33 Geo. III. c. 21, s. 12, Protestants and Roman Catholics were allowed to intermarry, and persons having jurisdiction to grant licences for marriages between Protestants and Roman Catholics, and the clergy of the Established Church, and Protestant dissenting ministers, might publish banns of marriage between such persons; but neither Protestant dissenting ministers, nor Roman Catholic priests, were permitted to celebrate marriages between members of the Established Church and Roman Catholics.³

33 Geo. III.
c. 21.

Protestants
and Roman
Catholics
allowed to
intermarry.

The Act of 12 Geo. I. c. 3, inflicted the punishment of death upon a Roman Catholic priest for marrying two Protestants, or a Papist and a Protestant.

Penalties on
Roman Catho-
lic priests;
Death.

By the Act of 33 Geo. III. c. 21, no Popish priest was to celebrate marriage between Protestants, or between a person professing to be a Protestant within twelve months before such celebration, and a Papist, unless such persons had been previously married by a clergyman of the Protestant religion, under a penalty of £500.⁴

Fine.

By the Act of 5 Vict. c. 28, transportation for seven years was substituted for the penalty of death for the celebration by a Roman Catholic of a marriage between Protestants, or between a Papist and a Protestant. In all cases the marriages themselves were pronounced null and void.

Seven years'
transportation
substituted for
death penalty.

By 33 & 34 Vict. c. 110, the disabilities affecting Protestant, Episcopalian and Roman Catholic clergymen marrying persons, one of whom was a Roman Catholic or Protestant Episcopalian,

33 & 34 Vict.
c. 110.

¹ 10 Cl. & F. 534.

² Sect. 4.

³ Sect. 13.

⁴ Sect. 12. This act was repealed by 3 & 4 Wm. IV. c. 102.

are completely removed, if the parties conform to the statutory requirements,¹ which provide that: A marriage may be lawfully solemnized by a Protestant Episcopalian clergyman between a person who is a Protestant Episcopalian and a person who is not a Protestant Episcopalian, and by a Roman Catholic clergyman between a person who is a Roman Catholic and a person who is not a Roman Catholic, provided the following conditions are complied with:—

Statutory
requisites :
Proper notice
to the regis-
trar, and issue
of his certi-
ficate.

(1) That such notice is given to the registrar, and such certificate is issued as required by 7 & 8 Vict. c. 81, ss. 13 & 16, and 26 Vict. c. 27, ss. 3, 4, and 5, in every case of marriage intended to be solemnized in Ireland according to the rites of the United Church of England and Ireland, with the exception of marriages by licence, or special licence, or after publication of banns.

Certificate to
be produced to
officiating
clergyman.

(2) That the certificate of the registrar is delivered to the clergyman solemnizing such marriage at the time of the solemnization of the marriage.

Marriage to be
had in a build-
ing set apart
for divine ser-
vice in regis-
trar's district.

(3) That such marriage is solemnized in a building set apart for the celebration of divine service, according to the rites and ceremonies of the clergyman solemnizing such marriage, and situated in the district of the registrar by whom the certificate is issued;

Open doors.

(4) With open doors.

Hours within
which mar-
riage to be
celebrated.

(5) That such marriage is solemnized between the hours of eight in the forenoon and two in the afternoon, in the presence of two or more credible witnesses.

Wilful non-
compliance
with the statu-
tory require-
ments renders
marriage
invalid.

Any marriage solemnized by a Protestant Episcopalian clergyman between a person who is a Protestant Episcopalian and a person who is not a Protestant Episcopalian, or by a Roman Catholic clergyman between a person who is a Roman Catholic and a person who is not a Roman Catholic, shall be void to all intents and purposes in cases where the parties to such marriage knowingly and wilfully intermarried without due notice to the registrar, or without certificate of notice duly issued, or without the presence of two or more credible witnesses, or in a building not set apart for the celebration of divine service according to the rites and ceremonies of the clergyman celebrating such marriage.² There must be a deliberate intention to disregard the statutory formalities;³ and a marriage celebrated without the proper statutory formalities cannot be questioned by either of the parties in order to avoid forfeiture of certain rights consequent on such marriage.⁴

The Act passed in the following year⁵ (The Marriage Law

¹ Sect. 38. See also sect. 40.

³ *Re Knox*, 23 L. R. (Ir.) 542.

⁴ *Ibid*.

² Sect. 39.

⁵ 34 & 35 Vict. c. 49.

(Ireland) Amendment Act, 1871) enabled Protestant Episcopalians and Roman Catholics intending marriage to substitute for the registrar's licence the licence of those empowered to issue ordinary licences.¹ The course of legislation has thus removed not only the legitimate grievances of those who did not conform to the faith and tenets of the Irish Church, but also the terrible pains and penalties affecting the Roman Catholic clergy which were a disgrace to the laws and customs of Ireland.

Ordinary licence substituted for registrar's licence in case of Protestant Episcopalians and Roman Catholics.

SECTION 8.

Divorce.

There is a marked difference between the law prevailing in Ireland and that obtaining in England as regards divorce. In Ireland, as in England, the old Ecclesiastical Court could decree a sentence of nullity of marriage for fitting and proper reasons, and might pronounce a sentence of divorce *a mensâ et thoro*, which was equivalent to the more modern decree of judicial separation, but could not divorce a couple *a vinculo matrimonii*, that is, dissolve the marriage tie itself. This latter remedy could only be obtained by a private Act of Parliament, the Bill being introduced into the House of Lords. In England, by the Divorce Acts of 1857² and 1858,³ the jurisdiction of the old Ecclesiastical Court was transferred to the new Court of Probate and Divorce,⁴ the powers of which were much enlarged; the injured party was no longer compelled to bring his action for criminal conversation against the seducer to recover damages, and bring his suit for a divorce *a mensâ et thoro*, and finally introduce his Bill into the House of Lords to dissolve the marriage and enable him to marry again. But if the conduct of the respondent (the wife) entitles the petitioner to a dissolution *a vinculo matrimonii*, the latter can join the seducer as a co-respondent, and get damages from him in the same suit; and if the allegations of the petitioner are proved, the court can pronounce a sentence of dissolution of marriage to take effect six months after the date of the decree *nisi*, unless in the meantime it is proved to the satisfaction of the court that the petitioner is disentitled to the relief he seeks. If the conduct of the respondent is only such as would warrant a judicial separation (divorce *a mensâ et thoro*), then in such a case the Court can pronounce a decree to that effect.

Difference between English and Irish divorce law.

¹ 34 & 35 Vict. c. 49, ss. 26 & 27. It was at first thought that sect. 26 gave the power to the bishops of the Church of Ireland (and to them alone) to issue special licences for these mixed marriages, but high legal opinion was taken on the point, and it was to the effect that such a construction of the section would be practically to repeal sect. 38 of 33 & 34 Vict. c. 110, and give to the bishops of the Church of Ireland an advantage and pre-eminence contrary to the spirit of that Act.

² 20 & 21 Vict. c. 85.

³ 21 & 22 Vict. c. 108.

⁴ Now the Probate, Divorce, and Admiralty Division of the High Court of Justice.

Constitution of
the court for
matrimonial
causes and
matters.
33 & 34 Vict.
c. 110, s. 7.

But in Ireland the old state of affairs was left untouched until the year 1870, when the changes effected by the disestablishment of the Irish Church necessitated a further alteration of the law. Accordingly, in that year, the "Matrimonial Causes and Marriage Law (Ireland) Amendment Act, 1870,"¹ was passed, the seventh section of which provides as follows: From and after the first day of January 1871, all jurisdiction now vested in or exercisable by any ecclesiastical court or person in Ireland in respect of divorces *a mensâ et thoro*, suits of nullity of marriage, suits for restitution of conjugal rights or jactitation of marriage, and in all causes, suits, and matters matrimonial, except in respect of marriage licences, shall belong to and be vested in Her Majesty, and such jurisdiction shall be exercised in the name of Her Majesty in a court of record, to be called the Court for Matrimonial Causes and Matters. This, it will be seen, constitutes a new court with the jurisdiction of the old, but does not enlarge its powers as did the Divorce Acts in England. The effect has been thus summed up: In Ireland the court can do all that was formerly done in relation to matrimonial causes by the ecclesiastical courts; but it can do no more. It can grant a divorce *a mensâ et thoro* from the adulterous wife, but it must do so at the expense of the husband. It cannot bring before it the guilty paramour, and condemn him in damages or costs. Over the children it has no power, nor can it order a settlement for their benefit. If the husband seeks a divorce *a vinculo*, he must go through the thrice painful ordeal of an action against the seducer for criminal conversation, a petition to the judge of the Matrimonial Court for a divorce *a mensâ et thoro*, and a proceeding by way of private Bill in the House of Lords.²

Irish divorce
court
cannot grant
a divorce
*a vinculo
matrimonii*.

It is not necessary for an Irish Divorce Bill that a definitive sentence of a divorce *a mensâ et thoro* should have been pronounced in the Irish Courts.³ Indeed, unless the husband or both parties come over to England, and there reside sufficiently long to give the English Court jurisdiction to entertain the suit, the only method of putting an end to the matrimonial tie is that given above. The English Divorce Court should exercise great caution in allowing petitions for divorce where there is ground for believing that the parties are domiciled out of the jurisdiction.⁴ It has recently been decided that where there are doubts as to the operation in Ireland of a decree under the English Divorce Acts for the dissolution of the marriage of a domiciled Irishman, the proper course is to apply for an Act of Parliament confirming the decree and removing the doubts.⁵

¹ 33 & 34 Vict. c. 110.

² Kisbey, Law and Practice of the Court for Matrimonial Causes and Matters.

³ Sinclair's Divorce Bill, [1897] A. C. 469.

⁴ *Ibid.*

⁵ Malone's Divorce (Valid Action) Bill, [1905] A. C. 314.

Until very recent times a wife domiciled in Ireland was held not entitled to obtain a divorce *a vinculo*, but the House of Lords has laid it down that since the passing of the Divorce Act, 1857, legal grounds of divorce, according to the provisions of that Act, though limited in its effect to England, will be sufficient to uphold an application to the Legislature to grant a divorce in Ireland, though the Act itself does not operate in that country.¹ The House of Lords has jurisdiction to sanction a clause giving the custody of the infant children to the innocent party, though no separate action has been instituted in Ireland for that purpose after a decree for separation *a mensâ et thoro* has been pronounced.² Where a Bill is introduced by the husband, and the wife has no means to defend herself with, the House of Lords will order the husband to pay the wife a small sum to enable her to make her defence.³

The following are some of the chief points of difference between the English and Irish law on this subject:—⁴

In England a husband or wife against whom a decree of judicial separation has been pronounced, may present a petition at any time thereafter praying for a reversal of the decree, on the ground that it was obtained in his or her absence. This cannot be done in Ireland.

Decree of judicial separation cannot be reversed.

In England a husband may present a petition praying the dissolution of his marriage on the ground of the adultery of his wife, may make the adulterer a co-respondent, and may claim damages against him; and the Court has power, after a verdict for damages, to direct that the whole or any part shall be settled for the benefit of the children of the marriage, or as a provision for the maintenance of the wife; and in addition may order the adulterer, who has been made a co-respondent, to pay the whole or any part of the costs of the proceedings. In Ireland these things cannot be done.

Husband may obtain in England divorce *a vinculo*, but not in Ireland.

In England a wife may petition for a dissolution of her marriage on the ground of the adultery of her husband, coupled with cruelty, or adultery coupled with desertion for two years, or bigamous or incestuous adultery. In Ireland she cannot obtain this relief.

Wife may obtain a divorce *a vinculo* in England but not in Ireland.

In other matters, however, such as the proof and effect of adultery, cruelty, or condonation of those offences, the method of bringing suits for nullity, or judicial separation, and the like, there is no such striking difference between the law in the two countries as calls for special mark or mention.

¹ *Westropp's Divorce Bill*, 11 App. Cas. 294; *Gifford's Divorce Bill*, 12 App. Cas. 362. Both these Bills were introduced into the House of Lords, on behalf of wives, to dissolve the matrimonial tie with their husbands, in which cruelty as well as adultery was alleged against the respondent.

² *Hart's Divorce Bill*, [1898] A. C. 305.

³ *A.'s Divorce Bill*, 12 App. Cas. 365.

⁴ Extracted from Mr. Kisbey's work, pp. 2-4.

CHAPTER V.

IMPEDIMENTS TO MARRIAGE.

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Distinction
between
canonical and
civil disabili-
ties in their
effect.

THERE are two kinds of disabilities constituting impediments to lawful and valid marriage, namely—canonical and civil. Accord-
ing to English law, there is an important distinction between

the two in the effect they have upon the marriage. The canonical disabilities, such as . . . certain corporal infirmities Canonical. only make the marriage *voidable*, and not *ipso facto* void, until sentence of nullity be obtained; and such marriages are esteemed valid unto all civil purposes, unless such sentence of nullity is actually declared during the lifetime of the parties. Civil disabilities, *e.g.*, prior marriage, want of age, idiocy, and the like Civil. (and now relationship within the prohibited degrees) make the contract void *ab initio*, not merely voidable; these do not dissolve a contract already made, but they render the parties incapable of contracting at all;¹ and any union formed between the parties is meretricious, and not matrimonial.

A marriage is termed void, when it is good for no legal Void marriage. purpose; and its invalidity may be maintained in any proceeding, in any court, between any parties, whether in the lifetime or after the death of the supposed husband and wife, and whether the question arises directly or collaterally.²

The grounds on which marriage is held void *ab initio* are based on public policy, and are not peculiar to the contracting parties; they are also mostly the subject of statutory enactments.

A marriage is voidable, when in its constitution there is an Voidable marriage. imperfection which can be inquired into only during the lifetime of both of the parties in a proceeding carried on for the very purpose of obtaining a sentence declaring it null. The term "voidable" implies an option to the parties to treat the relationship between them as binding or not binding. Until set aside, it is valid for all civil purposes;³ when set aside, it is rendered void from the beginning.⁴ This distinction between void and voidable arose from the interference of the temporal courts, acquired under 32 Henry VIII. c. 38, which in such cases prohibited the spiritual courts from bastardizing the issue after the death of one of the parties . . . for void is voidable *ab initio*.⁵

These disabilities form grounds for suits for nullity of marriage, that is, for pronouncing the marriage null and void; but are treated under this heading, because, though necessarily raised after the ceremony of marriage has taken place, yet when proved they are held to be obstacles or impediments to a valid marriage.

The jurisdiction in these suits for nullity belonged exclusively Jurisdiction of the Divorce Court. to the ecclesiastical courts; but after the passing of 20 & 21 Vict. c. 85, such jurisdiction was transferred to the new court, called "the Court for Divorce and Matrimonial Causes."

¹ *Elliott v. Gurr*, 2 Phill. 16.

² Bish. Mar. and Div. s. 105, citing Shelford, Mar. and Div. 479-483.

³ 1 Bl. Com. 434.

⁴ Bish. Mar. and Div. s. 105, citing *Elliott v. Gurr* (*ubi sup.*).

⁵ See *Ray v. Sherwood*, 1 Curt. 173, 188.

20 & 21 Vict.
c. 85, s. 6.

Section 6 of that Act enacts: As soon as this Act shall come into operation, all jurisdiction now vested in or exercisable by any ecclesiastical court or person in England in respect of . . . suits of nullity of marriage . . . shall belong to and be vested in Her Majesty, and such jurisdiction, together with the jurisdiction conferred by this Act, shall be exercised in the name of her Majesty in a court of record called "the Court for Divorce and Matrimonial Causes." Domicil is not necessary to found this jurisdiction in nullity suits, and matrimonial residence within the jurisdiction is sufficient to give the Court power to pronounce decrees of nullity.¹ The only substantial defence to suits for nullity is a denial of the facts that go to constitute the ground of nullity: thus, cruelty or adultery is no defence in such suits.

Proceedings
to annul void
marriage by
others than
parties to it.

A void marriage does not require the sentence of a court to annul it—that which is void is as though non-existent; but where a void marriage has been contracted any person having a sufficient interest in having it annulled may commence proceedings for nullity; thus, on the ground of the poor-law liability to support grandchildren such a suit may be brought by a father;² or a mother if a widow.³ In the case of *Bevan v. McMahon*⁴ it was held that a suit for nullity of a child's marriage which had abated through the death of the father could not be revived either by the widow or the executor, but since the Married Women's Property Act, 1882, the widowed mother would have the right to continue the suit. Such suit may also be brought by the guardian of a minor properly appointed for that purpose.⁵

Canonical
disability.
Impotency.

Canonical Disability.—The only canonical disability now recognized is the impotency of both or one of the parties to consummate the marriage through some bodily defect.⁶ Marriage having been ordained for the procreation of children, a capacity for consummating it is implied in the marriage contract. Consummation is one of the essential duties for which the parties stipulate, and the incapacity of either party to satisfy that duty affords a ground for nullifying the contract.⁷ It has also been said of marriage that as its first cause and reason ought to be the design of having an offspring, so the second ought to be the avoiding of fornication.⁸ Thus, if either of the parties is unable to satisfy the proper and reasonable expectations of the other, the courts will relieve not only on the ground that the full terms of the contract cannot be carried out, but also that the law will

¹ *Roberts (f. c. Brennan) v. Brennan*, [1902] P. 143.

² *Ray v. Sherwood*, 1 Moo. P.C. 396; *Bevan v. McMahon* (f. c. *McMahon*), 28 L. J. P. & M. 127.

³ 45 & 46 Vict. c. 75, s. 21.

⁴ *Ubi sup.*

⁵ See *Wells v. Cottam* (f. c. *Wells*), 33 L. J. P. & M. 41.

⁶ *B. v. M.*, 2 Rob. Eccl. Rep. 580. It may be mentioned that the Code Civil does not recognize this as a ground for annulling a marriage.

⁷ *Dalrymple v. Dalrymple*, 2 Hag. Con. Rep. 54, 62.

⁸ *Ayliffe*, Par. 300; *Briggs v. Morgan*, 3 Phill. 324.

never compel two persons to live together under such perilous conditions. Impotency has been defined as consisting "in the incapacity for copulation, or in the impossibility of accomplishing the act of procreation."¹

A suit for nullity, grounded on this disability, must be brought during the lifetime of the parties, and is no ground for impeaching the validity of the marriage after the death of either of the parties.² It is open to either party to set up the impotency of the other as a ground for nullity, but neither may set up his or her impotency for the purpose of dissolving the marriage.³

Suit for nullity must be brought during the lifetime of both parties.

There must be an *impotentia copulandi* on the part of the man or of the woman, proceeding from malformation, frigidity, disease, or some other like cause. It may arise from mere nervousness or hysteria on the part of the woman, and where it is found that consummation is practically hopeless a decree of nullity will be made.⁴ The impediment must exist at the time of the marriage, and cannot be cured without endangering life.⁵ Impotency supervening after marriage is no ground for nullity, though arising from causes having their origin before marriage.⁶ If the impotency be accidental, the presumption is that it began *after* marriage; if natural, the presumption is the reverse.⁷ If there is a possibility that its cause may be removed, though such cure is highly improbable, the court will not decree a sentence of nullity,⁸ if by delay and adoption of reasonable medical means the cure may be effected.⁹ There need not be any structural impediment to consummation, provided it is practically impossible;¹⁰ and it appears that nullity may be decreed on the ground of the sexual organs admitting only of partial connection.¹¹ As a general rule, the court will not grant a decree of nullity for impotency, whether arising from malformation or other cause, unless an order to inspect the respondent has been extracted from the registry at the instance of the party seeking for a decree; and if the husband is charged with impotency, the court usually requires a medical certificate to the effect that the woman is *virgo intacta*, and *apta viro*;¹² but where the suit is grounded on the malformation of the wife, the inspection of the husband

Impediment must exist at time of marriage.

No decree, if reasonable hope of cure.

Order for inspection of person.

¹ Shelford, Mar. and Div. 202.

² *A. v. B. and another*, L.R. 1 P. & D. 559.

³ *Norton v. Seton*, 3 Phill. 147.

⁴ *G. v. G.*, L. R. 2 P., & D. 287. *P. v. L.* (f. c. P.), cited in *S. v. A.* (otherwise *S.*), 3 P. D. 72.

⁵ *Dease v. Aveling*, 1 Rob. Eccl. Rep. 279; *B. v. B.*, 1 Eccl. & Adm. Rep. 248; *Williams v. Williams*, 30 L. J. P. M. & A. 73.

⁶ *Brown v. Brown*, 1 Hag. Eccl. Rep. 523; *Briggs v. Morgan*, 3 Phill. 324.

⁷ *Brown v. Brown* (ubi sup.).

⁸ *Stagg v. Edgecombe*, 32 L. J. P. M. & A. 153.

⁹ *Welde v. Welde*, 2 Lee 578.

¹⁰ *G. v. G.* (ubi sup.); *H. v. P.* (f. c. II.), L. R. 3 P. & D. 126.

¹¹ *Dease v. Aveling* (ubi sup.).

¹² *Pollard v. Wybourn*, 1 Hag. Eccl. Rep. 727.

is not usually ordered.¹ Where there has been persistent refusal to consummate a marriage on the part of one of the spouses (who also refuses to obey an order for medical inspection) while the other spouse has been anxious and willing that there should be consummation, the Court will assume the existence of some latent impediment amounting to incapacity.² The court will decline to pronounce a marriage invalid on the unsupported evidence of one of the parties,³ yet if the respondent withdraw himself or herself from out of the jurisdiction, any answers admitting non-consummation can be received as evidence of it.⁴ The calling on the respondent to submit to an operation is not a condition precedent to the petitioner's right of decree.⁵ As is natural in suits of this nature, the onus of proof lies on the complaining party.⁶

Onus of proof
on petitioner.

Wilful and wrongful refusal of marital intercourse is not of itself sufficient to justify the court in declaring a marriage to be null by reason of impotency. Recent cases, however, establish an inference that where a wife has not had intercourse with her husband after a reasonable time for consummation of the marriage, such refusal is due to a want of capacity.⁷ In such a case the petitioner must bring the suit within a reasonable time; not too soon, because the repugnance or scruples of the respondent may be overcome, nor after the lapse of many years, as, for instance, nine years, for the court would infer that there had been acquiescence in the state of affairs of which complaint is made.⁸

Suit must be
brought within
reasonable
time.

Triennial co-
habitation.

What is known as "triennial cohabitation" is generally required before suits of nullity on this ground can be brought,⁹ or an order for an inspection granted.¹⁰ So where a wife brought her suit for nullity on the ground of the impotency of the husband after cohabitation for two years and ten months without consummation, there being no visible defect in either, the court suspended its decree, but subsequently, on proof of cohabitation of the parties without consummation, made the decree.¹¹ This period is required by the law as being a reasonable and sufficient time to ascertain whether it is mere coyness or nervousness in either of the parties, or whether there is any physical incapacity.

¹ *B. v. L.* (f. c. *B.*), 1 L. R. 1 P. & D. 639.

² *F. v. P.* (f. c. *F.*) 75 L. T. 192; *B. (otherwise H.) v. B.*, [1901] P. 39.

³ *U.* (f. c. *J.*) v. *J.*, 37 L. J. P. M. & A. 7.

⁴ *Sparrow v. Harrison*, 3 Curt. 16; *S. C. Harrison v. Harrison*, 4 Moo. P. C. 96.

⁵ *W. v. H.*, 30 L. J. P. M. & A. 73.

⁶ *Cuno v. Cuno*, L. R. 2 H. L. (Sc.) 300.

⁷ *S. v. A. (otherwise S.)*, L. R. 3, P. & D. 72; *G. v. G.*, L. R. 2, P. & D. 287.

⁸ *S. v. A. (otherwise S.) (ubi sup.)*. But see *B. v. M.*, 3 Rob. Eccl. Rep. 580.

⁹ *Sparrow v. Harrison*, 3 Curt. 27; *S. C. Harrison v. Harrison*, 4 Moo. P. C. 96; *Welde v. Welde*, 2 Lee, 578.

¹⁰ *Aleson v. Aleson*, 2 Lee, 556; *Briggs v. Morgan*, 3 Phill. 329.

¹¹ *M. (f. c. H.) v. H.*, 34 L. J. P. M. & A. 12.

Such triennial cohabitation need not have existed uninterruptedly, but sufficiently to satisfy the requirements of the court on the subject;¹ but it has been held that where the interruption was for a considerable period, a corresponding period of cohabitation must be made up beyond the expired period of three years so as to complete three years in which the parties must have been living as man and wife.² This rule as to triennial cohabitation is not a hard-and-fast one to be applied in every case, but is relaxed where it is discovered that there is a natural malformation or physical infirmity apparent to the medical inspectors.³ It only applies where the impotency is left to be presumed from continual non-consummation; for where the impotency can be plainly proved *aliunde*, the court will never resort to it.⁴ Thus, where impotency can be at once ascertained, triennial cohabitation is not required;⁵ and a decree was granted where after a cohabitation of two years and ten months consummation was found impracticable on the part of the woman, though there was no structural defect.⁶ When once the fact is established that consummation is practically impossible, the petitioner should be prompt in seeking relief from the court, and sincere in the motive for so doing; and suits brought *alio intuitu* will be dismissed.⁷ Delay coupled with insincerity and unaccounted for operates as a fatal bar to the suit.⁸ But mere delay, however long continued, is no bar to a suit for nullity on this ground provided the impotency of the respondent is proved,⁹ and no particular number of years constitutes a bar where there are not other circumstances besides the question of time operating against the promoter.¹⁰ Thus, in *Pollard v. Wybourn*,¹¹ twelve years had elapsed; in *Sparrow v. Harrison*,¹² sixteen years; in *Castleden v. Castleden*,¹³ twenty-one years; and in a recent case,¹⁴ seven years. But, of course, where there is great delay there must be strict proof of the impotency.

Triennial cohabitation need not be uninterrupted.

Triennial cohabitation not required where impotency clearly established.

Mere delay no bar.

Where the petitioner has been guilty of adultery, but on the discovery of the misconduct has instituted a suit for nullity of

¹ *Sparrow v. Harrison* (*ubi sup.*).

² *Welde v. Welde* (*ubi sup.*).

³ *Scott v. Jones*, 2 Not. Cas. 36.

⁴ *D. (f. c. F.) v. F.*, 34 L. J. P. M. & A. 66.

⁵ *Briggs v. Morgan* (*ubi sup.*); *G. v. T.*, 1 Eccl. & Adm. Rep. 389, where there had been only three months' cohabitation with a husband impotent from incurable malformation.

⁶ *G. v. G.*, L. R. 2 P. & D. 287; and see *L. v. L.*, 7 P. D. 16. In this case there had been cohabitation for two years and eight months, and the wife might have undergone an operation with no great risk, but refused to do so.

⁷ *M. (f. c. C.) v. C.*, L. R. 2 P. & D. 414; *Cuno v. Cuno*, L. R. 2 H. L. (Sc.) 300; *W. (f. c. R.) v. R.*, 1 P. D. 405.

⁸ *B. v. B.*, 1 Eccl. & Adm. Rep. 248.

⁹ Per Lord Chelmsford in *Cuno v. Cuno* (*ubi sup.*).

¹⁰ See *B. v. M.*, 2 Rob. Eccl. 585.

¹¹ 3 Curt. 27.

¹² *M. (otherwise D.) v. D.*, 10 P. D. 75.

¹³ 1 Hag. 725.

¹⁴ 9 H. L. Cas. 185.

marriage, and proves the impotence of the respondent, such misconduct does not amount to a want of sincerity so as to disentitle the petitioner to a decree of nullity.¹

An agreement between husband and wife (though not under seal) to live apart and not sue each other for any cause, either at law or in equity, based upon the impotency of one of them, will be a bar to a suit for nullity, if the respondent has observed the terms of the agreement.²

Intervention
of King's
Proctor in suits
for nullity.

The King's Proctor is now enabled to intervene in suits for nullity; and the court will not, except for very special circumstances, shorten the period of time for a decree absolute to a less period than six months.³

Want of
consent of the
parties founded
on error, fraud,
and duress.

There is another kind of impediment which renders marriages affected by it voidable, viz., want of consent on the part of both or one of the parties to the marriage, on the principle *consensus non concubitus facit matrimonium*. In a marriage of this kind there is at the time of the solemnization an apparent consent, but the consent is not that of a person who is absolutely a free agent, or who is fully informed of the true state of affairs, but, on the contrary, is that of a person who is under compulsion or is intentionally deceived as to the essentials of the contract. This impediment exists where the marriage is brought about under circumstances of *Error*, *Fraud*, and *Duress*. Some text-writers have held marriages so celebrated to be *ipso jure* void, but the cases dealing with them go to show that they are to be classed in the category of voidable; for in each of them either a Bill was introduced into the House of Lords to dissolve the marriage, or a suit was promoted in the Ecclesiastical Court to declare it null and void. That which is null and void *ab initio* does not require the sentence of any tribunal to set it aside and declare it null. There is good sense in this, for what the law does not prohibit private individuals may acquiesce in or waive; and the consent which has been tricked or wrung out of a person may afterwards be freely and voluntarily given, and the original imperfection cured. If cohabitation and the birth of children followed on a marriage so obtained, the Divorce Court would be very loath to pronounce it null and void. But, as was said by the Court in *Mather v. Ney*,⁴ if the marriage be void *ab initio*, as offending against a statutory provision, no length of time can render it valid; cohabitation and the birth of children would not make it any the less invalid. Another test may be applied; the validity of any such marriage could not be tried in any purely lay tribunal, but only by suit for nullifying the marriage brought by one of

¹ *M. (otherwise D.) v. D. (ubi sup.)*.

² *Aldridge v. Aldridge (otherwise M.)*, 13 P. D. 210.

³ 36 & 37 Vict. c. 31, s. 1; *M. (f. c. B.) v. B.*, L. R. 3 P. & D. 200.

⁴ 3 M. & S. 265.

the parties in the Divorce Court; for if the parties themselves did not question the validity, third parties, whether directly or indirectly, could not do so, for *semper præsumitur pro matrimonio*.

Error.—The canonists enumerated four kinds of *error*, which formed grounds for nullifying a marriage affected by them—viz., *Error Personæ*: *Error Conditionis*: *Error Fortunæ*: and *Error Qualitatis*.¹

Error Personæ is where one person is substituted for another, *Error Personæ*, as where Leah is substituted for Rachel. This is a good ground for having a marriage set aside under circumstances of fraud. If a person is so tricked at the marriage ceremony, the marriage would be declared null and void.² This is the only mistake (that is where deception has been practised) against which relief would be granted for the identity of the person to whom the matrimonial consent has been given is in dispute. But a mere mistake of name would be no ground for relief; and where a man courts a woman whom he thinks to be someone else, and in a totally different position to that in which she really is, and he marries her, believing her to be that other woman, the marriage is valid, for he intends to marry the woman with whom he goes through the ceremony.³ The party who is guilty of the fraud will not be allowed to avail himself of his own wrong; but the party whose consent is fraudulently obtained in this manner may by subsequent cohabitation cure the imperfection and render the marriage good for all purposes.

Error Conditionis is where a man thinking to marry a free *Error Conditionis*, woman marries a bond woman.

Error Fortunæ is where one thinking to marry a rich spouse *Error Fortunæ*, has in truth married a poor one.

Error Qualitatis is where a man believing a woman to be a *Error Qualitatis*, virgin or of noble birth discovers her to be no virgin or of mean birth. But none of these three last mistakes are now grounds for nullifying a marriage, for they are mistakes as to accidentals and not essentials; even fraud practised as to the spouse's family is immaterial; a man who thinks to wed a duke's daughter but finds he is united to a scullion's drab has no redress.⁴ Thus, concealment by a woman from her husband at the time of her marriage that she is then pregnant by another man does not render the marriage null and void;⁵ that is to say, ante-nuptial incontinence on the part of a woman is no more a ground for nullifying her marriage than the like incontinence on the part of the husband;⁶ and it is immaterial whether such incontinence has resulted in

¹ Ayl. Par. 362, 363.

² See Lord Campbell's remarks in *Reg. v. Millis*, 10 Cl. & F. 785, as to persons married in masquerade, whose marriages would not be held valid.

³ *Beau Fielding's Case*, Howell's State Trials, vol. xiv. p. 1327.

⁴ See *Wakefield v. Mackay*, 1 Phill. 134 n.

⁵ *Moss v. Moss*, [1897] P. 263.

⁶ *Ibid*.

pregnancy or not. Fraud to vitiate a marriage and render it null and void must be of such a nature as to be inconsistent with a real and genuine consent to the contract on the part of both spouses.¹ In some of the United States of America it would seem to be the law that where ante-nuptial incontinence on the part of the wife has resulted in her pregnancy which she conceals from her husband at the time of marriage, the latter is entitled to relief by having the marriage annulled.² Where the contract of marriage is executory only, if the existence of a fortune were stipulated for as a condition precedent to the marriage, and one party discovered that the fortune of the other was non-existent, such want of fortune would form a good defence to an action based on a breach of promise to marry; so, too, if a man were to discover that the woman whom he thought to be and had courted as a virgin had led an immoral life, he would be entitled to break off his engagement to marry her.³ But not to be bound, to an agreement and to annul an existing contract are two different things. Even where one of the parties is a victim of a deliberate plot leading to a most disproportionate marriage as regards rank, fortune and habits of life, the Court cannot grant relief if there has been a capacity to consent, and that consent has been given.⁴

Fraud.

Fraud.—The marriage contract is the most important a man can enter into, and public policy requires that it shall be honestly made and carried through; so the law protects those who are made amenable to the dishonest practices of persons who, from interested or unworthy motives, fraudulently bring about a marriage to which one of the contracting parties gives but an unwilling assent. In the case of persons of tender age the Court will readily interfere to redress a wrong; but in the case of adults the fraud perpetrated must be in respect of the essentials and not mere accidentals of the marriages tie to entitle the defrauded party to set the marriage aside.⁵ Thus, it has been laid down, that apart from any question of duress or force, where there is considerable weakness of mind circumvented by proportionate fraud, whether practised on his ward by a party who stands in the relation of guardian,⁶ or by a trustee on his *cestui que trust* over whom he has obtained a great

When relief
against,
granted.

¹ See *Turner v. Meyers*, 1 Hag. Con. Rep. 419; *Earl of Portsmouth v. Countess of Portsmouth*, 1 Hag. Eccl. Rep. 355; *Scott v. Sebright*, 12 P. D. 21; *Earl of Durham v. Countess of Durham*, 10 P. D. 80; *Hunter v. Edney*, 10 P. D. 93; *Cannon v. Smalley*, 10 P. D. 96; *Cooper v. Crane*, [1891] P. 369; *Ford v. Stier*, [1896] P. 1.

² *Reynolds v. Reynolds*, 3 Allen, 605. This was a Massachusetts case. The reasons for this decision do not carry conviction of their force and accuracy. Bish. Mar. & Div. ss. 181-190.

³ See *post*, chap. vii.

⁴ *Sullivan v. Sullivan*, 2 Hag. Con. Rep. 238, 248.

⁵ See *Wakefield v. Mackay* (*ubi sup.*).

⁶ *Harford v. Morris*, 2 Hag. Con. Rep. 423.

ascendency,¹ the marriage so brought about will be set aside.² It has been recently held that a grown woman tricked (and coerced) into believing that some untoward mishap (such as bankruptcy or actions at the suit of creditors) would ensue unless she married is entitled to relief against the man, and have the marriage set aside.³ Where it was alleged in one case that a young woman under the influence of her mother believed that a ceremony in a church was nothing more than a betrothal, she was held not to be a free agent, and the marriage was declared null.⁴ Marriage brought about by a conspiracy may, under certain circumstances, be set aside, as where two or more conspire to make another person drunk, who while in that state is made to go through the form of marriage.⁵ Conspiracy :
when relief
granted.

Where the fraud is brought about by a conspiracy, but the party against whom the marriage is sought to be set aside was not one of the conspirators, but was ignorant of the fraud, the Court would not pronounce the marriage invalid.⁶ Where marriage is the voluntary act of a person, though brought about by the machinations of other persons, it is good for all purposes and cannot be set aside; thus, though a very young man, even under age, but capable of consenting, is entrapped by a deliberate plot conceived by designing persons into a marriage with a person socially much beneath him; yet, if he consent, the Court will not relieve, for his consent in his own act, however induced.⁷ When not.

Fraud as to the spouse's family or fortune is no ground for setting the marriage aside. "A man who means to act upon such representations should verify them by his own inquiries. The law presumes that he uses due caution in a matter in which his happiness for life is so materially involved, and it makes no provision for the relief of a blind credulity however it may have been produced."⁸ So, too, a false representation by a woman that she is a virgin and chaste, when in reality she is not a virgin but a prostitute, is not a ground for setting a marriage aside.⁹ But if a man marry an unchaste woman, her post-nuptial unchastity would be a ground for divorce, if his conduct did not conduce to it.¹⁰ When relief
not granted.

Fraud which brings about a mistaken notion in one party to

¹ *Earl of Portsmouth v. Countess of Portsmouth*, 1 Hag. Eccl. Rep. 355.

² So in the case of *Miss Turner, Rex v. Wakefield*, 2 Lew. Cr. Cas. 1; 69 Ann. Register, 316; *Turner's Nullity of Marriage Bill*, 17 Hans. Parl. Deb., N. S. 1133.

³ *Scott (f. c. Sebright) v. Sebright*, 12 P. D. 21. For remarks on this case, see *post*, p. 69.

⁴ *Ford (f. c. Stier) v. Stier*, [1896] p. 1.

⁵ See *Sullivan v. Sullivan*, 2 Hag. Con. Rep. 238; *Gore v. Gibson*, 13 M. & W. 623.

⁶ See *Rex v. Inhabitants of Birmingham*, 8 B. & C. 29.

⁷ See *Sullivan v. Sullivan (ubi sup.)*.

⁸ Per Lord Stowell in *Wakefield v. Mackay*, 1 Phill. 134 n.

⁹ See *Perrin v. Perrin*, 1 Add. Eccl. 1; *Reeves v. Reeves*, 2 Phill. 125.

¹⁰ Per Lord Penzance in *Baylis v. Baylis*, 1 P. & D. 395.

the marriage as to the character, fortune, or health of the other party does not render the marriage void, for such are the accidentals and not essentials of the contract.¹ Fraud that would not entitle the defrauded person to a decree of nullity might so justify him in not fulfilling his promise as to render him harmless in the matter of damages for the breach. The party whose consent has been obtained by fraud may by subsequent cohabitation cure the original defect, and render the marriage good for all purposes.

The party guilty of the fraud will not be allowed to avail himself of his own wrong.

Duress.

Duress, or *Force*.—Duress is that harsh constraint which is illegally applied by one person to another, and may be either corporeal or mental. Corporeal is where the constraint takes the form of blows, rough usage, or confinement; and mental, where threats or menaces or terrorising acts and words are used. A marriage brought about by duress is *de facto* a marriage, and cannot be avoided until proved to be purely the effect of compulsion, and not the result of a choice (unbiased by fear) between the consequences of compliance or refusal; but there must be an absolute unwillingness in the breast of the party coerced, though the lips speak the words of consent.²

Marriage
voidable.

It has been debated whether a marriage brought about by compulsion is void *de facto* as well as *de jure*, so that it does not need the sentence of any Court to pronounce it invalid, or whether it is voidable only. The better opinion would seem to be that above stated on the text, that is, voidable only; for the want of consent may be purged away by subsequent and spontaneous cohabitation, from which the true matrimonial consent may be inferred. Any contract void *ab initio* is as though it never existed, and cannot be ratified, whether the avoiding of such contract depend on its being contrary to public policy or the result of direct statutory provision.

Quantum of
coercion varies
with the
strength of
the person
affected.

“It has sometimes been said that in order to avoid a contract entered into through fear, the fear must be such as would compel a person of ordinary courage and resolution to yield to it. I do not think that is an accurate statement of the law. Whenever, from natural weakness of intellect or from fear, whether reasonably entertained or not, either party is actually in a state of mental incompetence to resist pressure improperly brought to bear, there is no more consent than in the case of a person of stronger intellect and more robust courage yielding to a more serious danger. Whether the cause assigned for the mental

¹ *Wakefield v. Mackay (ubi sup.)*.

² “Si patre cogente ducit uxorem quam non duceret, si sui arbitrii esset contraxit tamen matrimonium quod inter invitos non contrahitur maluisse hoc videtur.” See Com. Dig. Baron et Feme (B 6).

condition is adequate or not is immaterial. The difficulty consists not in any uncertainty of the law on the subject, but in its application to the facts of each individual case."¹

Fear of some untoward circumstance happening (not necessarily to the party coerced, but to some third person whose interests are a concern to the party coerced) is a necessary ingredient. Thus, where a young girl was taken away from school, hurried about from place to place abroad, and then married by one of her guardians, the marriage was set aside on the ground of fraud and duress; and it was laid down that if the girl acted under terror at a time when the marriage was solemnized, that was a reason for setting it aside.² So, too, in the case of another young girl enticed away from school, and married at Gretna Green in consequence of a lying tale told her of her father's desperate straits, and of his certain ruin unless she married the conspirator who had taken her off, which tale she believed, and in her terror acted on, the marriage was set aside by a Bill introduced into Parliament.³ The mere undesirableness and even impropriety of the match, though brought about by a considerable degree of pressure, is not a ground for pronouncing the marriage null and void, if evidence of the want of free consent is lacking. A young lady, eighteen years of age, entitled to considerable property (her parents being dead), spending her holidays at the house of one of the executors named in her father's will, whom she considered as her guardian, was induced by his brother (a man of fifty-two years of age), who was residing in the same house, to promise to marry him; a few days afterwards she withdrew that promise, but was importuned again, and prevailed upon to renew it. The marriage was celebrated without the knowledge of any of her friends, upon a false statement made by the husband as to her age and residence in the publication of the banns and in the marriage register. There was no cohabitation or consummation. After a few days she went to a friend's house, and by his advice applied for an Act to annul the marriage. The introducer of the Bill for annulling the marriage refused to move its second reading as it did not appear in evidence that the marriage was not celebrated with the free consent of the wife, and the Bill was lost.⁴

Fear of harm
necessary in-
gredient.

The strongest case to be found in the books of relief granted on the ground of duress is quite a recent one; and in it the doctrine has been carried further than in any of the earlier

Scott v.
Sebright.

¹ Per Butt, J., in *Scott v. Sebright*, 12 P. D. 24, based on Ayl. Par. 362; Shelf. Mar. & Div. 214; and Bish. Mar. & Div. s. 211.

² *Harford v. Morris*, 2 Hag. Con. Rep. 423; *Bartlett (f. c. Rice) v. Rice*, 72 L. T. 112.

³ *Turner's Nullity Bill*, 17 Hans. Parl. Deb., N.S. 1133; *Rex v. Wakefield*, 2 Lew. Cr. Cas. 1; 69 Ann. Reg. 316.

⁴ *Field's Nullity Bill*, 2 H. L. Cas. 48.

decisions ; indeed, considering the facts of the case and the course taken in its conduct (the respondent offering no evidence in contradiction, except on one particular) the decision can hardly be regarded as satisfactory and supplying the leading principles to be followed. The learned President of the Probate and Admiralty Division (Sir C. P. Butt) felt a doubt whether he had all the facts that ought to have been made known to him ; but, notwithstanding that doubt, he felt at liberty to act on the facts that were before him.¹ They disclosed that the petitioner, a young woman twenty-two years of age, and not a person of weak mind or apparently of an impressionable nature, had got herself into money difficulties, and though she may not have desired to marry the respondent at the exact time she did, yet she was not unwilling to get herself out of the pecuniary scrape by marrying him. The learned judge found that she had been reduced by mental and bodily suffering to a state in which she was incapable of offering resistance to coercion and threats, which in her normal condition she would have treated with contempt, and that there never was any such consent on her part as the law requires for the making of a contract of marriage. But putting the threat of personal violence out of the case, it is difficult to see how she was not a free agent at the time of the marriage.

*Cooper (f. c.
Crane) v.
Crane.*

In a later case the court, acting on the principle that where a person of full age and sound mind has gone through the ceremony of marriage publicly in the presence of witnesses who discovered nothing in her demeanour to suggest constraint, and had complied with the formality of signing her name and answering questions without apparent difficulty or compulsion, held that very clear and cogent evidence must be given before the presumption of consent can be rebutted and the marriage annulled, and declined to set aside the marriage, though the petitioner, a young woman of twenty-five years of age, was of a weak and impressionable character and without much power of resistance to a stronger will, and the respondent had suddenly taken her into church after saying, "You must come into the church and marry me, or I will blow my brains out, and you will be responsible." The petitioner went through the marriage ceremony without showing any signs of unwillingness, repeated the responses in an audible tone, and signed the register in a clear, firm hand. After the ceremony the respondent took the petitioner home, and left her at the door of the house. The marriage was never consummated, and the parties never saw each other afterwards, though they corresponded, but always on the footing of cousins (as they were) and not as husband and wife.² But in a still later case the court has

¹ 12 P. D. 21.

² *Cooper (f. c. Crane) v. Crane*, [1891] P. 369.

gone back upon the principles laid down by Lord Hannen in *Cooper v. Crane*. In *Ford (f. c. Stier) v. Ford*¹ the petitioner at the time of her marriage with the respondent was seventeen years old. The respondent was a friend of her brother, who had met her only a few times, and had never spoken of marriage or professed affection for her. She alleged that one day her mother, who was a woman of strong character and had great influence over her daughter, took her to a church where the respondent awaited her; and with him she went through the marriage ceremony, but afterwards threw away the wedding-ring. She said she thought the ceremony was that of mere betrothal, and would not have gone through it except under the influence of her mother. The parties never consummated the marriage, for the respondent left her at the church door, and sailed the same day for South Africa, where on his arrival he told the petitioner's brother of the marriage. No mention of the marriage was made to her father, or in the family. The mother died in the following year. Four years after the petitioner married another man, and then thoroughly understood the nature and meaning of the marriage ceremony. The petitioner applied for the relief of nullity of her marriage with Stier after he wrote from Africa claiming her as his wife. Sir Gorell Barnes on these facts granted a decree for nullity. This case does not present the necessary ingredients of duress; no threats of damage or harm were made; her father was alive and capable of protecting her; and it is idle to suppose that a girl of seventeen mistook the ceremony of marriage for one of betrothal, especially when it is remembered that a formal betrothal is almost unknown in this country.

If a man by force takes away or detains against her will any woman of any age with intent to marry her (and whether he marries her or not is immaterial), he may be indicted for abduction.²

Civil Disabilities.—The other impediments to marriage, or grounds for nullity, are civil, and their operation is to make the marriage void, and not merely voidable. Suits grounded on civil impediments may be brought by interested parties other than those who have gone through the ceremony of marriage; while a suit grounded on an allegation of impotency or of want of free consent can be brought only by the person who alleges that he or she suffers from the injury done by the non-consummation of the marriage, or that his or her consent has been obtained by some mistake or fraud or coercion. These impediments are (1) Nonage; (2) Insanity; (3) Consanguinity and Affinity, or Relationship within the Prohibited Degrees; (4) Previous Marriage.

¹ [1896] P. 1.

² 24 & 25 Vict. c. 100, s. 54.

Nonage.

Age of matrimonial consent: fourteen in males; twelve in females.

Effect of marriage contracted between persons within age.

(1) *Nonage*.—Nonage, or want of age of the contracting parties, operates to render the marriage void, on the twofold ground of a want of consent and the immaturity of the bodies or body of both parties or of one party to the engagement. The English law, following the canon law, has fixed the age of matrimonial consent at fourteen in the male, and twelve in the female, on the assumption that the sexes are at those respective ages capable of appreciating the responsibilities and performing the duties of marriage. By the common law persons may marry at any age, and if they marry under the age of consent, they are husband and wife till disagreement.¹

The question whether marriages contracted between persons under the age of consent are void or voidable, is not without some difficulty, for there are expressions in some of the authorities which warrant the assumption that at the utmost such are only voidable. Thus Coke says "that when her husband dies, a wife who has attained the age of *nine* years, shall be admitted to dower of whatsoever her husband be seised, albeit he were but four years old."² If the female child were not a wife, she could not be dowable, though the husband has not reached even the age of seven, when he might be proved to have consented, and understood the meaning of his acts. The explanation of this may be found in what Swinburne³ says of children who are yet *impuberes*, that they cannot contract matrimony, or spousals *de presenti*, but only *de futuro*, and that when either party attains the age of puberty, he or she can "resile" from the contract, or confirm it, and need not be married again. Such marriages do not require the decision or sentence of a court to render them invalid and void. Though, strictly speaking, these marriages are inchoate or imperfect, yet they were not treated by the courts as *void*.⁴ It seems, however, to be clear law now that as contracts

¹ Com. Dig. Baron and Feme, B. 5 & 6. The following is a table of the marriageable ages of males and females in the principal countries of Europe:—

Country.	Males.	Females.
Austria . . .	$\left\{ \begin{array}{l} 14 \left\{ \begin{array}{l} \text{Rom. Cath.} \\ \text{Orth. Grk. Ch.} \end{array} \right. \\ 18 \text{ Prot.} \end{array} \right.$	$\left\{ \begin{array}{l} 12 \left\{ \begin{array}{l} \text{Rom. Cath.} \\ \text{Orth. Grk. Ch.} \end{array} \right. \\ 15 \text{ Prot.} \end{array} \right.$
Belgium . . .	18	15
Denmark . . .	20	16
France . . .	18	16
Greece . . .	15?	12
Italy . . .	18	15
Netherlands . .	18	16
Portugal . . .	14	12
Prussia . . .	18	14
Russia (generally) .	18	16
Norway . . .	20	16
Sweden . . .	21	15
Switzerland . . .	14-20	12-18
Turkey has no particular time or age returned.		

² Co. Litt. 33 a.³ Sect. 7, p. 25.⁴ *Elliot v. Gurr*, 2 Phill. 16.

per verba de præsenti or *de futuro* cannot be enforced, marriages of infants under seven must be absolutely void. The law on this subject may be shortly summed up thus: (a) Where both parties or one, are or is seven years of age, or is under seven years, the marriage is absolutely void; (b) Where both parties or one are or is above seven and under fourteen and twelve respectively, the marriage is imperfect and inchoate, depending for its validity in the first case on the consent of both on reaching the respective marriageable ages; and in the second case on the consent of that party who is under the marriageable age on reaching that period; (c) Where the parties are above fourteen and twelve respectively and under twenty-one, the marriage, if with the consent of parents or guardians, is clearly good, and even without such consent. Where marriage is had without the consent of parents or guardians, the offending party is punished by forfeiting his or her interest in any property which has accrued by force of the marriage.¹

Marriages of infants under seven void.

Marriages of infants between seven and fourteen, voidable at their election;

over fourteen and twelve respectively, when good.

In 1885 the Criminal Law Amendment Act² was passed, making carnal connection with a girl under thirteen a felony,³ and carnal connection with a girl between thirteen and sixteen a misdemeanour.⁴ But these provisions do not alter in any way the common law age of consent to marry; and the connection in both cases must be "unlawful," which is the word governing the constitution of the offences; and as that which is permitted by the law is not "unlawful," the connection of the sexes following on a marriage recognized by the law, though the wife may be within the ages specified in the Act, is not unlawful and so criminal.

Criminal Law Amendment Act, 1885.

(2) *Insanity*.—Insanity, or want of reason, is a bar to marriage on the ground that as without consent there can be no contract, so where there is no reason there is no power to consent. Mere weakness of understanding is not enough, but some sort of mental derangement evidenced by overt acts and conduct of the imbecile or lunatic.⁵ The difficulty in all these cases, as in other branches of the law, is to determine what the true state and capacity of the intellect of the alleged imbecile or lunatic was at the time of the marriage; for the exact time and separation between reason and incapacity may be difficult to be found and marked out in the abstract, though it may not be difficult in most cases to decide upon the result of the circumstances.⁶ The courts are inclined to be strict in applying the signs of mental derangement at the inception of this tie, and are not content to take as proof of a

Insanity a bar to valid marriage.

The courts strict in applying signs of mental derangement in cases of marriage contracts

¹ 4 Geo. IV. c. 76, s. 23. The consent of proper parties will be discussed lower down in the next chapter, "The Essentials of a Valid Marriage," p. 85.

² 48 & 49 Vict. c. 69.

³ Sect. 4.

⁴ Sect. 5.

⁵ *Earl of Portsmouth v. Countess of Portsmouth*, 1 Hag. Eccl. Rep. 355.

⁶ *Browning v. Reane*, 2 Phill. Eccl. Cas. 69; *Cannon v. Smalley*, 10 P. D. 96.

capacity to contract marriage, that which would certainly not be accepted as evidence of a power to enter into other contracts, or arrange the ordinary affairs of life. If the evidence shows that the mind was diseased, the court will not inquire into the extent of the derangement consequent upon the disease. On this point Lord Penzance says: "If any contract more than another is capable of being invalidated on the ground of the insanity of either of the contracting parties, it should be the contract of marriage, an act by which the parties bind their property and their persons for the rest of their lives."¹ But in a later case, Sir J. Hannen said that "the contract of marriage is a very simple one, which does not require a high degree of intelligence to comprehend. . . . I agree . . . that a mere comprehension of the words of the promises exchanged is not sufficient. The mind of one of the parties may be capable of understanding the language used, but may yet be affected by such delusions or other symptoms of insanity, as may satisfy the tribunal that there was not a real appreciation of the engagement apparently entered into."² Each case must be decided on its own facts; but one of the tests of the capacity to understand the nature of the contract is the absence or presence of morbid delusions on the subject of marriage.³ The insanity must have existed at the time of the alleged marriage; for if it supervene after the marriage is contracted, it will form no ground for nullity.⁴ A valid marriage may be entered into in a lucid interval, between two periods of madness or imbecility, provided the individual has not been found lunatic by a commission.⁵

Marriage contracted between two periods of madness.

Acquiescence during lucid interval.

The question whether marriages contracted by lunatics or imbeciles can be made good and valid by acquiescence in them on the return of reason, without going through a further ceremony, has not been debated much of late. Shelford says: "There is authority for the proposition that a marriage by a *non-compos*, when of unsound mind, is rendered valid by consummation during a lucid interval."⁶ It might, however, be argued that the policy of the law, which should protect the weak against the strong, would be against such a contention; and that a ratification of a contract which never was a contract, is no ratification at all.

A person on recovering sanity may institute proceedings to set aside a marriage had when *non-compos*; and if insanity at the time of the formation of the contract is proved, the marriage will

A person becoming sane may institute proceedings to set aside marriage had when *non-compos*.

¹ *Hancock* (f. c. *Peaty*) v. *Peaty*, L. R. 1 P. & D. 335.

² *Durham* v. *Durham*, 10 P. D. 82.

³ *Ibid.*; *Hunter* v. *Edney*, 10 P. D. 93. See *Banks* v. *Goodfellow*, L. R. 5 Q. B. 549.

⁴ *Parnell* v. *Parnell*, 2 Hag. Con. Rep. 169.

⁵ *Turner* v. *Meyers*, 1 Hag. Con. Rep. 414. See *Hancock* v. *Peaty* (*ubi sup.*).

⁶ Mar. and Div. 197, citing *Ashe's Case*, Prec. Ch. 703; Freeman, C. C. 259.

be declared void.¹ A suit may be brought by a guardian to set aside the marriage of one who was imbecile or of weak mind;² but the court will not pronounce its decree without the sanction of the petitioner; it will, however, proceed to try the issue of sanity or insanity raised before it. The proper course to raise the point of restoration to sanity is by motion for the court to vacate its order appointing the guardian on the ground of the lunatic's recovery.³ But as the marriage is void if the insanity of either party is proved, the question whether one of the parties was insane or capable of contracting can be litigated in proceedings to which neither is a party, and after the death of either or both; thus if a man has gone through the ceremony of marriage with a woman who was insane, and on her death claims all her property *jure mariti*, her next-of-kin could raise the question of the invalidity of the marriage in an action brought to determine the ownership of her property. The basis of the marriage tie is the matrimonial consent, without which consent there is no marriage.⁴ Suits for nullity on this ground are not common, and are usually brought by or on behalf of the person alleged to be insane at the time of the marriage.

Where the insanity is proved to be permanent, the burden of proof that the lunatic was sane at the time of the marriage is cast upon the person alleging the sanity; otherwise, the burden of proof lies on the person alleging the insanity.⁵ So, too, where the suit is brought not on behalf of the alleged lunatic but by the other party to the contract, the burden of showing that the respondent was insane at the time of the marriage lies on the party asserting it;⁶ and if the capacity to understand the nature of the contract is not impaired by such a mental condition as melancholia, the presence of such an affliction does not entitle the petitioner to a decree of nullity.⁷

The marriages of persons found to be lunatics by commission are governed by 51 Geo. III. c. 37,⁸ which enacts that "in case any person who has been, or at any time hereafter shall be found a lunatic by any inquisition taken or to be taken by virtue of a commission under the Great Seal of Great Britain and Ireland respectively, or any lunatic or person under a frenzy, whose person and estate by virtue of any Act of Parliament now or hereafter shall be committed to the care and custody of particular trustees, shall marry before he or she shall be declared of sane

Burden of
proof of sanity
or insanity.

Marriages of
lunatics so
found by com-
mission.

51 Geo. III.
c. 37.

¹ *Turner v. Meyers*, 1 Hag. Con. Rep. 414.

² *Wilkinson v. Wilkinson*, 4 Notes of Cas. 295.

³ *Hancock (f. c. Peaty) v. Peaty*, L. R. 1 P. & D. 335.

⁴ This is the law in the United States. See Bish. Mar. & Div. s. 90 *et seq.* See also definition of "Void Marriage," *ante*, p. 59.

⁵ *Le Geyt v. O'Brien*, Milw. Ir. Eccl. Rep. 325.

⁶ *Durham v. Durham*, 10 P. & D. 80; *Hunter v. Edney*, *ibid.* 93.

⁷ *Cannon v. Smalley (otherwise Cannon)*, *ibid.* 96.

⁸ This re-enacted 15 Geo. III. c. 30, and extended its provisions to Ireland.

mind by the Lord High Chancellor of Great Britain and Ireland, &c., or such trustees as aforesaid, or the major part of them respectively, as the nature of the case shall require, every such marriage shall be and is hereby declared to be null and void to all intents and purposes."

Drunkenness.

Drunkenness at the time of the marriage may or may not be a ground for nullity; and it depends upon the circumstances surrounding the inception of the contract whether the results flowing from it are or are not modified by them. A person intoxicated, though not absolutely dead-drunk, may enter into a valid contract, provided fraud and trickery were not used to accomplish it.¹ Drunkenness producing *delirium tremens* from time to time, but not proper or permanent insanity, does not throw upon those who desire to support the marriage the burden of proof that the person so affected was capable of forming the contract.² The case is different where the marriage is celebrated, and one of the parties is in a state of frenzy or *delirium tremens* proceeding from excessive drinking.³ The general law of Scotland and of the United States is similar on these points;⁴ and in those countries it is held that a marriage celebrated during the drunkenness of both or either of the parties will be held good, if acquiesced in, and not disclaimed on the return of reason and sobriety.

Deaf and dumb. Their marriages *primâ facie* valid.

Deaf and dumb persons may contract a valid marriage, and the presumption of the court is in favour of such marriage, and casts the burden of proof of their incapacity upon those who would impeach the marriage; and the court, if satisfied with the competency of the deaf and dumb, will not grant an issue to try the validity of the marriage.⁵

Relationship within the prohibited degrees. Formerly canonical impediment, but now civil in its effect.

(3) *Relationship within the Prohibited Degrees.*—This is an impediment to marriage created by consanguinity and affinity, and was formerly a canonical bar, rendering the marriage only voidable and annulable by sentence of nullity passed during the lifetime of the parties; but since Lord Lyndhurst's Act (5 & 6 Wm. IV. c. 45), it has been constituted in its effect a civil impediment rendering the marriage void. This statute, after reciting that marriages between persons within the prohibited degrees of consanguinity or affinity should be *ipso facto* void, and not merely voidable, proceeds to enact that "all marriages which shall hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity shall be absolutely null and void to all intents and purposes whatsoever."⁶ Consanguinity

⁵ & 6 Wm. IV. c. 54, s. 2.

Consanguinity.

¹ See *Gore v. Gibson*, 13 M. & W. 623.

² *Le Geyt v. O'Brien*, Milw. Ir. Eccl. Rep. 325; *Parker v. Parker*, 2 Lee, 382.

³ *Le Geyt v. O'Brien* (*ubi sup.*).

⁴ Fraser, H. & W. 72; Bish. Law of Mar. and Div. s. 131.

⁵ *Harrod v. Harrod*, 23 L. T. 243.

⁶ Sect. 2. This Act draws a distinction between affinity and consanguinity by declaring that marriages celebrated before its passing (August 31, 1835) by persons

is the relationship of parties who are descended from the same ancestor, and is either in the direct or collateral line. In the direct line of ancestors and descendants marriage is absolutely unlawful, however remote the relationship may be. And in the collateral line all beyond the first degree of the canon law computation, or the third of the civil law, may contract valid marriages.

Affinity is the relationship which arises from marriage, and exists between one spouse and the relations of the other spouse, and is an impediment to the same extent as consanguinity;¹ but the kindred of the one may marry the kindred of the other;² and one of the spouses may marry the *affinis* of the other spouse, for *affinis mei affinis non est mihi affinis*. Affinity by the law of England must be created by marriage, and carnal intercourse is not sufficient.³

By the operation of the unrepealed portion of 32 Hen. VIII. c. 38 (the Statute of Pre-contracts), which incorporated the prohibited degrees set out in 28 Hen. VIII. c. 7, and of the 99th canon, the table of prohibited degrees compiled by Archbishop Parker in 1563, and inserted in the Common Prayer Book (the Levitical degrees),⁴ is a portion of the statute law of the realm, and are binding both on the clergy and laity.⁵

The marriage of a domiciled Englishman with the sister of his dead wife is within the prohibited degrees above mentioned, and void,⁶ although celebrated in a country where such marriages are valid.⁷ This rule applies equally to a naturalized British subject, though by the law of the domicile of origin of the naturalized subject the marriage would have been valid.⁸

The status of illegitimacy does not prevent the operation of the law against marriages within the prohibited degrees both as regards consanguinity and affinity; for though, legally speaking, a bastard is *filius nullius*, and has no relations, yet the decencies of society and the purity of morals hinder the legal theory from being logically carried out.⁹ Thus, a marriage with the niece of

within the prohibited degrees of affinity shall not be annulled unless decree pronounced in a suit depending at the time of the passing of the Act (sect. 1). This Act does not extend to Scotland (sect. 3).

¹ *Butler v. Gastrill*, Gibb. Ch. 156.

² Shelf. Mar. & Div. 174. *Owenham v. Gayre*, Bac. Abr. Mar. & Div. A.

³ *Wing v. Taylor* (f. c. *Wing*), 30 L. J. P. M. & A. 258; *Pagani v. Pagani*, L. R. P. & D. 223.

⁴ Leviticus, chap. viii.

⁵ *Sherwood v. Ray*, 1 Moo. P. C. 353.

⁶ *Hill v. Good*, Vaugh. 302; *Reg. v. Chadwick*, 17 L. J. Q. B. 81.

⁷ *Brook v. Brook*, 9 H. L. Cas. 193. Whether, since the decision of the Court of Appeal in *Re Goodman's Trusts*, 17 Ch. D. 266, these marriages will be held void for all purposes, remains to be seen. See *Forrestier v. Buddicombe*, W. N. 1881, 144.

⁸ *Mette v. Mette*, 28 L. J. P. M. & A. 117.

⁹ *Horner v. Horner*, 1 Hag. Con. Rep. 337; *Blackmore v. Brider*, 2 Phill. 359, *Woods v. Woods*, 2 Curt. 516; *Reg. v. Brawn*, 1 C. & K. 144; *Reg. v. St.-Giles-in-the-Fields*, 17 L. J. Q. B. 81. Compare the Roman law on the *contubernium* of slaves, which, though not recognized as *matrimonium*, was not permitted to be incestuous.

a dead wife was set aside, though the mother of the niece was an illegitimate daughter of the dead wife's mother.¹

The relationship of the half-blood is equally affected with the whole blood by these prohibitions; thus, the marriage of a man with a daughter of the half-sister of his dead wife is null and void.² A widower married the niece of his dead wife, and during the marriage married another woman. Though he was found guilty of bigamy, the second marriage was declared void.³ The court will pronounce a decree of nullity in a case where both parties were at the time of the ceremony aware of this impediment.⁴ Such sentence is not necessary, as the marriage of persons within the prohibited degrees is void *ab initio*.

(4) *Previous Marriage*.—Another and important impediment to a valid marriage is a pre-existing valid marriage on the part of both or either of the spouses; that is, where the husband or wife of a prior legal marriage is living at the date of the ceremony of the second marriage. This second marriage is bigamous or polygamous,⁵ and the contracting it is treated as a felony, and severely punishable by the criminal law.

A second marriage while the first is undissolved is null and void without any sentence, although under such circumstances as would not render the bigamist criminally liable. The children of the second marriage are in England illegitimate, though both parties, or at any rate one of them, may have contracted the union in perfect good faith and in ignorance of the impediment to their marriage.⁶ This kind of marriage is called by the canon law *matrimonium putativum*, and is recognized by the Scotch law, which follows the canon, so far as to render the children of such union legitimate, though the marriage itself be null. This also seems to be the law in several of the United States.⁷

When suits for nullity are instituted on this ground, strict proof is required of the identity of the parties;⁸ but lapse of time is no bar to the bringing of the suit.⁹ Misconduct also, however gross, of a party proceeding to annul a marriage by reason of bigamy is no bar to a sentence of nullity; accordingly

¹ *Reg. v. Brighton*, 30 L. J. M. C. 197.

² *Ibid.*

³ *Reg. v. Allen*, L. R. 1 C. C. 367.

⁴ *Andrews (f. c. Ross) v. Ross*, 14 P. D. 15. In this case *Miles v. Chilton* (1 Rob. 684) was followed, which was a decision of an ecclesiastical court; but in the earlier case the respondent opposed the suit on the ground of the misconduct and fraud of the petitioner; and the court had to dispose of the suit that was before it.

⁵ What is defined in modern English law as "bigamy" was known to the canon law as "polygamy," for a "bigamist" was one who married a second time whether the consort of the previous marriage was alive or not, *e.g.*, marrying two unmarried women in succession, or once marrying a widow.

⁶ *Re Wilson's Trusts*, L. R. 1 Eq. 247.

⁷ *Fraser, H. & W.* 137, and *Parent and Child*, 22; *Bish. Laws of Mar. & Div.* s. 301.

⁸ *Searle v. Price (f. c. Searle)*, 2 Hag. Con. Rep. 187.

⁹ *Johnston v. Parker (f. c. Johnston)*, 3 Phill. 39; *Duins v. Duins (otherwise Donovan)*, 3 Hagg. Eccl. Rep. 301. For sufficiency of evidence, see *Bayard (f. c. Morphey) v. Morphey*, 2 Phill. 321.

Relationship by the half-blood affected.

Previous marriage.

Bigamy a felony.

Bigamous marriage null and void without sentence.

Putative marriage.

Lapse of time or misconduct no bar to the bringing of the suit.

an allegation by a woman pleading misconduct and fraud on the part of the second husband, including his cognizance of the first marriage at the time of the second, and of the first husband being then alive, was rejected as insufficient to bar the sentence of nullity.¹ As a conviction for bigamy is not a judgment *in rem*, it would seem that a respondent in a suit for nullity based on bigamy is at liberty, notwithstanding the conviction, to prove the invalidity of the first marriage.²

This offence was originally cognizable only in the ecclesiastical courts, but was made a capital offence by 1 Jac. I. c. 11. The statute that now regulates the offence is 24 & 25 Vict. c. 100, s. 57:—

“Whosoever, being married, shall marry any other person during the life of the former husband and wife, whether the second marriage shall have taken place in England or Ireland, or elsewhere,³ shall be guilty of felony; and any such offence may be dealt with, inquired of, tried, determined, and punished in any county or place in England or Ireland where the offender shall be apprehended, or be in custody, in the same manner, in all respects as if the offence had been actually committed in that county or place; Provided that: (1) “Nothing in this section contained shall extend to any second marriage contracted elsewhere than in England or Ireland by any other than a subject of Her Majesty; (2) or to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time; (3) or shall extend to any person who, at the time of such second marriage, shall have been divorced from the bond of the first marriage; (4) or to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction.”

Offence originally cognizable in ecclesiastical court now a felony.

Punishment on conviction.

Exceptions.

Seven years' absence of spouse not known to be alive within that time good defence. Divorce from first marriage at time of second good defence. Nullity of previous marriage good defence.

The first exception limits the liability for bigamy committed elsewhere than in England or Ireland to subjects of the British crown; thus, a French subject marrying in England, then going back to France and contracting a second marriage, subsisting the first, would not be liable to the pains and penalties of this section.

The second exception does not throw upon the prisoner the burden of proving that it was not known to him or her that the former wife or husband was living at the time of the celebration of the second marriage. The usual presumption is that a person not proved to be dead within a reasonable time is still alive;⁴ but the presumption in favour of innocence is still greater.⁵

Onus of disproof of knowledge as to existence of absent spouse not thrown on accused.

¹ *Miles v. Chilton*, 1 Rob. 684.

² See *Searle v. Price* (f. c. *Searle*), 2 Hag. Con. Rep. 187; *Bayard* (f. c. *Morphew*) v. *Morphew*, 2 Phill. 321.

³ “Elsewhere” is not to be limited to within the dominions of the Crown; *Rex v. Russell* (Earl), [1901] A. C. 446.

⁴ *Reg. v. Cargwen*, L. R. 1 C. C. R. 1.

⁵ *Rex v. Twynning*, 2 B. & Ald. 386.

Exception.

Where, however, there is no evidence of separation, the accused is bound to displace the presumption that he or she was aware of the existence of the other spouse at the time of the second marriage.¹

Seven years' absence of spouse not now insisted on.

It is not now deemed necessary to wait for the seven years' absence to be complete, if the accused marries a second time within that period under a *bonâ fide* and reasonable belief that the other spouse is dead.² While there is no strict irrebuttable presumption in favour of the existence of human life, without reference to accompanying circumstances, as the age or health of the party,³ yet where there are conflicting presumptions, the presumption in favour of life will have most weight; and in all cases it is a question of fact for the jury.⁴ The absence for the statutory period, or ignorance of the existence of the other spouse, does not render the second marriage valid.

The bond of marriage exists until decree absolute.

The third exception does not include a judicial separation or divorce *a mensâ et thoro*. The *ligamen* or *vinculum matrimonii* still exists until it is legally and fully dissolved by the *decree absolute* of the court of divorce,⁵ and parties run a risk of being indicted for bigamy if they contract a fresh marriage within the time of appealing against such decree absolute. The court will relieve where, through inadvertence and mistake, the decree *nisi* has not been made absolute and the parties have since married, by making the decree absolute, notwithstanding the marriage if the King's Proctor does not oppose.⁶

Strict proof of first marriage.

In an indictment for bigamy the first marriage must be strictly proved, and mere reputation and cohabitation will not suffice;⁷ and it is doubtful whether the unsupported admission of the defendant is enough.⁸ With reference to the second marriage, it is sufficient if the parties go through the forms and ceremonies

¹ *Reg. v. Jones*, 11 Q. B. D. 118.

² *Reg. v. Tolson*, 23 Q. B. D. 168. In this case the majority of the Court for Crown Cases Reserved (nine to five) decided that, where a prisoner was convicted of bigamy, having gone through the ceremony of marriage *within* seven years of being deserted by her husband, and the jury found that she went through the second marriage in good faith and on reasonable grounds for believing her husband to be dead, her conviction ought to be quashed, as a *bonâ fide* belief on reasonable grounds in the death of the husband at the time of the second marriage was a good defence. The ingenious judgment of Cave, J. (which seems to be the basis of the judgments of the majority), is tantamount to a repeal of the seven years' limit within which one spouse deserted by the other marries at his or her risk; only after seven years is knowledge or want of knowledge of the existence of the deserting spouse material. The words of the section constituting the offence are plain and unambiguous, and the seven years' period of continued absence was no doubt based on the assumption that a person absent and unheard of for seven years was dead. It may be that such period should be shortened; but that requires an act of the legislature.

³ *Shelf. Mar. & Div.* 226; *Reg. v. Lumley*, L. R. 1 C. C. R. 196.

⁴ *Reg. v. Willshire*, 6 Q. B. D. 366.

⁵ *Stanhope v. Stanhope*, 11 P. D. 103.

⁶ *Wickham v. Wickham*, 6 P. D. 11.

⁷ See *Morris v. Miller*, 4 Burr. 2057; *Birt v. Barlow*, 1 Doug. 171. These cases were actions of crim. con.

⁸ *Reg. v. Flaherty*, 2 C. & K. 782; but see *Rex v. Truman*, 1 East, P. C. 470, and *Reg. v. Upton*, cited 3 Russ. Cr. 315.

legal and necessary in the place of celebration,¹ though the marriage itself, from the circumstances attending it, is void, as not being recognized by the law;² but the form of ceremony must be valid and recognized by the law of the place where it is solemnized.³

The sentence of divorce *a vinculo matrimonii* of an English marriage pronounced by a foreign court must be on grounds sufficient to dissolve it in England, otherwise it will be no defence to an indictment for bigamy.⁴ The sentence of a court of competent jurisdiction formerly was not, but is now, a conclusive defence against an indictment for bigamy;⁵ but a conviction for bigamy does not prevent a person setting up the invalidity of his first marriage in a suit for nullity of the second marriage.⁶

Competency of foreign court to dissolve an English marriage.

The usual test applied by the English courts to foreign dissolutions of English marriages is the domicile of the parties. A divorce of a foreign court has never been held to invalidate an English marriage between English subjects where the parties were not domiciled in the country by whose tribunals the divorce was granted;⁷ so, where the parties went to Scotland only for the purpose of getting a divorce, and were not domiciled there, the decree of divorce of the Scotch courts was held not to dissolve the English marriage;⁸ so, too, where the decree is obtained by collusion.⁹ It is the same where one of the parties goes abroad, and without having acquired a domicile in the foreign country presents a petition for divorce, which is granted.¹⁰ But an "English marriage" does not include every "marriage celebrated in England," so that where a domiciled Scotchman marries an Englishwoman in England, and both go back to Scotland and there reside, and one of them obtains a decree of divorce, even upon a ground not capable of founding a divorce in England, such divorce will be held good in England.¹¹ A foreign court of competent jurisdiction may dissolve a marriage between a

Domicil test of jurisdiction.

"English marriage" does not include every marriage celebrated in England.

¹ *Reg. v. Allen*, L. R. 1 C. C. R. 367, disapproving of *Reg. v. Fanning*, 17 Ir. C. L. 289.

² *Reg. v. Brawn*, 1 C. & K. 144.

³ *Burt v. Burt*, 29 L. J. P. M. & A. 133.

⁴ *Reg v. Lolley*, 2 Cl. & F. 567. For an explanation of this case see *Harvey (otherwise Farnie) v. Farnie*, 8 App. Cas. 43; and see *post*, chap. xviii., "The International Aspect of Marriage and Divorce."

⁵ *The Duchess of Kingston's Case*, 1 Leach, 146.

⁶ *Bruce v. Burke*, 2 Add. 471, 480.

⁷ *Shaw v. Att.-Gen.*, L. R. 2 P. & D. 156; *Green v. Green*, [1893] P. 89.

⁸ *Conway v. Beazley*, 3 Hag. Eccl. Rep. 639; *Tollemache v. Tollemache*, 1 Sw. & Tr. 557; *Dolphin v. Robins*, 29 L. J. P. M. & A. 11. See also *McCarthy v. Decair*, 2 Russ. & M. 614; but this case is no longer law.

⁹ *Bonaparte v. Bonaparte (otherwise Megone)*, [1892] P. 402.

¹⁰ *Briggs v. Briggs*, 5 P. D. 163.

¹¹ *Harvey (otherwise Farnie) v. Farnie*, 8 App. Cas. 43. This question of foreign divorces is more fully treated in chap. xviii., on "The International Aspect of Marriage and Divorce."

domiciled Englishwoman and a domiciled subject of the country whose court pronounces the decree on a ground for which in England a decree of nullity only would be pronounced, and such dissolution will be held valid for all purposes in this country.¹

There is another kind of impediment to a valid marriage affecting only a particular class in the realm, namely, the Royal Marriage Act,² which imposes upon certain members of the royal family, descendants of King George II., the necessity of first obtaining the consent of the reigning Sovereign of this country to their marriage if under the age of twenty-five, or if over twenty-five, the approbation of both Houses of Parliament to their marriages.

No descendant of the body of King George II., male or female (other than issue of princesses who have married or may hereafter marry into foreign families), shall be capable of contracting matrimony without the previous consent of the reigning Sovereign, signified under the Great Seal and declared in Council; and every marriage or matrimonial contract of any such descendant without such consent first had and obtained shall be null and void to all intents and purposes whatsoever.³

In case any such descendant of the body of King George II., being above the age of twenty-five years, shall persist in his or her resolution to contract a marriage disapproved of or dissented from by the reigning Sovereign, then such descendant, upon giving notice to the Privy Council, which notice is to be entered in the books thereof, may at any time from the expiration of twelve calendar months after such notice given to the Privy Council, contract such marriage; and his or her marriage, with the person before proposed and rejected, may be duly solemnized without the previous consent of the Sovereign; and such marriage shall be good as if this Act had never been made, unless both Houses of Parliament shall, before the expiration of the said twelve months, expressly declare their disapprobation of such intended marriage.⁴

The judges consulted by the House of Lords in the *Sussex Peerage Case*⁵ unanimously decided that the operation of this statute was not limited to marriages celebrated within the kingdom of Great Britain and Ireland, but extended to marriages entered into by the descendants of George II. in foreign countries, and the validity of the foreign marriages did not prevent this Act from rendering them null and void. They held that the statute does not enact an incapacity to contract matrimony within

The Royal
Marriage Act.

Act not
confined to
marriages cele-
brated in
England.

¹ *Turner (f. c. Thompson) v. Thompson*, 13 P. D. 37.

² 12 Geo. III. c. 11.

⁴ Sect. 2.

³ Sect. 1.

⁵ 11 Cl. & F. 85.

one particular country, but to contract matrimony generally, and in the abstract. It is an incapacity attaching itself to the person of the individual affected by it, which he carries with him wherever he goes;¹ and the object of the Act would be frustrated, and the mischief intended to be remedied would remain unremedied, and the power of the Sovereign nugatory, if a marriage which in England would be confessedly void should be held good and valid when celebrated out of the country.

¹ 11 Cl. & F. 144.

CHAPTER VI.

THE ESSENTIAL REQUIREMENTS OF A VALID MARRIAGE.

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THE clear policy of the law requires that the inception of the matrimonial state shall, as far as possible, be safeguarded from fraud and mistake, and not lightly entered upon; therefore every marriage is to be prefaced by certain necessary acts, without which it is either absolutely null and void, or liable to be called

in question, and the parties to it severely punished for their tortious or irregular conduct. The *lex loci celebrationis* determines what necessary acts should preface the inception of the tie; the *lex domicilii* determines the capacity of the parties to contract marriage.¹ The validity, but not invalidity, of the marriage of any natural born and domiciled English subject may be tested in the Probate Division in a petition by such person for a decree that the marriage is valid under the Legitimacy Declaration Act, 1858.²

The necessary preliminaries will be set forth in this chapter in three sections:—

Section 1. The consent of proper parties.

- „ 2. The essential requirements of a valid marriage in England: (a) Of those belonging to the Established Church; (b) Of Nonconformists.
- „ 3. The requirements of a valid marriage celebrated by English subjects abroad.

SECTION I.

The Consent of Proper Parties.

The nature of marriage renders it absolutely necessary that the contracting parties should consent to form a binding union; and if the ceremony be gone through between infants or minors who have not reached the age of consent (twelve in girls and fourteen in boys), the result is an inchoate and imperfect marriage, which may be treated by the parties on attaining the age of consent as null and void without the aid of a judicial sentence, and indeed is now treated by the courts as void.³ Not only is the consent of the contracting parties requisite, but where the parties are minors, the approbation of those in whose power they are is now by statute strictly required. By common law the marriage of infants who have reached the age of consent is valid *per se*, and does not require the consent of parents and guardians; but since Lord Hardwicke's Act such consent is requisite by statute.

“The father, if living, of any party under twenty-one years of age, such party not being a widower or widow; or if the father shall be dead, the guardian or guardians of the person of the party so under age lawfully appointed, or one of them; and in case there shall be no such guardian or guardians, then the mother of such party, if unmarried; and if there shall be no mother unmarried, then the guardian or guardians of the person

Consent of proper parties.

Infant contracting parties.

Father or guardian,

or mother.

¹ See *Re Bethell*, *Bethell v. Hildyard*, 38 Ch. D. 220, and *post*, chap. xviii. “The International Aspect of Marriage and Divorce.”

² 21 & 22 Vict. c. 93. See *Scott v. Att.-Gen.* 11 P. D. 128; *Brinkley v. Att.-Gen.* 15 P. D. 76.

³ See *ante*, p. 72.

appointed by the Court of Chancery,¹ if any, or one of them, shall have authority to give consent to the marriage of such party; and such consent is hereby required for the marriage of such party so under age, unless there shall be no person authorized to give such consent."²

If the father of the minor be *non compos mentis*, or if the guardians or mother be also *non compos mentis* or beyond seas, &c., or such persons shall unreasonably or from undue motives refuse or withhold their consent, the persons desirous of marrying may apply by petition to the Lord Chancellor, &c., who, on finding the marriage to be a proper one, may declare it to be so; and such declaration shall operate as validating the marriage.³

The consent of the proper person has been held to be directory only, and its want does not render the marriage celebrated without it invalid.⁴ A formal written consent is not requisite,⁵ nor a personal knowledge of the party intending to marry the minor.⁶ It is enough if the consent be given at the ceremony, which fact may be proved by the presence of the father, who does not express his dissent.⁷ Though consent in the case of a marriage by licence,⁸ and after publication of banns, is presumed, the presumption does not hold good where the father remained totally ignorant of the marriage for some time after its celebration.⁹ Where dissent is openly expressed by the proper parties to a marriage intended to be celebrated after publication of banns, such publication becomes null and void.¹⁰ Where, however, there is no dissent, the publication, even without consent, operates to render the marriage valid, and after solemnization it cannot be set aside.¹¹

An action in the Chancery Division relative to infants or their estates makes the infants wards of court, and during the pendency of the suit, attempting to marry,¹² or marrying, or abetting the marriage of the wards, is a contempt, and punishable.¹³ The jurisdiction of the court is not affected by the father of the infant being alive, or by a testamentary guardian having been appointed. Ignorance of the infant being a ward of court does not free the marrying party from the consequences of his act.¹⁴ The Court

¹ See *Re Woolscombe*, 1 Mad. 213; *Ex parte Becher*, 1 B. C. C. 555.

² 4 Geo. IV. c. 76, s. 16.

³ *Ibid.* s. 17. It will be noticed that in the case of the father the Chancery guardian is substituted only where he is *non compos mentis*; whereas if the mother or other guardians are under disabilities, then a Chancery substitute may be petitioned for.

⁴ *Re v. Inhabitants of Birmingham*, 8 B. & C. 29.

⁵ *Hodgkinson v. Wilkie*, 1 Hag. Con. Rep. 262, 267.

⁶ *Cresswell v. Cosins*, 2 Phill. 281.

⁷ *Cope v. Burt*, 1 Hag. Con. Rep. 434.

⁸ *Smith v. Huson*, 1 Phill. 287, 296.

⁹ *Balfour v. Carpenter*, 1 Phill. 221.

¹⁰ 4 Geo. IV. c. 76, s. 8.

¹¹ *Diddear v. Faucit*, 3 Phill. 580.

¹² *Warter v. Yorke*, 19 Ves. 451.

¹³ *Butler v. Freeman*, Amb. 301; *Wellesley v. Duke of Beaufort*, 2 Russ. 1; *Phipp v. Earl of Anglesea*, 1 P. Wms. 696.

¹⁴ *Herbert's Case*, 3 P. Wms. 116; *Nicholson v. Squire*, 16 Ves. 259. See *post*, Part IV. chap. v.

Want of consent of father, &c., does not invalidate marriage.

Jurisdiction of court over marriages of wards.

of Chancery will restrain its wards from contracting marriages which are likely to prove injurious to them, although they have attained the age of consent, and might contract a valid marriage. It will, therefore, make orders preventing the access of an ineligible or improper person by letter or other means.¹ The court in flagrant cases will not content itself with merely committing the party in contempt, but will direct a criminal prosecution.² The settlements made by the court on the marriage of its wards will be discussed later on.³

Illegitimate minors can have no lawfully appointed guardians except those given to them by the Court of Chancery; and when there are no such guardians appointed, the illegitimate minors may contract a valid marriage without the consent of any person; for their parents (not being lawful parents) have no power either to consent or to object to their marriage.⁴

Bastard
minors.

Forfeiture of Property accruing from a Marriage obtained by Fraud.—Between the passing of Lord Hardwicke's Act and 1823, the want of consent of the proper parties avoided the marriages of minors which were obtained in fraud of such parties. But in the latter year the Act of 4 Geo. IV. c. 76, s. 23, provided that where marriages (celebrated according to the rites of the Church of England⁵) of minors, who are neither widowers nor widows, by licence or after publication of banns are procured by false oath or fraud, the Attorney- or Solicitor-General may sue for a forfeiture of all estate, right, title, and interest in any property accruing to the party so offending by force of such marriage by information at the relation of a parent or guardian of a minor whose consent has not been given to the marriage.⁶ The written authority of the relator should be filed with the information.⁷ The court has no discretion to mitigate the penalty, but is bound to declare a forfeiture in the words of the Act.⁸ The court may then declare the forfeiture, and order that all the estate and interest as shall have accrued or shall accrue to the offending party by force of the marriage shall be secured under the direction of the court for the benefit of the innocent party, or of the issue of the marriage, or of any of them, in such manner as the court shall think fit, for the purpose of preventing the offending party from deriving any interest in real or personal

Forfeiture of
property under
4 Geo. IV.
c. 76, s. 23

¹ *Wellesley v. Duke of Beaufort* (*ubi sup.*); *Smith v. Smith*, 3 Atk. 305.

² *Priestley v. Lamb*, 6 Ves. 421.

³ *Post*, Part IV. chap. v.

⁴ *Horner v. Horner*, 1 Hag. Con. Rep. 337; *Priestley v. Hughes*, 11 East 1.

⁵ The provisions of this section are extended by 6 & 7 Wm. IV. c. 85, s. 43, and 19 & 20 Vict. c. 119, s. 19, to marriages not celebrated according to the rites of the Church.

⁶ Sect. 25. The complaint of the parent or guardian must be on oath, and made within three months from the time of the marriage becoming known to the relator; and the information must be filed within a year after the solemnization of the marriage.

⁷ *Att.-Gen. v. Willshire*, W. N. [1875], 182.

⁸ *Att.-Gen. v. Mulley*, 4 Russ. 329.

estate, or pecuniary benefits from such marriage, If both parties are guilty, then the property may be settled by the court for the benefit of the issue of the then or any future marriage. Any previous agreements made in contemplation of such marriage are void.¹ The proper mode of settling the property of the minor (if a female) by the court has been held to be, that if there be no children, the wife should have the power of appointing the whole, during the coverture by will, and if she survive her husband, either by deed or will; if there be children, and the wife die first, then the whole to go to the children—if sons, at twenty-one, and if daughters, at twenty-one or marriage; but if she survive her husband, then two-thirds go to the children of the marriage, and one-third to be subject to her appointment by deed or will.² This latter provision enables her to provide for a second marriage. Where the fund is small, the court will order it not to be settled, but paid into court; and will declare the trusts of it both in possession and in reversion.³ The court will not now make an order for a settlement in these cases, unless the Attorney-General appears separately from the relator.⁴

Usual settlement where minor is a female.

SECTION 2.

The Essential Requirements of a Valid Marriage in England.

When persons intending marriage have obtained the consent (if necessary) of the proper parties to their union, they must celebrate or solemnize their marriage in a lawful and recognized manner, after satisfying the requisite formalities imposed upon them by law. This section will be subdivided into two parts, namely: (1) The essential requirements of a marriage celebrated in accordance with the rites of the Church of England; (2) The essential requirements of a Nonconformist marriage.

(1) *Church of England Marriages.*—Where a marriage is celebrated according to the rites of the Established Church, the preliminary requirements are either (a) publication of banns; (b) or special licence; (c) or common or Ordinary's licence; (d) or superintendent-registrar's certificate in lieu of publication of banns; (e) and the presence of a duly ordained minister at the ceremony.

(a) *Publication of Banns.*—The publication of banns was first rendered compulsory in England by Lord Hardwicke's Act in 1753 (following the course taken by the Council of Trent), for all persons marrying who were not Quakers or Jews, or had not obtained a special or Ordinary's licence.

¹ 4 Geo. IV. c. 76, sect. 24.

² *Att.-Gen. v. Lucas*, 2 Ph. 753; followed in *Att.-Gen. v. Read*, L. R. 12 Eq. 38.

³ *Att.-Gen. v. Clements*, L. R. 12 Eq. 32.

⁴ *Att.-Gen. v. Read* (*ubi sup.*).

Requirements of a valid marriage in England.

Church of England marriage.

Publication of banns.

The signification of the word is a "proclamation," and its ostensible use is a notification to people generally that the parties proclaimed intend to contract a marriage; if, therefore, the publication is such as not to designate, but to conceal, the parties, it is no publication.¹ It is used to awaken the vigilance of parents and guardians, and to give them an opportunity of protecting their rights. The law, therefore, requires that a true name should be given to them, evidently considering that a name assumed for the occasion is a name that will not answer the purposes of the provisions.² Formerly the publication of false names formed an *impedimentum dirimens* invalidating the marriage *in toto*; ³ but since the Marriage Act of 4 Geo. IV. c. 76, nullity is confined to cases where the parties "knowingly and wilfully intermarry without due publication of banns"; ⁴ and that which under the earlier law would have been no publication at all, has been held under the later not to be such an undue publication as prevented a valid marriage from being contracted.

Meaning of the term "banns."

Publication must be due and proper.

Both parties must be shown to be aware of the undue publication before the celebration of the marriage; ⁵ for the wrongful act of the one will not be allowed to operate to the prejudice of the other, unless a participator; ⁶ and where only one is guilty of fraud, the innocent party will not be allowed to have the marriage declared null and void.⁷

Both parties must concur in the fraud.

The Act of 1823 requires the true Christian and surnames of the parties to be published. The true name of the parties is *primâ facie* the native name; at the same time, it is possible that a person may have assumed another name so as to bring it within the description required by the statute. A person may take any surname, and even Christian name,⁸ he likes, and the law will recognize it; and it needs neither royal licence nor Act of Parliament to sanction the change; ⁹ and where the new name has not been assumed for any fraudulent purpose, or for the occasion of the publication, banns may lawfully be published in that new name.¹⁰ A name, too, may be acquired by repute, and where the name so acquired is better known than the true name of the party, that is the proper name in which publication should be made; for it may be that an act of concealment would, under certain circumstances, be the result of using

True names.

Names by repute.

¹ *Fellowes v. Stewart*, 2 Phill. 238.

² *Wakefield v. Wakefield*, 1 Hag. Con. Rep. 394.

³ *Sullivan v. Sullivan*, 2 Hag. Con. Rep. 238; *Pouget v. Tomkins*, 2 Hag. Con. Rep. 142. ⁴ Sect. 22.

⁵ *Re v. Wroton*, 4 B. & Ad. 640; *Wright v. Elwood*, 1 Curt. 662; *Brealy v. Reed*, 2 Curt. 833; *Midgely v. Wood*, 30 L. J. P. M. & A. 57; *Gompertz v. Kensit*, L. R. 13 Eq. 369.

⁶ *Wiltshire v. Prince*, 2 Hag. Eccl. Rep. 332; *Hadley v. Reynolds*, cited in *Tongue v. Allen*, 1 Curt. 39, 47; 1 Moo. P. C. 90 (on appeal).

⁷ *Templeton v. Tyree*, L. R. 2 P. & D. 420.

⁸ *Wyatt v. Henry*, 2 Hag. Con. Rep. 215.

⁹ *Frankland v. Nicholson*, 3 M. & S. 259 n.

¹⁰ *Re v. Billinghamurst*, 3 M. & S. 250.

Illegitimate
children.

the true name.¹ The courts will look with greater suspicion on an assumed name in which a minor is married than on one in which an adult is married; because the rights of the parties interested in the minor might be directly affected by the assumption of such new name, whereas in the other case, if no fraud is practised on the other contracting party, the interests of third persons are not equally affected.² Illegitimate children have no name except that which they acquire by repute, though usually they take that of their mother. Where there is a name of baptism and a native surname, those are the true names, unless they have been overridden by other names assumed and generally accredited; ³ and the names by which persons are usually known, should be used in the publication of banns.⁴

Total variation
in names.

The variation in the names may be either *total* or *partial*. If there be a total variation of a name or names—*i.e.*, if the banns are published in a name or names totally different from those which the parties, or one of them, ever used, or by which they were ever known—the marriage in pursuance of that publication is invalid, if both parties are cognizant of the undue publication; ⁵ and it is immaterial in such cases whether the misdescription has arisen from accident or design, or whether such design be fraudulent or not.⁶ The above is part of Lord Tenterden's judgment, which was under the old law; it is now submitted, however, that the law is not absolutely clear on the point whether or not, if two parties, both of full age, without the intention of committing fraud, choose to get married after publication of banns in names which are not their true names, their marriage will be held null and void.⁷ After long cohabitation and birth of children, the court would be more likely to presume in favour of than against the validity of such marriage. Where two minors marry after publication of banns in names which are not true but with consent of parents or guardians, it may be asked whether such marriage should be held valid.⁸ Where the variation is partial, it is always open to explain the supposed misdescription; and then the presence or absence of fraudulent intent and motives of the parties become of marked importance.⁹ Such varieties may arise not only from fraud, but from negligence, accident, error,

Partial
variation.

¹ *Rex v. St. Faith's, Newton*, 2 D. & R. 34; and see *Fendall v. Goldsmith*, 2 P. D. 263.

² *Mayhew v. Mayhew*, 2 Phill. 11.

³ *Wakefield v. Wakefield*, 1 Hag. Con. Rep. 394.

⁴ *Sullivan v. Sullivan*, 2 Hag. Con. Rep. 238; *Wilson v. Brockley*, 1 Phill. 132, 147.

⁵ *Brealy v. Reed*, 2 Curt. 833; *Meddowcroft v. Gregory*, 2 Phill. 365.

⁶ *Rex v. Tibshelf*, 1 B. & Ad. 190.

⁷ 4 Geo. IV. c. 76, s. 22, and see *Holmes v. Simmons*, L. R. 1 P. & D. 523; but see *Midgley v. Wood*, 30 L. J. P. M. & A. 57.

⁸ Per Lord Penzance in *Holmes v. Simmons* (*ubi sup.*). The tendency of the courts would be to uphold it, as the element of fraud and the evasion of the rights of those whose consent is requisite would be absent.

⁹ *Pouget v. Tomkins*, 2 Hag. Con. Rep. 142; 3 M. & S. 262 n.

from unsettled orthography, or other causes consistent with honesty of purpose. Explanatory evidence will be received; but if unsatisfactory, the court will presume against the *bona fides* of the transaction,¹ as where part of a name is omitted,² or an additional name is inserted.³ A marriage celebrated as if by banns, but without any publication, comes within section 22 of 4 Geo. IV. c. 76, and is treated as one celebrated without due publication, and so null and void.⁴ But a marriage is valid though celebrated without banns, unless both parties were aware at the time of the ceremony of their absence.⁵

Marriage celebrated without any publication of banns null.

Mode of Publication.—All banns of matrimony are to be published in an audible manner in the church, &c., of the parish in which the persons to be married dwell,⁶ according to the form of words prescribed by the rubric prefixed to the Office of Matrimony in the Book of Common Prayer, upon three Sundays preceding the solemnization of marriage, during the time of morning service, or of evening service (if there be no morning service), immediately after the second Lesson.⁷ If the persons to be married dwell in different parishes, &c., the banns are to be published in the church, &c., belonging to the parish, &c., in which each of the said persons dwell. In all cases where banns have been published the marriage must be solemnized in one of the parish churches, &c., where the banns have been published, and in no other place.⁸ After the solemnization of any marriage under a publication of banns, it shall not be necessary in support of such marriage to give any proof of the actual dwelling of the parties in the respective parishes wherein the banns were published, nor shall any evidence be received to prove the contrary in any suit touching the validity of such marriage.⁹

Mode of publication.

¹ See the cases where partial variation occurred, *Dobbyn v. Corneek*, 2 Phill. 102; — *v. Longley*, 1 Phill. 148 *n.*; *Meddowcroft v. Gregory*, 2 Phill. 365.

² *Stanhope v. Baldwin*, 1 Add. 93; *Tongue v. Allen*, 1 Moo. P. C. 90.

³ *Green v. Dalton*, 1 Add. 289.

⁴ *Wright v. Elwood*, 1 Curt. 662.

⁵ *Greaves v. Greaves*, L. R. 2 P. & D. 432.

⁶ See also 1 Vict. c. 22, s. 33, and 3 & 4 Vict. c. 72, s. 2. The bishop may, with the consent of the patron and incumbent, authorize the publication of banns in any public chapel of the parish, or of any chapel situated in an extra-parochial place, 4 Geo. IV. c. 76, s. 3; and may license chapels in populous places for the solemnization of matrimony, 6 & 7 Wm. IV. c. 85, s. 26.

⁷ Some considerable doubt has arisen as to what is the proper place for publishing banns, whether after the second Lesson, or immediately before the sentences for the offertory, as the rubric has it; the former time is the one most generally used, and, being statutory, is the more safe.

⁸ 4 George IV. c. 76, s. 2. Where the parties live in different parishes, the rubric imposes the duty on the incumbent of the one parish not to solemnize marriage between them without a certificate of the banns having been thrice asked from the incumbent of the other parish. But if the one incumbent marry without the certificate of the other incumbent, the marriage would be valid, though the clergyman himself might be libelled in his bishop's court for an ecclesiastical offence. If the one incumbent wrongfully withheld his certificate he also might be ecclesiastically censured, and the other incumbent might validly perform the marriage.

⁹ Sect. 26. *Trec v. Quinn*, 2 Phill. 14; *Rex v. Hind*, R. & R., 253. (See notes 3 and 4 on p. 44.)

The clergy
may demand
notice

No clergyman shall be *obliged* to publish the banns of matrimony between any persons, unless they shall, seven days at least before the time required, for the first publication of such banns respectively, deliver or cause to be delivered to such clergyman a notice in writing, dated on the day on which the same shall be so delivered: (i) Of their true Christian names and surnames; (ii) Of the house or houses of their respective abodes within their parish or chapelry; (iii) And of the time during which they have dwelt, inhabited, or lodged in such house or houses.¹ No clergyman solemnizing marriage between persons, both or one of whom shall be under the age of twenty-one after banns published, shall be punishable by ecclesiastical censures for solemnizing such marriage without the consent of parents or guardians, unless he shall have notice of the dissent of the parents or guardians; and in case where such parents or guardians, or one of them, shall openly and publicly declare, or cause to be declared in the church or chapel where the banns shall be so published, at the time of such publication, his, her, or their dissent to such marriage, the publication shall be absolutely void.²

Public dissent
of parents, &c.,
renders pub-
lication of
banns void.

Republication
necessary if
marriage not
celebrated
within three
months.

If a marriage be not had within three months after the publication of banns, it will not be valid unless they have been republished in a proper and legal method,³ or the marriage is celebrated in some other manner.

Where one party to a marriage celebrated in England is resident in Scotland and the banns of such party are proclaimed according to Scotch law or custom, in the parish or place in which

¹ 4 Geo. IV. c. 76, s. 7. This section shows most clearly that publication of banns, though intended to promote notoriety and prevent secrecy in the contracting of matrimonial relations, operates with the exactly contrary effect (Report of Commission on Marriage Laws, p. vi., and Rev. S. C. Wilks' Memorial, Appendix, 16-28). The clergyman is not bound to call for any notice of particulars of name or residence of the parties to be married; all he can do is to refuse to marry unless he is furnished with such notice, and if the parties make false statements in the notice, no penalties are attached to their so doing. Indeed, if the clergyman does not insist upon having proof of a seven days' residence in his parish by one of the parties, a residence in the parish of one clear day before the notice of publication of the banns is sufficient, whereas, before a licence can be granted by the Ordinary, one of the parties must depose on oath to a fifteen days' residence in the parish of the church or chapelry in which the marriage is to be celebrated (see *post*, Licence, p. 93). The clergyman should, however, take reasonable precautions that the publication of banns should be due and proper, and if he be aware of a false description of residence he ought not to proceed with the marriage, though, if it be already solemnized, it is not thereby invalidated (*Sullivan v. Sullivan*, 2 Hag. Con. Rep. 238). But a clergyman who marries persons non-resident in his parish, and does not use diligence in his inquiries about them, is liable to ecclesiastical censures (*Nicolson v. Squires*, 16 Ves. 259. See also *Priestley v. Lamb*, 6 Ves. 421; *Wynn v. Davies*, 1 Curt. 69; *Voysey v. Martin*, Stephen's Laws relating to the Clergy, 743). If a clergyman improperly refuse to perform the marriage service, he can be proceeded against in the ecclesiastical courts (*Argar v. Holdsworth*, 2 Lee, 515). Whether he can be proceeded against by action or indictment, see *Davis v. Black*, 6 Jur. 55; and *Reg. v. Moorhouse James*, 19 L. J. M. C. 179. It is very doubtful whether he can be proceeded against by action, especially since the passing of 6 & 7 Wm. IV. c. 85, which enables parties to be married elsewhere than in their parish churches. The case of *Reg. v. Moorhouse James (ubi sup.)* can be no longer law on its special facts since 19 & 20 Vict. c. 119, s. 11.

² Sect. 8.

³ Sect. 9.

he or she is resident, such marriage in England shall not be rendered invalid only by reason of such publication being in accordance with the Scotch and not the English method.¹

(b) *The Licence*.—A licence is a dispensation which enables the parties who obtain it to be married without the publication of banns; it cannot be granted except by persons having episcopal authority. There are two kinds of licence for marriages according to the rights and ceremonies of the Church of England: the special licence of the Archbishop of Canterbury; and the Ordinary's, or common, licence, granted by the proper officer authorized to issue them. Licence.

Special Licence.—When the supremacy of the See of Rome was successfully controverted by Henry VIII., the legatine jurisdiction of granting dispensations, faculties, and licences was, however, reserved to the Archbishop of Canterbury by 25 Hen. VIII. c. 21, s. 4. This privilege was preserved to him by the Marriage Act, 4 Geo. IV. c. 76, s. 20, and by 6 & 7 Wm. IV. c. 85, s. 1. The special licence enables the parties who obtain it to dispense with the necessity of residing in any particular place before its grant, and to be married at any time or place within three months from the date of the issue. The cost of this licence, including the stamp (£5), is about £30.² Special licence ; marriage on, must take place within three months from date of issue.

(c) *Common, or the Ordinary's, Licence*.—This licence is obtained from the vicars-general appointed by the Archbishops of Canterbury and York for their respective provinces, and from the chancellors and surrogates³ appointed by the bishops for their respective dioceses, who derive this power of issuing licences both from the Common Law and 25 Hen. VIII. c. 21. The issuing of this licence is governed by 4 Geo. IV. c. 76, ss. 10–19. Common, or Ordinary's, licence.

Marriage on this licence must be celebrated in no other church or chapel than in the parish church, or in some public chapel of or belonging to the parish or chapelry within which the usual place of abode of one of the parties to be married shall have been for the space of fifteen days immediately before the granting of the licence.⁴ Fifteen days' residence by one of the parties in the district of the church or chapel in which the marriage is to be celebrated.

A caveat may be entered against this licence, which is not to issue until such caveat has been withdrawn, or it has been decided by the proper person that it ought not to obstruct the grant of the licence.⁵ Caveat may be entered against issuing of licence.

The oath to be taken before the surrogate, &c., by one of the Oath

¹ 49 & 50 Vict. c. 3, s. 1.

² It is obtainable only at the Faculty Office, Knight-riders Street, Doctors' Commons, E.C. For the wider powers of the Irish Church bishops and heads of denominational bodies in Ireland, under 33 & 34 Vict. c. 110, ss. 36, 37, see Marriage Laws of Ireland, pp. 44 to 48.

³ These surrogates must take oaths of office, and give security in a bond of £100 to the bishop of the diocese for the due and faithful execution of their office, 4 Geo. IV. c. 76, s. 18.

⁴ Sect. 10.

⁵ Sect. 11.

parties previous to the granting of the licence is to the following effect:—

of no impediment or hindrance to the marriage;

of fifteen days' residence;

of consent of proper persons, if necessary.

Marriage to be had within three months of date of issue.

Wilful non-compliance with statutory requirements voids the marriage.

Difference between banns and licences.

(i) That there is no impediment of kindred or alliance, or of any other lawful cause, nor any suit commenced (in the Probate, Divorce, and Admiralty Division of the High Court of Justice) to bar or hinder the proceeding of the said matrimony according to the tenor of the licence. (ii) That one of the parties hath for the space of *fifteen* days immediately preceding the application for the licence had his or her usual place of abode within the parish or chapelry within which such marriage is to be solemnized. (iii) That where either of the parties, not being a widower or widow, shall be under the age of twenty-one years, the consent of the person or persons whose consent to such marriage is required has been obtained thereto.¹ If, however, there be no such person having authority to give consent, the licence may issue upon the deponent making an oath to that effect.²

Unless a marriage on a licence of this kind take place within three months from the date of its issue, it is not to be solemnized until a new one be obtained, or the parties married with other legal formalities.³ The Marriage Act of Geo. IV. (in section 22) enacts that where persons wilfully intermarry without licence from a person or persons having authority to grant the same first had and obtained, or knowingly and wilfully consent to or acquiesce in the solemnization of marriage by any person not being in holy orders, such marriage shall be null and void.⁴

The difference of ideas as to notoriety associated with banns and licences has rendered necessary in the case of the latter much less strictness in the accuracy of the names of the parties; accordingly, a false Christian name or surname in a licence does not render the marriage celebrated on it void;⁵ so a mere misdescription, unless fraudulent, will not invalidate a marriage, for "in licences the identity is the material circumstance to which the court principally looks."⁶ Thus, where a man was described in a licence (not for purposes of fraud) as having two Christian names more than he really had, the marriage which took place on the licence was held valid;⁷ and a partial departure from the true name of one of the parties to a marriage in a licence obtained in the altered name by the other party, though for the purpose of concealing the intended marriage, has been held to be no cause of nullity, if the altered name may represent the person, and if

¹ 4 Geo. IV. c. 76, sect. 14.

² *Ibid.*

³ Sect. 19.

⁴ See *post*, p. 95.

⁵ *Rex v. Burton-upon-Trent*, 3 M. & S. 537. A false statement on oath before a surrogate is not indictable as perjury (*Rex v. Forster*, R. & R. 459); but as made to procure a marriage (whether celebrated or not) amounts to a common law misdemeanour (*Reg v. Chapman*, 18 L. J. M. C. 152).

⁶ *Ewing v. Wheatley*, 2 Hag. Con. Rep. 175, 184; *Cope v. Burt*, 1 Hag. Con. Rep. 434; see also *Clowes v. Clowes*, 2 Not. of Cas. 1.

⁷ *Haswell v. Haswell and Gilbert*, 51 L. J. P. D. & A. 150.

the licence had been obtained for and by the direction of that person;¹ but a like alteration of names in a publication of banns would be a ground for annulling the marriage.²

As in banns, the guilty and fraudulent knowledge of both parties must be proved before a marriage celebrated on a licence obtained from a person not having authority to grant it will be rendered void.³ Where parties marry without a licence, and both are at the time of the ceremony unaware of its absence, the marriage is valid.⁴

(d) *On the Registrar's Certificate.*—Since the passing of 6 & 7 Wm. IV. c. 85 (amended by 7 Wm. IV. and 1 Vict. c. 22), which made a solemn change in the laws governing and regulating marriages in England, the certificate of the superintendent-registrar is now held equivalent to publication of banns or episcopal licence. It is only optional, and not obligatory on the part of the clergy of the Church of England to marry persons who have obtained this certificate.⁵ The method of obtaining it will be treated of under the heading of Nonconformist marriages.⁶

(e) *Presence of a duly Ordained Minister.*—As it has been conclusively laid down that the presence of a duly ordained minister at the ceremony is by the common law indispensable to a complete and regular marriage,⁷ the parties must be married in church⁸ in the presence of a duly ordained minister of the Church of England. A clergyman cannot validly marry himself; some other clergyman must perform the ceremony.⁹ The question has been debated whether, if a person holding himself out to be a properly ordained minister performs the ceremony, but in reality is not a clergyman at all, and the parties are ignorant of his imposture, the marriage is a good one. Lord Stowell, in *Hawke v. Corri*,¹⁰ said it was a generally credited opinion that the marriage should be upheld, because parties who came to be married were not expected to ask for a sight of the minister's letters of orders; and if they saw them, they could not be expected to inquire into the authenticity. Sir R. Phillimore¹¹ holds that section 22 of Geo. IV. c. 76¹² confirms Lord Stowell's dictum in the above case. On the other hand, the presence of an official witness to a marriage ceremony is necessary. The case of *Reg. v. Millis*¹³ has

Registrar's certificate.

Clergy of the Church of England not bound to accept it.

Presence of duly ordained minister.

Whether marriage celebrated before person not in holy orders valid.

¹ *Beran* (t. c. *McMahon*) v. *McMahon*, 30 L. J. P. & M. 61.

² *Ibid.* ³ *Dormer v. Williams*, 1 Curt. 870.

⁴ *Greaves v. Greaves*, L. R. 2 P. & D. 432.

⁵ 19 & 20 Vict. c. 119, s. 11.

⁶ *Post*, p. 97.

⁷ *Reg. v. Millis*, 10 Cl. & F. 534; *Catherwood v. Cuslon*, 13 L. J. Ex. 433; *Culling v. Culling*, [1896] P. 116.

⁸ Unless they have a special licence to be married out of church, *ante*, p. 93.

⁹ *Beamish v. Beamish*, 9 H. L. Cas. 274.

¹⁰ 2 Hag. Con. Rep. 280, 288.

¹¹ *Eccles. Law*, 804, 805.

¹² If any persons shall knowingly and wilfully consent to or acquiesce in the solemnization of such marriage by any person not being in holy orders, the marriages of such persons shall be null and void to all intents and purposes whatsoever.

¹³ 10 Cl. & F. 534.

decided that a marriage to be valid at common law must be celebrated in the presence of a duly ordained clergyman of the Church of England; and the Marriage Act of 4 Geo. IV. was passed before that decision was given. Since the Registration Acts the presence of a marriage registrar, or in the case of Nonconformists a duly authorized person, is equivalent to that of a duly ordained clergyman of the Church of England. Marriage according to the forms of the Church of England must be performed by a minister of the Established Church—*per presbyterum sacris ordinibus constitutum*.¹ But the judges have avoided deciding the question,² and it is still open. In 1888 a person was convicted of uttering forged letters of orders by means of which he passed as a clergyman of the Church of England and was appointed to more than one living;³ while so beneficed he had solemnized several marriages between persons believing him to be properly ordained. Doubts were raised as to the validity of these marriages, and an Act was passed validating them.⁴

Reg. v. Ellis.

If both parties go through the form of marriage according to the ceremonies of the Church of England before a person whom they know to be not a duly ordained minister, their marriage is null and void.⁵ But where the parties honestly believe the person by whom they are married to be a duly ordained clergyman, or official of the authorized class, their marriage ought to be held valid and binding in law, notwithstanding any defect in the orders, title, or authority of the person so officiating; and a general enactment to this effect should be passed.

Canonical
hours 8 A.M.
to 3 P.M.

All marriages, except those on the special licence, must be celebrated in church in the presence of two or more witnesses, and between the hours of eight in the morning and three in the afternoon.⁶

Marriage in
church or
chapel.

The parties must be married in the church or chapel in which the banns have been proclaimed, or which has been mentioned in the licence, unless dispensed with by a special licence;⁷ but a marriage solemnized in a vestry which forms part of the church is good.⁸

Where to be
celebrated
when church or
chapel under
repair.

If the parish church or chapel is under repair, marriages may be had in some building in the parish licensed for the perform-

¹ Cripps, *Law of the Church and Clergy*, 636.

² *Rea v. Luffington*, Burr. Sett. Cas. 232.

³ *Reg. v. Ellis*, Suffolk Summer Assizes, 1888; 16 Cox, C. C. 469.

⁴ 51 & 52 Vict. c. 28 (Marriages Validation Act, 1888). The author raised these doubts, and communicated them to persons placed in high office, and the Act was passed in consequence. It seemed too full of risk to allow the question of their validity or invalidity to be raised between the parties with the chance of issue being bastardized, the devolution of property altered, and even of attempts made by either party to the marriage to set aside the matrimonial relationship of which he or she might have grown tired.

⁵ 4 Geo. IV. c. 76, s. 22.

⁶ 49 & 50 Vict. c. 14. This Marriage Act does not extend to Scotland or Ireland.

⁷ 4 Geo. IV. c. 76, s. 22.

⁸ *Wing v. Taylor* (f. c. *Wing*), 30 L. J. P. & M. 258.

ance of divine service; or if there be no such licensed place, then in some adjoining parish or chapelry.¹

(2) *Essential Requirements of Nonconformist Marriages.*—The Acts of 6 & 7 Wm. IV. c. 85, 19 & 20 Vict. c. 119, and 61 & 62 Vict. c. 58, have placed almost all the religious bodies not in communion with the Church of England on an equal footing in respect of the marriages of their members, who now need not have recourse to the churches of the Establishment to render their unions lawful; but can celebrate them in the churches or chapels of their respective denominations. Further, these statutes afford to *all* persons, whether members of the Established Church or Nonconformists, wishing to marry, a choice between a *religious* and *civil* ceremony; and under the earliest Act for the first time in the history of the matrimonial laws of England, as before noticed, the intervention of one in holy orders was rendered no longer necessary to a regular and valid marriage. Marriage can now be celebrated before a civil officer in a building not set apart for religious worship or before duly authorized persons in properly registered buildings set apart for religious purposes either with or without the presence of the civil officer. The preliminary requirements for these marriages, whether with civil or religious rites, are:—

Effects of 6 & 7 Wm. IV. c. 85, 19 & 20 Vict. c. 119, and 61 & 62 Vict. c. 58.

Intervention of person in holy orders no longer necessary for non-Church of England marriages.

The registrar's certificate; or the registrar's licence.

(a) *The Registrar's Certificate.*—Persons desirous of obtaining a certificate from the superintendent-registrar for a marriage in some registered building, or in the office of the superintendent-registrar, must give to the superintendent-registrar or respective superintendent-registrars (as the case may be), in whose district or districts they must have lived at least seven days before the application is made, a notice² containing (i) the name or surname;³ (ii) the profession or condition of each of the parties intending marriage; (iii) the dwelling-place of the party giving the notice; (iv) the time during which he or she has dwelt therein;⁴ (v) and the church⁵ or other building in which the marriage is to be solemnized.⁶ This notice is to be accompanied by an affidavit, the two forming one document, to be signed and subscribed by the party making it in the presence of the superintendent or district registrar. Any false statements in the declaration will be visited with the penalties of perjury.⁷

Marriage on the registrar's certificate.

The notice. Its contents.

¹ 5 Geo. IV. c. 32, s. 2.

² For what is a due notice under these Acts, see *Holmes v. Simmons*, L. R. 1 P. & D. 523.

³ A surname acquired by repute, and not for the purposes of concealment or fraud, though not the true name, is sufficient. *Reg. v. Smith*, 4 F. & F. 1099.

⁴ If either party has resided a full calendar month previous to the application, a statement of residence of "one month and upwards" will be enough.

⁵ The reference to a *church* would be omitted if the notice were given in an application for a *licence*.

⁶ 6 & 7 Wm. IV. c. 85, s. 4.

⁷ 19 & 20 Vict. c. 119, s. 2.

The declaration, its contents.

The declaration must state: (α) that the declarant believes that there is no impediment of kindred, or alliance, or other lawful hindrance to the marriage; (β) that the parties have for the space of seven days immediately preceding the giving of such notice had their usual place of abode and residence within the district of the superintendent-registrar or respective superintendent-registrars; (γ) that where either of the parties, not being a widower or widow, shall be under age, the consent of the person or persons whose consent to such marriage is by law required has been given, or that there is no such person who could give the requisite consent.¹ Without this declaration no certificate is to be issued.²

Suspension of notice twenty-one clear days.

This notice must be suspended or affixed in some conspicuous place in the office of the superintendent-registrar twenty-one consecutive days next after the date of entry in the "Marriage Notice Book."³

Issue of certificate forbidden. Effect.

The issuing of the certificate may be forbidden by any person authorized to do so; and if the certificate has issued, the effect of the forbidding is to render all proceedings consequent upon the notice void.⁴ Unless forbidden, the issue of the certificate is made twenty-one successive or clear days after the day of entry of the notice⁵ by the superintendent-registrar to whom the notice was given;⁶ and the certificate is to hold good for three months from the date of its issue.⁷

Marriage on the registrar's licence.

Fifteen days' residence by one of the parties in the district of the supt-registrar to whom the notice is given.

(b) *The Registrar's Licence*.—When a marriage is intended on the registrar's licence, the same notice must be given as for a certificate, except that the affidavit accompanying the notice must state that one of the parties has had his or her usual place of abode and residence in the district of the superintendent-registrar to whom the notice is given for at least *fifteen* days immediately preceding the giving of the notice.⁸

Issue of licence.

On an application for a licence this notice need not be suspended in the registrar's office.⁹ After the expiration of one whole day next after the date of the entry in his "Marriage Notice Book," the superintendent-registrar who received the notice may grant a licence to marry to the party giving the notice, unless its issue has been in the meanwhile forbidden. The licence is valid for three months from the date of its issue.¹⁰

¹ See 6 & 7 Wm. IV. c. 85, s. 10, for those who are entitled to give or withhold their consent.

² 19 & 20 Vict. c. 119, s. 2.

³ *Ibid.* s. 4.

⁴ 6 & 7 Wm. c. 85, s. 9. A caveat on the payment of five shillings may be lodged against the grant of a certificate; and its issue is to be withheld until the caveat is removed, or has been held not to warrant the refusal to issue the certificate. *Ibid.* s. 13.

⁵ 19 & 20 Vict. c. 119, s. 4.

⁶ *Ibid.* s. 2.

⁷ 6 & 7 Wm. IV. c. 85, s. 15; 19 & 20 Vict. c. 119, s. 9.

⁸ 19 & 20 Vict. c. 119, s. 2.

⁹ *Ibid.* s. 5.

¹⁰ *Ibid.* s. 9.

Wilful false statements, even if made by both parties, would not render a marriage celebrated on a licence null and void, on the ground of want of due notice. The penalty of fraudulently giving a false name is perjury,¹ and a forfeiture of property at the suit of the Attorney-General.² If persons knowingly and wilfully intermarry without due notice to the registrar, or without a certificate of notice duly issued, the marriage is null and void;³ but where a notice is in a wholly false name (which must be fraudulently done), it may be doubted whether that is a notice at all.⁴

Perjury by both parties not a ground of nullity.

The following is a sketch of the differences in the provisions affecting marriages celebrated on a certificate and those celebrated on a licence:—

Differences between certificates and licences.

(1) *Notice.*

As to notice.

(a) *Certificate.*—If the parties intending marriage reside in the districts of different registrars, notice must be given to the registrars of both districts, and must state how long they have resided therein;⁵ and the notice must be suspended twenty-one successive days in the office of the registrar.⁶

Certificate.

(b) *Licence.*—If the parties live in different districts, notice need be given to the registrar of only *one* district, and only the party giving notice need state how long he or she has had his or her usual place of abode in the district.⁷ The notice need not be suspended at all in the registrar's office.⁸

Licence.

(2) *Residence.*

As to residence.

(a) *Certificate.*—Both parties must have had their usual place of abode for *seven* clear days before notice given in their respective districts (if more than one).⁹

Certificate.

(b) *Licence.*—The party giving the notice must have resided *fifteen* clear days in the district of the registrar to whom the notice is given, irrespectively of the length of residence of the other party, whether in the same or different districts.¹⁰

Licence.

(3) *Time of Issuing Certificate.*

As to time of issuing certificate.

(a) *Certificate.*—*Twenty-one* clear days after date of entry in "Marriage Notice Book."¹¹

Certificate.

(b) *Licence.*—*One whole day* next after date of entry in "Marriage Notice Book."¹²

Licence.

When the certificate or licence is granted by the registrar the parties are at liberty to marry (according to the ritual of their denomination) in the building (registered for the solemnization of marriage) mentioned in the certificate or licence, and no other;¹³ but the consent of the trustees, owners, deacons, or

Marriage in a registered building.

¹ 6 & 7 Wm. IV. c. 85, s. 38.

³ *Ibid.* s. 42.

⁵ 19 & 20 Vict. c. 119, s. 2.

⁷ *Ibid.* ss. 2, 6.

¹¹ *Ibid.* s. 4.

⁸ *Ibid.* s. 5.

¹² *Ibid.* s. 9.

² *Ibid.* s. 43.

⁴ See *Holmes v. Simmons*, L. R. 1 P. & D. 523.

⁶ *Ibid.* s. 4.

⁹ *Ibid.* s. 2.

¹⁰ *Ibid.* ss. 2-6.

¹³ 6 & 7 Wm. IV. c. 85, s. 42.

managers thereof, or of the officiating minister of any registered building of the Church of Rome, or of any church or chapel of the Church of England, must be first obtained.¹ If both parties knowingly and wilfully marry in some place other than the proper church or building, their marriage is null and void.² The marriage must take place between the hours of eight A.M. and three in the afternoon. If the marriage is not to take place in any of the foregoing churches, or registered buildings, the parties may be married at the registry office in the presence of the superintendent-registrar and some district registrar, under the like conditions as marriages celebrated elsewhere. No religious forms or ceremony are allowed to be used, but the parties must at some time or other express their mutual consent to take each other as man and wife.³

Marriage celebrated between 8 A.M. and 3 P.M.
Marriage in the registrar's office.

No religious ceremony is to be used.
Mutual consent must be expressed.

Nonconformist marriages under Marriage Act, 1898.

A further and material alteration in the marriage law of England has been brought about by the Marriage Act of 1898.⁴ Under the Registration Act of 1836⁵ the presence of the registrar of the district in which the marriage of the Nonconformists (other than Jews and Quakers) was to take place was requisite. This grievance, at once irksome and anomalous, has now been removed. The marriages of Nonconformists may be celebrated (as before) in registered buildings certified to be set apart for religious purposes by the governing body or trustees of the building,⁶ and in the presence of a duly authorized person,⁷ who is defined by the Act to be a person certified as having been duly authorized for the purpose by the trustees or other governing body of the building, or of some registered building in the same registration district;⁸ and the presence of the registrar is not necessary. When the parties do not give notice to the superintendent registrar of their intention to be married at his office he is to give to one of the parties a certificate entitling them to be married at the registered building of their choice.⁹ But if the parties desire the presence of the district registrar, he is bound to be present.¹⁰

The authorized person in whose presence the marriage has taken place must, like the clergy of the Church of England, immediately after the marriage register in duplicate the proper particulars and sign the entry, and see that it is signed by the parties and two witnesses,¹¹ and shall at the proper times forward signed copies of the entries in his marriage register book to the

¹ 19 & 20 Vict. c. 119, s. 11.

² 6 & 7 Wm. IV. c. 85, s. 42.

³ 6 & 7 Wm. IV. c. 85, ss. 20, 21; and 19 & 20 Vict. c. 119, s. 12.

⁴ 61 & 62 Vict. c. 58.

⁵ 6 & 7 Wm. IV. c. 85.

⁶ So far as Roman Catholics are concerned, the words "trustees or governing body" shall include the bishop or vicar-general of the diocese. Sect. 1 (3).

⁷ Sect. 4.

⁸ Sect. 6 (3).

⁹ Sect. 5.

¹⁰ Sect. 10.

¹¹ Sect. 7.

superintendent registrar of his district.¹ If an authorized person refuses or fails to comply with respect to the solemnization and registration of marriages, he is liable to be convicted either on summary conviction or indictment, and if convicted he ceases to be an authorized person.²

The important question of what is undue publication of banns, and the effect of false names in the common licence of the Ordinary have been touched upon;³ and it is not now necessary to do more than state that since the provisions of the Registration Acts inflicting the penalties of perjury upon wilful false statements in the declaration sworn before surrogates, &c., or marriage registrars, the analogy, if any existed, between marriages by banns and marriages by notice to the surrogates or registrar, has been effaced. Nullity is no longer the sequel of a mis-statement in declaration or notice does not avoid marriage.⁴ There is, then, this striking anomaly, that a material falsehood, which renders a marriage celebrated on the publication of banns null and void, merely operates to create a forfeiture of property in a marriage on the Ordinary's licence, or a registrar's certificate, and subjects the parties to a prosecution for perjury. If the parties choose the one method of marriage, they are man and wife; if the other, they are as though they had never been married; both methods are open to them, but in ignorance of the law their election is unhappy. On the other hand, material false statements made to the clergyman before publication of banns do not entail any personal duress or restraint as a punishment; but if made to the surrogate or registrar, are visited with the pains and penalties of perjury. The law strikes unevenly and unfairly, and serious modifications, tending to uniformity and symmetry, are much needed in this branch of English jurisprudence.

Re-marriages.—Persons after being married civilly before the registrar, at his office, may, if they so desire, add the religious ceremony provided by the church or denomination to which they belong, and the clergyman or minister of such church or denomination may, after notice given to him, and on production of the registrar's certificate, perform the marriage ceremony according to the accustomed rites, as supplemental to, but not in supersession of, the civil ceremony. This religious ceremony is not to be registered as a marriage.⁵ It is sometimes considered expedient to add this second marriage where there has been a civil mixed

Re-marriages.

Religious ceremony supplemental to, but not in supersession of, the civil. Under what circumstances the ceremony added.

¹ Sect. 11.

² Sect. 12.

³ See *ante*, Due Publications of Banns, pp. 89-91; Common Licence, p. 93; Registrar's Certificate, p. 97.

⁴ *Holmes v. Simmons*, L. R. 1 P. & D. 523; see also the earlier cases of *Piers v. Piers*, 2 H. L. Cas. 331; and *Lane v. Goodwin*, 12 L. J. Q. B. 157.

⁵ 19 & 20 Vict. c. 119, s. 12; *Hammick*, pp. 131-133 and 199-202.

marriage, as between a member of the Church of England and a Roman Catholic, or Jew; or where the parties domiciled in England have married abroad; or where there has been some invalidity in the previous marriage; but this course ought not to be pursued where children have been already born.

Marriages of Quakers and Jews.—The privilege of celebrating their marriages according to their own forms and ceremonies has always been allowed both to Quakers and Jews: to the former, because of their quiet resistance to any pressure put upon them by those in authority to make them conform to the usages of the Established Church;¹ to the latter, less because of any regard for their feelings if compelled to have recourse to the churches of Christians, than from the idea of the churches being polluted by their presence, and they have ever been reckoned an alien race.

Quakers.—Quaker marriages were excepted from the provisions of 26 Geo. II. c. 33, and 4 Geo. IV. c. 76, and were expressly recognized by 6 & 7 Wm. IV. c. 85. s. 20.

Marriages according to the rites of Quakers may be celebrated either on the registrar's certificate or licence,² after the usual and proper notice has been given. The persons to be married may be both Quakers, or only one a Quaker, or neither of them a Quaker. When one or both of the parties does or do not belong to the Society of Friends, the notice to the registrar must always be accompanied by a certificate signed by some registering officer of the Society of Friends, to the effect that the party by whom or on whose behalf such notice is given, or each such party (as the case may be), is authorized thereto in pursuance of some general rule or rules of the said society.³

After the certificate or licence is obtained, the parties must be married within three months from the date of its issue, but not necessarily in the district or districts in which they dwell,⁴ according to the rites of Quakers, in the presence of some registering officer of the society, and of two other witnesses.

Jews.—Jews, like Quakers, were excepted from the provisions of Lord Harkwicke's Act, and 4 Geo. IV. c. 76, and their marriages were expressly recognized by 6 & 7 Wm. IV. c. 85, s. 2; but before the latter date the validity of Jewish marriages was accepted by the courts.⁵

According to 6 & 7 Wm. IV. c. 85, s. 2, both parties must be

¹ 6 & 7 Wm. & M. c. 6, ss. 57, 58; Sewell, Hist. of Quakers, 492; and 1 Hag. Con. Rep. Appendix, p. 9.

² 6 & 7 Wm. IV. c. 85, s. 2; 19 & 20 Vict. c. 119, s. 21.

³ 35 Vict. c. 10, s. 1, which repealed the proviso in 23 Vict. c. 18, s. 1, requiring profession with, if not membership of, the society on the part of both persons intending to be so married.

⁴ 3 & 4 Vict. c. 72, s. 5.

⁵ *Horn v. Noel*, 1 Camp. 61.

Marriages of
Quakers and
Jews.

Quakers.
Their mar-
riages recog-
nized.

Where only
one or neither
party is a
Quaker.

Parties must
be married in
the presence of
registering
officer of a
meeting-house.

Jews.

Their mar-
riages recog-
nized.

Both parties
must be Jews.

Jews in order to contract a valid marriage celebrated in conformity with the Jewish rites; but where the validity of a marriage and legitimacy of children depended upon reputation, a marriage between a Jew and a Christian woman was held valid on evidence of repute that they had lived together as man and wife.¹

The question of the validity or invalidity of these marriages is to be settled by the laws prevailing among the Jews, and evidence of such will be admitted;² and if it prove that the parties are not married by Jewish law, the marriage will be held invalid.³ But the capacity of domiciled British Jews to contract marriage is regulated by the laws of England; and such Jews are affected by the Table of Prohibited Degrees.⁴ If Jews are married according to the rites and ceremonies prevailing among Christians, they must conform to the regulations of the Marriage Acts.⁵

Questions of validity settled by Jewish law.

After giving the proper and usual notice to the superintendent-registrar, Jews may be married on the certificate or licence.⁶ The marriage must be celebrated in the synagogue of the husband in the presence of the secretary of the husband's synagogue, and be registered by him. If the man and woman are living in different places, but it is desired to celebrate the marriage in the place where the woman resides, the man must qualify himself as a member of the woman's synagogue. The Act of Wm. IV. does not direct that the secretary of the synagogue shall be present at the marriage, yet he, as the official witness, ought to satisfy himself before registering the marriage of its regularity, and that a due compliance has been made with all requisite and proper formalities.

Registration of the marriage by the secretary of the husband's synagogue.

It will have been noticed that Quakers and Jews have always possessed a privilege which has lately been extended to all nonconforming bodies. At their marriages the presence of a registrar is dispensed with; and the official witness for Quakers is the registering officer of the meeting-house, and for Jews the secretary of the synagogue.

Official witness at the marriages of Quaker and Jews.

Up to very recent times the usual method of validating a marriage as to the legality of which there existed a doubt by reason of some informality, was the passing of an Act of Parliament declaring such marriage to be good and valid; but now the machinery of Provisional Orders and local inquiries has been applied to such a marriage. A Secretary of State (presumably the Home Secretary) may now, in the case of marriages solemnized

Validation of marriages invalid or of doubtful validity.

¹ *Goodman v. Goodman*, 28 L. J. Ch. 745.

² *Goldsmid v. Bromer*, 1 Hag. Con. Rep. 324.

³ *Lindo v. Belisario*, 1 Hag. Con. Rep. 216, 244.

⁴ *Re De Wilton, De Wilton v. Montefiore*, [1900] 2 Ch. 481.

⁵ *Jones v. Robinson*, 2 Phill. 285.

⁶ 6 & 7 Wm. IV. c. 85, s. 2; 19 & 20 Vict. c. 119, s. 21.

in England appearing to him to be invalid or of doubtful validity by reason of some informality, make a Provisional Order for the purpose of removing the invalidity or doubt.¹ The draft of such order is to be advertized not less than one month before the order is made; and the Secretary of State is to consider all objections to it sent to him in writing during the month; and he shall, if it appears necessary to him, direct a local inquiry into the validity of any such objection.² Such order is to be no force unless confirmed by Parliament; and the Secretary of State may bring in a Bill confirming the order. If a petition is presented against the order while the Bill is pending before Parliament, the Bill, so far as it relates to the order, may be referred to a select committee, and the petitioner shall be allowed to appear and oppose as in the case of private Bills.³

SECTION 3.

Marriages of English Subjects celebrated Abroad.

Marriages of English subjects celebrated abroad.

Marriages of non-British subjects celebrated abroad.

Valid by the *lex loci contractus* valid everywhere.

American theory.

English law exceptions; marriages involving incest and polygamy.

This section deals with a complicated branch of the law, upon which neither legislation nor the decisions of the court are clear and indubitable. Before passing on to discuss foreign marriages of British subjects, brief mention will be made of the marriages of non-British subjects celebrated abroad. These may be succinctly disposed of by stating the general and broad proposition, that the English courts will recognize as valid the marriage of foreigners who have conformed to the essentials of the contract to the requirements of the law of the domicile of the parties; and in the ceremonials to the requirements of the law of the locality in which the parties solemnized their union. Some writers on this province of the law, more especially American authors, would make this proposition of the widest possible scope, so that in all cases the Government of each State "ought to accept all marriages celebrated within the territorial limits of other States (and valid by their laws), whether such as itself approves or not and whether between its own citizens, or between others, as good and lawful."⁴ Not all jurists, however, go to this length.

The ordinary exceptions to this rule, as far as can be gathered from the earlier decisions of the English courts, were marriages between parties which violated some general and well-recognized prohibition imposed by Christianity to prevent incest and polygamy. Accordingly, a Mormon marriage has not been recognized in England so as to found divorce proceedings;⁵ so,

¹ Provisional Order (Marriages) Act, 1905 (5 Edw. VII. c. 23), s. 1 (1). This machinery doubtless has been substituted for that of a private Bill to save the time of Parliament, and to ensure the validation being speedily obtained.

² *Ibid.* s. 1 (2).

³ *Ibid.* s. 1 (3).

⁴ Bish. Mar. and Div. s. 360.

⁵ *Hyde v. Hyde and Woodmansee*, L. R. 1 P. & D. 130. It may, however, be taken

too, a marriage celebrated according to the forms of a savage African tribe in which polygamy was permissible¹ has not been recognized.

But a decision of the Court of Appeal has clearly imported another requisite which hitherto, it is submitted, has not been deemed essential by the law of England, namely, that *the marriage must be valid according to the law of the domicile of the parties*; and if not, though valid by the law of the place of celebration, it is invalid both there and everywhere.² This decision must, if followed in the future, and not overruled, impose on the courts the invidious and onerous task of discovering whether or not a marriage celebrated between foreigners in a country not their domicile, was or was not valid by their *lex domicilii*, though the court has not the proper means of duly investigating the fact.

(1) *Marriages of British Subjects celebrated Abroad.*

(a) *On Foreign Territory.*—The English courts will recognize the marriages of British subjects sojourning in foreign parts if celebrated according to the forms required in those countries and valid by their laws, and between parties who are not prohibited from contracting marriage by the laws of England by reason of nearness of blood, or affinity, or a previous marriage.³ This has been the doctrine of the courts of England for a long succession of years, and was based on the reason that confusion and mischief would arise if marriages validly celebrated abroad, in accordance with the laws of the place of celebration, were not recognized as good and lawful by the courts of the domicile of the marrying parties;⁴ but a marriage invalid by the *lex loci celebrationis*, where one of the parties is subject to the local law, is invalid by English law.⁵

Marriages of British subjects celebrated abroad; on foreign territory.

Lord Stowell has laid down the principle which the English law affords as applicable to the elucidation of these matters—viz., to refer the question of the validity of the marriage to the laws of the place where it was celebrated.⁶ Of course, it is quite competent for the law of England expressly to prohibit certain marriages between those persons who are subject to it; and if English subjects proceed on purpose to evade their own laws to other places where such prohibited marriages are lawful, the English courts are bound to treat these marriages as null and void,⁷ and

that the issue of a polygamous marriage between non-Christians in a non-Christian country where it was validly celebrated would be held legitimate in England, at any rate for succession to personal property.

¹ *Re Bethell, Bethell v. Hildyard*, 38 Ch. D. 220.

² *Sottomayor v. De Barros*, 3 P. D. 1. This case is more fully criticized in the chapter on The International Aspect of Marriage and Divorce; see *post*, chap. xviii.

³ *Smith v. Smith*, 51 L. J. P. & D. 46.

⁴ *Scrimshire v. Scrimshire*, 2 Hag. Con. Rep. 395. See also *Harford v. Morris*, *ibid.* 423; and *Middleton v. Janverin*, *ibid.* 437.

⁵ See *Re Alison's Trusts*, 31 L. T. 638.

⁶ *Dalrymple v. Dalrymple*, 2 Hag. Con. Rep. 54.

⁷ *Brook v. Brook*, 9 H. L. Cas. 193.

this on the clear principle of the territorial sovereignty of England. This is not by any means the same proposition as that enunciated in the recent case of *Sottomayor v. De Barros*.¹ The English law has a perfect right to say to those who are subject to it that it will not recognize certain marriages contracted by them, whether at home or abroad. But if this case be properly decided, the law of England, which holds two parties who are quite competent by it to contract a marriage, is to be told by a foreign law that it must not recognize their union, because the requisites of their domiciliary law have not been satisfied or legally dispensed with. This is a near approach to the surrender of the theory of the territorial independence of free nations.

Diriment
prohibitions.

Impedient
prohibitions.

Down to the decision in the last-mentioned case, the only prohibitions rendering British subjects incompetent to contract valid marriages were *diriment*, such as by the law of England prevented parties from contracting an union that would be recognized by it, viz., incest, and polygamy or a previous marriage. To these, seemingly, a third must be added—a want of capacity to marry by the foreign domicil of the parties. *Impedient* prohibitions, which could be waived or overcome, and concerned the form and ceremony rather than the essence of the contract, were never held to invalidate the marriage of Englishmen contracted abroad in accordance with the requisites of the foreign country. It mattered not whether the parties were *bonâ fide* sojourning in alien territory, or went there for the sole and evident purpose of evading the restrictions of the law of their domicil.² In either case, if competent to marry by the law of England, they contracted a valid marriage if it conformed to the requirements of the law of the country in which they formed their union.

Statutory ex-
ceptions.

Foreign
Marriage Act,
1892.

Certain exceptions to the rule requiring conformity to the *lex loci celebrationis* have been made in favour of marriages of British subjects, or where one of the contracting parties is a British subject, celebrated outside of the United Kingdom before the proper officer, and in accordance with the statutory requirements.³ This branch of the law has been codified by the Foreign Marriage Act, 1892.⁴ The marriage is to be celebrated by or in the

¹ 3 P. D. 1.

² The *Gretna Green* marriages afford a clear and unmistakable instance and proof that the English courts recognized as valid marriages celebrated abroad and satisfying the requisites of the foreign country. The parties who went across the Border could not, and did not, conceal that they went to Scotland for the sole purpose of evading the law of England, which required the consent of the proper parties to a valid marriage. When they had made themselves man and wife by the ceremony *per verba de presenti*, valid enough in Scotland, though not in England, they turned back, and their marriage was never questioned, or if questioned, upheld. See *Gardner v. Att.-Gen.*, 60 L. T. 839.

³ For other exceptions to the doctrine that conformity to the *lex loci*, at any rate in the matter of forms and ceremonies, is needful for a valid marriage, see *post*, chap. xviii.

⁴ 55 & 56 Vict. c. 23, repealing the following statutes 4 Geo. IV. c. 91; 12 & 13 Vict. c. 68; 31 & 32 Vict. c. 61; 53 & 54 Vict. c. 47; 54 & 55 Vict. c. 74.

presence of a marriage officer.¹ A marriage officer is one authorized by a warrant issued and signed by a Secretary of State, or one who, under the marriage regulations of the Act, is authorized to act without such warrant.² The following may be authorized by warrant to act as such—(i) A British ambassador, and any officer prescribed as an officer for solemnizing marriages in the official house of an ambassador, (ii) a British consul,³ (iii) a British governor, high commissioner, or resident or consular, or other officer appointed to act in their place as such marriage officer;⁴ (iv) the commanding officer on board one of H.M. ships on a foreign station.⁵ A marriage officer shall not allow a marriage to be solemnized in his presence, if in his opinion such would be inconsistent with international law or the comity of nations.⁶

Marriage
officers.

(i) *Marriages in Official House of British Ambassador.*—A British ambassador, if authorized by warrant, or any officer prescribed as a marriage officer,⁷ may solemnize a marriage in the ambassador's official house, or in the Embassy chapel, if declared under the Act to be part of the official house.⁸ Where the marriage can be solemnized at a British consulate, the marriage is not to be solemnized in the Embassy house without the leave of the ambassador.⁹

(ii) *Marriages in Official House of British Consul.*—A consul, if authorized by warrant as a marriage officer, may solemnize in his official house.¹⁰

(iii) *Marriages in Official House of British Governor.*—A governor, high commissioner, resident, consular or other officer, or a person appointed to act as a marriage officer in his place, if authorized by warrant, may solemnize marriage in his official house.¹¹

(iv) *Marriages on Board H.M. Ships.*—The commanding officer of one of H.M. ships on a foreign station, if authorized by warrant as a marriage officer, may solemnize marriage on board of her.¹² The chaplain of one of H.M. ships may celebrate a marriage on board without a licence.¹³

One of the parties to a marriage solemnized by any of such marriage officers must be a British subject, or the marriage will not be deemed valid.¹⁴

¹ Sect. 8.

² Sect. 11 (a), (b).

³ This expression includes consul-general, consul, vice-consul, pro-consul, or consular agent. Sect. 24.

⁴ In such cases the application of the Act is not limited to places outside his Majesty's dominions. Sect. 11, sub-s. 2 (c).

⁵ Sect. 12.

⁶ Sect. 19. There is, however, a right of appeal to a Secretary of State against such decision.

⁷ Sect. 21 (f).

⁸ Sects. 11, 21 (b).

⁹ Regulations made by Order in Council under sect. 7 of the Act, dated October 4, 1892 (*London Gazette*, November 4, 1892, p. 6161).

¹⁰ The official house is the office at which the business of such officer is transacted.

¹¹ Sect. 11, sub-s. 2 (c).

¹² Sect. 12.

¹³ *Culling v. Culling and Nicholson*, [1896] P. 116.

¹⁴ Sect. 1. See *Pertreis v. Tondear*, 1 Hag. Con. Rep. 136.

Statutory Requirements for a Valid Marriage.—These are based on the Marriage Registration Acts. One important alteration was introduced by the Foreign Marriage Act, 1891, which has been preserved by the present statute—viz., the abolition of the “licence for marriage”; and a marriage can only be solemnized after the notice has been posted for fourteen consecutive days.¹

Notice,
stating names,
condition,
residence.

Notice sus-
pended for
fourteen days.

Solemnization
in presence of
marriage
officer.

Caveat.

Notice good
for three
months only.
Oath before
marriage.

A notice stating names, condition, and residence of the parties, &c., must be signed by one of them and given to the marriage officer within whose district *both* of the parties have had their residence not less than one week preceding the giving of the notice, which must state that they have so resided.² This notice is to be filed and a copy suspended in a conspicuous place in the office during fourteen consecutive days;³ after which the marriage may be solemnized at the official house of the marriage officer, with open doors, between 8 A.M. and 3 P.M., before two or more witnesses. The marriage must be solemnized either by the marriage officer or in his presence, whether it is according to the rites of the Church of England, or after any other form or ceremony.⁴

A caveat may be lodged with the marriage officer, and the marriage is not to be solemnized until such caveat is withdrawn, or the marriage officer is of opinion that it ought not to obstruct the marriage.⁵

The marriage must be solemnized within three months after giving the notice, or such notice will be void.⁶

Before the marriage the parties must make and subscribe an oath of belief of no impediment to the marriage by reason of kindred or alliance; that both have had for three weeks immediately preceding their usual residence within the district of the marriage officer; and, where either of the parties, not being a widower or a widow, is under twenty-one, that the consent of the proper parties has been obtained.⁷ The punishment for making a false oath and notice is the penalties of perjury,⁸ and if any interest has accrued to the offending party by reason of the marriage, the Attorney-General may sue for the forfeiture of such interest.⁹

The above requirements may be modified in the case of marriages to be solemnized on board ships of war on a foreign station.¹⁰ Under the Regulations of October 2, 1892, these have been modified in respect of these marriages by providing that not less than three weeks' notice of the intended marriage should be given in such public manner or to such relations or friends of the parties as to satisfy the commanding officer that as much notice of the intended marriage had been given as if it had taken place in England, and that it was not clandestine.

¹ Sect. 3.

² Sect. 2.

³ Sect. 3.

⁴ Sect. 8.

⁵ Sect. 5.

⁶ Sect. 6.

⁷ Sect. 7.

⁸ Sect. 15.

⁹ Sect. 14.

¹⁰ Sect. 12.

If a marriage is duly solemnized according to the *lex loci*, where one of the parties is a British subject, a British consul who has personally attended at such marriage may register the marriage in accordance with the marriage regulations as having been so solemnized.¹ If a marriage by the *lex loci* is recognized as valid by English law, such ought not to take place at an Embassy or consulate unless the marriage officer is satisfied that both parties are British subjects; or if one only is a British subject, the other party is not a subject of the country in which the marriage is to be solemnized; or if one is a British subject and the other a subject of the country, that sufficient facilities for the marriage in that country in accordance with the local law do not exist.²

Registration of marriages solemnized under the *lex loci*.

As a general remark affecting these foreign marriages, it may be worth while to observe that where one of the parties is not a British subject more caution should be observed, because, though such a marriage would be good by English law;³ yet, unless the other party had conformed to the requirements of his or her country, the marriage *might* there be treated as null and void. Consuls under such circumstances should warn the parties intending to contract a mixed marriage, that the *lex loci* does not necessarily recognize its validity. The British consul, who may now attend a marriage solemnized according to the forms required by the *lex loci*, and register that marriage under the above Act will no doubt satisfy himself that the native subject has conformed to all the proper formalities required by the *lex loci*.⁴

(v) *Marriages within the Lines of the British Army serving Abroad.*—Marriages solemnized within the British army by any chaplain or officer, or any person officiating under the orders of the commanding officer of a British army serving abroad, shall be effectual and valid.⁵ This is a statutory recognition of the principles of law laid down by Lord Stowell in *Ruding v. Smith*.⁶ It is not necessary that there should be a state of actual hostility.⁷

(vi) There is no judicial decision which has recognized, or statute which validates, a marriage celebrated on board of any British merchant ship; but the Merchant Shipping Act, 1854,⁸ provides for the entry by the master in the official log-book of any marriage taking place on the vessel. If both parties were British subjects, and were married by a minister in recognized orders, the marriage

Provisions of the Merchant Shipping Act, 1854, as to Marriages solemnized on board ship.

¹ 55 & 56 Vict. c. 23, s. 18.

² Regulation No. 4. In *Hay v. Northcote* ([1900] 2 Ch. 262), it was decided that a marriage celebrated between a British subject and a French subject before a British consul in France under the Consular Marriage Act, 1849, was by the law of England valid as regards form, though invalid by French law. But such is no longer law by reason of the combined effect of section 21 of the Foreign Marriages Act, 1892, and Regulation 4 made in pursuance of that section.

³ *Re Wright's Trusts*, 25 L. J. Ch. 621; *Lloyd v. Petitjean*, 2 Curt. 251.

⁴ See s. 18.

⁵ Sect. 22.

⁶ 2 Hag. Con. Rep. 371.

⁷ *The Waldegrave Peerage*, 4 Cl. & F. 649.

⁸ 17 & 18 Vict. c. 104, s. 282.

would probably be upheld, on the ground that British emigrants carry with them the common law of the country, until, *ratione loci*, they become affected by some other law.

Marriages in India.

(b) *Marriages in India*.—Before 1851 British subjects in India were held capable of contracting a valid marriage, *per verba de presenti*, and without the intervention of a minister in holy orders;¹ since then legislation has placed the marriage laws of that great dependency on much the same basis as those of England. The chief statutes are:—

(i) 14 & 15 Vict. c. 40, an English Act, which provided for the appointment of marriage registrars in India.

(ii) The Indian Act of 1852 [Act V. of 1852], passed to give effect to the provisions of the English Act of the previous year.

(iii) The Indian Marriage Act, 1872 [Act XV. of 1872], enabling marriages between European British subjects to be celebrated:—

Clergyman in Episcopal orders.

(a) By any person who has received Episcopal orders, provided the marriage be celebrated according to the rites and ceremonies of the Church of which he is a member.

Clergyman of the Church of Scotland.

(β) By any clergyman of the Church of Scotland, with the like provision as in the preceding case.

Marriage registrar.

(γ) By or in the presence of a marriage registrar under the provisions of 14 & 15 Vict. c. 40, or Act V. of 1852.

Authorized minister of religion.

(δ) By any minister of religion who, under the provisions of the Act, has obtained a licence to solemnize marriages.

The solemnization of an Indian marriage may be proved by the production of a certificate of the marriage from the India Office.²

Marriages in the colonies.

(c) *Marriages in the Colonies*.—The legislative bodies of the various colonies have the authority to pass laws regulating and providing for [*inter alia*] marriages within their respective jurisdictions, which become of full effect on receiving the royal assent. Marriages celebrated in accordance with the terms of such local Acts are to be held valid in all parts of the British Empire.³ In cases where doubts have arisen from time to time as to the validity of marriages celebrated under various circumstances, and in various places, both at home and abroad, the Legislature is in the habit of passing Acts validating such marriages.

Marriages of Domiciled Foreigners in England.—The English courts will recognize as valid marriages celebrated in England between domiciled foreigners if celebrated at the chapels or courts of their respective ambassadors or consuls.⁴

¹ *Maclean v. Cristall*, Perry's Oriental Cases, 75.

² *Westmacott v. Westmacott*, [1899] P. 183.

³ 28 & 29 Vict. c. 64.

⁴ See *Bailet v. Bailet*, 84 L. T. 272.

CHAPTER VII.

ACTION FOR BREACH OF PROMISE OF MARRIAGE.

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THIS action has been maintainable in the English courts for some three hundred years. In the times before the passing of Lord Hardwicke's Act such actions were not very favourably regarded; but in 1674 the first leading case on the subject¹ unmistakably decided that an action for such a breach would lie, notwithstanding it might be possible to enforce the marriage by a suit in the ecclesiastical courts. It has been shown in an earlier chapter² that clandestine marriages entered into *per verba de presenti* or *per verba de futuro cum copulâ*, enabled one of the parties to sue in the ecclesiastical courts to compel the solemnization of the marriage regularly *in facie ecclesiæ*. The entertainment of these suits by the secular courts was considered an infringement of the prerogatives of the ecclesiastical. The jurisdiction of the temporal courts in *Dickison v. Holcroft*³ was founded on the proposition that the promise to marry was a temporal matter, and so damages consequent upon the non-fulfilment of the promise were within the cognizance of the

¹ *Dickison v. Holcroft*, 3 Keb. 148.

² "A Short History of the Marriage Laws of England," chap. ii. p. 14 *et seq.*

³ 3 Keb. 148.

temporal courts. The execution of the marriage itself belonged solely to the spiritual courts.

Actions encouraged by the passing of Lord Hardwicke's Act, 1753.

Since the Marriage Act of 1753,¹ which by its 13th section took away the right of compelling the celebration *in facie ecclesiæ* of clandestine marriages *per verba de præsentì* and *per verba de futuro cum copulâ*, as might be expected, these actions have increased in number, as the other remedy in the spiritual courts has been taken away; for the ordinary relations of the parties to modern actions of breach of promise of marriage would formerly, in many instances, have constituted valid grounds for a decree for the celebration of the marriage *in facie ecclesiæ*.² Had the Statute of Precontracts³ continued in its entirety as the law for any length of time, Vaughan, C.J., in *Dickison v. Holcroft*,⁴ would never have quoted an isolated instance of this action in the reign of Queen Elizabeth; for that statute, anticipating Lord Hardwicke's Act, deprived the parties of their remedy in the spiritual courts to compel a regular celebration of a clandestine marriage, by which they might avoid a subsequent regular marriage perfected by consummation. The more complete freedom allowed to women may be another reason for the frequency of these actions at the present day.

A valid contract to marry must be mutual.

In order to found this action it is necessary that the parties shall have mutually entered into a valid contract to marry; for a mere promise to marry made to one party would not be sufficient for the purposes of this action unless accepted by the other. The promise and acceptance, however, need not be concurrent, but must be within a reasonable time of each other.⁵ An expression of intention to marry a person not in the hearing of the person intended or communicated by the authority of the party expressing the intention, does not amount to such a promise as to sustain this action.⁶ On the other hand, it has been held that the promise to marry need not necessarily be made in so many words; but the conduct, demeanour, and behaviour of persons towards each other may constitute proof of the contract.⁷

Damages.

Compensation for loss of positive advancement in the world.

The gist of the suit is compensation sought for the loss of positive advancement in the world. Marriage is deemed to be advancement in the world, and the reasonable expectations of enjoying this advancement when frustrated are to be compensated by pecuniary damages; just as in other affairs of life, when one party to a contract refuses to fulfil his share of it, he is either compelled specifically to perform it, or is mulcted in damages to the amount of the probable loss occasioned to the other party by

¹ 26 Geo. II. c. 33.

³ 32 Hen. VIII. c. 38.

⁵ *Vineall v. Veness* (*ubi sup.*).

⁷ *Hickey v. Campion*, 20 W. R. 752.

² *Vineall v. Veness*, 4 F. & F. 344.

⁴ 3 Keb. 148.

⁶ *Cole v. Cottingham*, 8 C. & P. 75.

his refusal. Specific performance of the marriage promise can no longer be decreed. This action, therefore, is equally open to the man as to the woman. What are known as “sentimental damages,” such as for injured feelings and the like, on the breach of this contract alone are allowed to be reckoned in the assessment of the fine;¹ and the strict pecuniary loss caused by the breach of the defendant—*e.g.*, loss of an establishment in life, or a share of the affluence of the defendant,² is not the only item taken into consideration. This action is given as an indemnity to the injured party for the loss sustained, and has been always held to embrace the injury to the feelings, affections, and wounded pride as well as the loss of marriage.³ The damages, of course, vary with the wealth of the defendant. It is now allowable to join for damages for the breach of the contract to marry a claim for special damages for seduction.⁴

A promise to marry, without more, is a promise to marry within a reasonable time, otherwise no breach could be assigned;⁵ but a conditional promise to marry is perfectly valid, and no action will lie until the time for its completion is arrived.⁶ If, however, a defendant before the fulfilment of the condition absolutely refuses to carry out his part of the contract, an action will lie;⁷ so, too, where the contract is executory, and the defendant puts it out of his power to fulfil it, as where he marries in the meanwhile.⁸ A married man or woman can make a valid promise of marriage, for it is possible that he or she might become free to perform the promise.⁹ This has been so held on the ground that though seemingly the contract on the part of the married person to marry the plaintiff was illegal, yet the plaintiff's remaining unmarried through the conduct of the defendant was prejudicial, and so a good consideration for the original promise to marry.¹⁰ Knowledge of the married state of the defendant at the time of the promise would be fatal to the plaintiff's claim for damages.¹¹

The plaintiff and defendant in this action are now competent witnesses since the passing of the Act of 32 & 33 Vict. c. 68.¹² By section 2 it is enacted that “the parties to any action for breach of promise of marriage shall be competent to give evidence in such action”; but with the following qualification:

¹ *Frost v. Knight*, L. R. 7 Ex. 111.

² *Jones v. James*, 18 L. T. 243; *Berry v. Da Costa*, L. R. 1 C. P. 243.

³ 2 Sedgwick, Damages, 146. ⁴ *Millington v. Loring*, 6 Q. B. D. 190.

⁵ *Potter v. Deboos*, 1 Stark, 82.

⁶ *Atchinson v. Baker*, Peake, Add. Cas. 103.

⁷ *Frost v. Knight* (*ubi sup.*); *Donaghue v. Marshall*, 32 L. T. 310.

⁸ *Harrison v. Cage et ux*, 1 Ld. Raym. 386; *Caines v. Smith*, 15 L. J. Ex. 106. See also *Harvey v. Johnston*, 17 L. J. C. P. 298; *Short v. Stone*, 8 Q. B. 358.

⁹ *Wild v. Harris*, 18 L. J. C. P. 297; *Millward v. Littlewood*, 20 L. J. Ex. 2.

¹⁰ *Wild v. Harris* (*ubi sup.*).

¹¹ See dictum of Pollock, C.B., in *Millward v. Littlewood* (*ubi sup.*).

¹² Evidence Further Amendment Act, 1869.

Plaintiff's evidence of promise must be corroborated.

"That no plaintiff in any action for breach of promise of marriage shall recover a verdict unless his or her testimony shall be corroborated by some other material evidence in support of such promise." This evidence, if material, need not be of a robust kind to corroborate the story of the plaintiff. The corroboration of the promise may be facts showing conduct of the parties before the promise itself was made.¹

Bessela v. Stern.

The leading case on this point is *Bessela v. Stern*.² The plaintiff in this case had had a child by the defendant, and alleged that he had promised to marry her. The corroboration put forward to support the promise was contained in two conversations; one between the plaintiff's sister and the defendant previous to the birth of the child, in which the defendant told the sister of the plaintiff that he would marry the latter, or do anything if she would not expose him; the second was after the birth of the child between the plaintiff and defendant, and overheard by the plaintiff's sister; the plaintiff reproached the defendant, and said: "You always promised to marry me, and you don't keep your word." This statement, the sister declared, he did not deny. Grove and Denman, JJ., sitting as a Divisional Court, were of opinion that such evidence was not a material corroboration of the promise within the meaning of section 2 of 32 & 33 Vict. c. 68. The Court of Appeal,³ however, reversed their decision, Cockburn, C.J., saying: "The evidence given in corroboration need not go the length of establishing the contract; if the evidence support the contract, it is enough." Bramwell, L.J., said: "If we were to hold that that (referring to the conversation overheard by the sister) was no evidence of a promise, we should get rid of a great deal of evidence which is given every day at *nisi prius*." But the mere fact that the defendant does not answer letters written to him by the plaintiff, in which she writes that he had promised to marry her, is not corroborative evidence of the plaintiff's evidence of such promise within the meaning of this Act.⁴

Promise to marry within the Infants' Relief Act, 1874.

Infant may maintain action for breach against an adult.

The promise to marry is a promise within section 2 of the Infants' Relief Act, 1874,⁵ which renders ineffectual any ratification made after full age, of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age. No action will lie against an infant for breach of a promise to marry made while an infant, yet such infant may sue for a breach by the other party

¹ *Wilcar v. Gofrey*, 26 L. T. 481. See also *Hickey v. Champion*, 20 W. R. 752.

² 2 C. P. D. 265.

³ Consisting of Cockburn, C.J., and Bramwell and Brett, L.JJ.

⁴ *Wiedemann v. Walpole*, [1891] 2 Q. B. 534.

⁵ 37 & 38 Vict. c. 62. *Cozhead v. Mullis*, 3 C. P. D. 439; *Northcote v. Doughty*, 4 C. P. D. 385; *Ditcham v. Worrall*, 5 C. P. D. 410.

if an adult.¹ Ratification made after age of a promise made before age, will not be treated as a fresh promise in order to take the case out of the above section, unless there is clear evidence that the new promise is quite independent of the promise made during infancy;² and where there is evidence of a new promise by the defendant on attaining majority it then becomes a question for the jury to say whether or not the words used amount to a mere ratification of the old promise or establish a new promise.³ But in order to render the principle of the Act effective, if a new promise is alleged, evidence of something more than a mere ratification must be given indicating an intention on the part of the defendant after attaining full age to make a new promise; and evidence of language which is equally consistent with a ratification of the old promise as with a fresh promise is insufficient.⁴

New promise after majority must be unconnected with promise made during infancy.

This promise was formerly held to be within the Statute of Frauds, and so required the evidence and proof of writing;⁵ but that doctrine has been long exploded, and a promise in writing is not necessary to found an action.⁶

Promise to marry not within Statute of Frauds.

If the circumstances of the case make it impossible to prove an express promise either by letters, or by a distinct promise to marry made in the presence of parties other than the plaintiff and defendant, evidence of the conduct of the parties, and how they were regarded by their relations and friends may be tendered to show that they were an engaged couple, and were so treated by their intimate acquaintances.⁷

This action cannot be brought by or against executors or administrators of a deceased promisee or promisor on the principal expressed in the maxim, *Actio personalis moritur cum persona*. It is founded on a breach of contract, but the injury is personal in respect of which damages are given; but the damages may be increased by circumstances of aggravation on the part of the promisor, and lessened by the acts of the promisee. The ages and the general behaviour of the respective parties may be taken into account.⁸ With the death of the promisor all claim to damages of a sentimental or exemplary kind ceases. Whether the action will lie at the suit of or against executors, if there has been a pecuniary loss resulting to the promisee's estate is not quite clear; in *Chamberlain v. Wilson*¹⁰ the court thought if there was a strict

Action for breach of promise will not lie against executors.

¹ *Holt v. Ward* *Clarencieux*, 2 Stra. 937.

² *Corhead v. Mullis* (*ubi sup.*); *Holmes v. Brierley*, 59 L. T. 70.

³ *Northcote v. Doughty* (*ubi sup.*); *Ditcham v. Worrall* (*ubi sup.*).

⁴ *Holmes v. Brierley* (*ubi sup.*).

⁵ Com. Dig. Action on the Case upon *Assumpsit* (F. 3).

⁶ *Cork v. Baker*, 1 Stra. 34; *Mountague v. Maxwell*, 1 Stra. 236.

⁷ *Daniel v. Boules*, 2 C. & P. 553.

⁸ *Chamberlain v. Williamson*, 2 M. & S. 408. *Finlay v. Chirney*, 20 Q. B. D. 494.

⁹ Per Lord Esher, M.R., in *Finlay v. Chirney* (*ubi sup.*).

¹⁰ 2 M. & S. 408.

pecuniary loss then the action would survive the death of the promisee; and several American cases following the dictum in *Chamberlain v. Williamson* have so decided; but Lord Esher, M.R., has doubted whether the action would lie against executors even when special damage is alleged.¹

Without special damage founded on another and contemporaneous promise.

If the promisee has suffered any special damage such must be specifically alleged and pleaded; and the mere allegation of special damage will not open the case against the defendant's executors and make them liable. Such special damage can only exist where in addition to the promise to marry, there existed contemporaneously with that promise another promise affecting the personal property of the one party or the other, which promise would be one of the considerations or part of the consideration for the promise of the other party. Such promise must either be expressed, or circumstances must show that the special damage arising from the breach of such promise must have been in the contemplation of the parties at the time of making the promise.² Damages for seduction and birth of a child are not such special damages as will survive against an executor.³

Defences to the action.

The defences to the action for breach of promise of marriage, or reasons why the defendant should be held harmless for non-fulfilment of the contract, are for the most part based upon fraud, or something akin to fraud, on the part of the plaintiff. In putting them forward, the defendant alleges that the promise to marry would never have been made or accepted had the true state of facts connected with the plaintiff been fully disclosed before the making or accepting of the promise.

False representation as to pecuniary circumstances.

(1) A false representation, or fraudulent concealment in material particulars, of the pecuniary circumstances or previous life of the plaintiff.⁴

Secret disposition of property by plaintiff to defraud defendant.

(2) A secret disposition of the plaintiff's property, with a view to defraud the defendant of a just share of its enjoyment; but fraud must be of the essence of such secret disposition.⁵ It would seem doubtful whether, if the woman possessed of property desired to settle it to her separate use, contrary to the man's wish, and he refused to marry her for that reason, and she brought an action for the breach, the defendant would have a good defence to the action: perhaps it would be difficult to imagine an action brought under such circumstances. This fraudulent disposition of the woman's property would appear to be a good defence even under the altered state of the law as to the marital rights of

¹ *Finlay v. Chirney* (*ubi sup.*).

² *Ibid.*

³ *Ibid.* See the important judgments in this case of Esher, M.R., and Bowen, L.J., as to what is not but may be special damage capable of founding an action that will survive the death of the promisor.

⁴ *Foulkes v. Selway*, 3 Esp. 336; *Wharton v. Lewis*, 1 C. & P. 529; *Horam v. Humphreys*, Loft, 80.

⁵ 1 Rep. H. & W. 166 n.

a husband, because he may have looked forward to share in the woman's fortune under a settlement.

(3) Impotency of the plaintiff discovered after the promise is a good defence. Impotency of the man or woman is an impediment to a marriage and ground for a suit for nullity, and so would clearly entitle either of the parties, on the discovery of such an impediment, to rescind the contract. But it is not open for either party to set up his or her incapacity.¹ The bodily infirmity of the one party discovered by the other after the making of the contract is a good reason for breaking off the engagement.² Again, lunacy, either at the time of the making or the breaking of the promise, is a good defence to the action; but not if the defendant, though lunatic before or after, was at either of those periods of sound mind, or was of sound mind before and after the making of the promise.³ Slight bodily or mental infirmities discovered after promise made are not sustainable grounds for a breach of the contract.

Grounds for nullity of marriage.

Lunacy.

(4) If the defendant can prove that the plaintiff, being a woman, was of bad character, he will have a good defence to this action when brought by the woman whom he promised to marry.⁴ Thus, where it was proved that the plaintiff had had a child, and the defendant was not its father, and that the defendant broke his promise because he had found the plaintiff to be a loose and immodest woman, and that he was unaware of her character at the time of making the promise, the jury were directed to find a verdict for the defendant.⁵ But if the defendant knew at the time of making the promise that the woman was of a loose and immodest character, he is bound by his promise.⁶

Bad character subsequently discovered.

If character known, defendant bound.

(5) If the plaintiff's conduct towards the defendant since the making or acceptance of the promise has been violent, or rough, or brutal, the defendant is entitled to say that he or she will not intrust his or her lifelong happiness to the keeping of such an one.⁷

Subsequent bad conduct towards defendant.

(6) A release by the plaintiff of the defendant is a good defence; a plea, therefore, that before breach the plaintiff had absolved, exonerated, and discharged the defendant was held, on its proof, to entitle him to a verdict.⁸ Such discharge or release

Release by plaintiff.

¹ *Hull v. Wright*, 29 L. J. Q. B. 43.

² *Atchinson v. Baker*, Peake, Add. Cas. 103.

³ *Baker v. Cartwright*, 30 L. J. C. P. 364. Public policy, however, should make this an effective defence.

⁴ *Foulkes v. Sellway* (*ubi sup.*).

⁵ *Baddeley v. Mortlock*, Holt, 151; *Irring v. Greenwood*, 1 C. & P. 350; *Bench v. Merrick*, 1 C. & K. 463; *Young v. Murphy*, 3 Scott, 379.

⁶ See *Irring v. Greenwood* (*ubi sup.*), and *Bench v. Merrick* (*ubi sup.*).

⁷ *Leeds v. Cook*, 4 Esp. 257.

⁸ *King v. Gillett*, 7 M. & W. 55; *Davis v. Bomford*, 30 L. J. Ex. 139. In this case the defendant asked the plaintiff to return him his letters, which she refused to do, but subsequently went away to reside at a distance.

may be proved by the parties not corresponding or meeting for a long time, as, for instance, two years.¹

Prior engage-
ment no de-
fence.

A prior engagement of the defendant is no defence, though a fraudulent concealment of a previous engagement on the part of the plaintiff might decidedly affect the plaintiff's right to recover.² Until judgment is signed by the plaintiff in an action for breach of promise, the plaintiff is not a creditor of the defendant.³

¹ *Davis v. Bomford (ubi sup.)*.

² *Beachey v. Brown*, 29 L. J. Q. B. 105.

³ See *Reg. v. Hopkins*, [1896] 1 Cl. B. 652.

CHAPTER VIII.

MARRIAGE SETTLEMENTS.

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THIS chapter will be divided into seven sections for convenience of reference, as follows:—

1. Introductory.
2. Settlements generally: (a) Those founded on valuable consideration; (b) Voluntary settlements.
3. Covenants in settlements.
4. Construction of settlements.
5. Enforcement of settlements.
6. Rectification of settlements.
7. Revocation and setting aside of settlements.

SECTION I.

Introductory.

Introductory.

In the preceding chapters matters anterior to the state of matrimony have been discussed, the requisite rites and ceremonies, what things must be done and conditions fulfilled before a valid marriage can be contracted; and in the immediately preceding chapter, the penalty for entering into a matrimonial engagement and not fulfilling it, when no lawful obstacles intervene. In this chapter the agreements which are entered into between the intended husband and wife and the other parties interested in the marriage will be considered.

What is a marriage settlement.

A marriage settlement has been described to be “an instrument executed before marriage, and wholly or partly in consideration of it, by which the enjoyment and devolution of real and personal estate is regulated.”¹ Post-nuptial settlements, or those executed by husband and wife, are also called “marriage settlements”; but, as will be seen, the consideration of marriage is wanting.

Marriage of the parties necessary to the full operation of the settlement.

In order to make a settlement in consideration of marriage fully operative, it is of course necessary that the intended marriage should take place; and where the parties, after settling their property on certain trusts, and executing the deed, do not

¹ Wat. Comp. Eq. 549. For a full disquisition on this important topic the reader is referred to Vaizey on Settlements, and Bythewood and Jarman's Conveyancing (4th edit.), vol. vi.

marry, but show by their conduct that they consider the trusts of the deed are at an end, the contract will be rescinded, and the trusts of the settlement declared to be at an end.¹

Now the object of a strict settlement made on marriage, equally with that of the wider family settlement, is the preservation of property, real and personal, in a particular family, or in the new group to be formed by the union of the spouses. By it the dissipation of the property of the husband or of the wife by reckless extravagance or unfair dealing is checked and prevented, and the interests of the children, the fruit of the union, are safeguarded. Another object is the provision of a suitable maintenance for the new household during the life of the parties and of the survivor.² The most important reasons (so far as this present work is concerned) for the making of marriage settlements, are the definite ascertaining of the rights of husband and wife in each other's property, to make provision for the family life, and to declare the interests of those who will be the fruit of the union, or of those who are to take in default of such issue.

Marriage formerly operated at common law as a conveyance to the husband (absolutely as regards her personalty, and for the period of coverture, or for life, as regards her realty) of all the property of the wife at the time of the marriage, and that which was subsequently acquired by her; save such as was settled to her separate use in accordance with equity doctrines. The wife had no corresponding right and advantage, though, it is true, she had a right to be dowered of her husband's lands, and to share on his intestacy in the third or half of his personal property, as the case might be; but since the Dower Act, 1834, he has been enabled to defeat and determine her right to both kinds of property by a disposition during his life, or by will. The Married Women's Property Act, 1882,³ has wrought a considerable change in the relations of husband and wife, by making all property acquired by her her own, and by giving her absolute control over it; and both these facts have a material bearing on the present subject of marriage settlements. This Act in no way affects the right and capacity of a husband or third party to settle property on the wife, nor does it prevent a wife from settling her property on marriage in any lawful manner she may think fit. On the contrary, it provides that:

Objects of a marriage settlement.

Marriage formerly a conveyance of the wife's property to the husband.

M.W.P. Act, 1882, does not interfere with arrangements carried out by means of marriage settlements.

"Nothing in this Act contained shall interfere with or affect any settlement, or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman, or shall

¹ *Essery v. Cowlard*, 26 Ch. D. 191; *Bond v. Walford*, 32 Ch. D. 238.

² "There are three points to be looked at in a settlement—the destination of the income, the mode in which the capital is to be limited to the children, and the way in which it is to go if there are no children, who acquire an indefeasible interest in it." Per Baggallay, J.A., in *Cogan v. Duffield*, 2 Ch. D. 44, 49.

³ 45 & 46 Vict. c. 75.

interfere with or render inoperative any restriction against anticipation attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument.”¹

The effect of this change in the law is that a woman may, after the coming into operation of the Act, alone, and without any covenant on the part of her husband, make a settlement of the real and personal property to which she is entitled at the time of her marriage, or acquired by her during coverture, as she might have settled it previously to the passing of the Act, but subject to the claims of her ante-nuptial creditors; and that any settlement existing before the Act will not be interfered with or affected.²

Marriage settlements requisite as ever.

Owing to the unlimited control of the wife over her property conferred by this Act, the matrimonial rights and duties of the spouses will require more than ever to be accurately ascertained, defined, and set forth. Thus, the consideration of the subject is as requisite as heretofore.

Trustees.

Their intervention still requisite.

Every marriage settlement that is properly drawn provides for the appointment of trustees; for without their intervention its provisions cannot be carried out with certainty, but are liable to fail. If the husband and wife entitled to property settled upon their marriage obtained the legal estate and possession of it, it would be difficult to prevent their so disposing of it as to defeat the rights of their children; so also, if there were no settlement, and the husband obtained possession of his wife's property, his rights would prevail, and it would be his to alienate as he might please. The right of the wife to a share of her property under such circumstances, known as her equity to a settlement, was devised by the Court of Chancery as a protection; but it could only be exercised where the property was in the power of the court.³ It is to protect the interests of all parties, both those *in esse* and those yet to be born, that trustees are appointed.⁴ The Married Women's Property Act, 1882, now provides that married women may hold their property without the intervention of a trustee;⁵ but as it is possible that this provision may prove more of a snare than a protection, it is clear that the necessity for the appointment of trustees in the future still exists, if not to protect her interests, yet those of the children.

¹ Sect. 19.

² Where a woman married before the coming into operation of this Act (January 1, 1883) has entered into a binding covenant to settle after-acquired property, this section has much modified the full power of disposition over her property conferred by the other sections of the Act. *Re Stonor's Trusts*, 24 Ch. D. 195; *Hancock v. Hancock*, 38 Ch. D. 78. See *post*, Covenants to settle after-acquired property.

³ See *post*, chap. xiii.

⁴ See *Sampayo v. Gould*, 12 Sim. 426. The powers of trustees are more fully treated of lower down, Part III., Guardian and Ward, chap. vi.

⁵ Sect. 1, sub-sect. 1.

Who can make Marriage Settlements.—In general, all persons are competent to make binding marriage settlements, except lunatics and infants. A woman under coverture was incapacitated in most instances from making a valid settlement, without the concurrence of her husband, unless she was exercising a power given to her in that behalf, or she was dealing with her separate estate,¹ but now her right to make a settlement is a necessary incident of her absolute ownership of her property. There does not appear to be any case in which the question of a marriage settlement made by a lunatic has been involved; but if ever it should come up for discussion, it may be laid down with confidence that the ordinary rules governing the contracts of lunatics will be applied, viz., that if the contract was executed by a lunatic when insane, it would be set aside: and, on the contrary, would be upheld if executed by him during a lucid interval; or while he was sane, and subsequently became afflicted with lunacy.

Married women.

Lunatics.

As in another portion of this work the marriage settlements of infants will be more particularly set forth,² it will here suffice to say that marriage settlements executed by infants are, except under certain circumstances, voidable.³ It was once thought that the consent of guardians could supply and fill up the requisite authority, but this is no longer the law.⁴ But a female infant, it appears, may on marriage be bound in certain respects, and in the matter of certain kinds of property; thus, it has been decided the right of dower may be barred by a proper provision of jointure made for her before marriage, and she may be barred of her share of her husband's personal estate under the Statute of Distributions, where a provision is made for her by settlement.⁵

Infants.

Settlements by infants voidable.

Consent of guardians cannot make settlements by infants binding.

But infants intending to marry may apply by petition to the Court of Chancery (they are not, however, thereby constituted wards of court) under the Infants' Settlement Act, 1855,⁶ and with the approbation of the court make binding settlements of their real and personal estate on marriage. The limitation of the ages of the applicant is for males twenty years, and for females seventeen years. This Act removes the disability of infancy only, but so far as married women are concerned leaves untouched the disability of coverture. Where an infant ward of court married without leave and afterwards executed a post-nuptial settlement sanctioned by the court, by which she purported to settle certain reversionary property her title to which was under a will becoming operative before Malins' Act⁷ came into force, and so not

Petitioning infants under 18 & 19 Vict. c. 43.

¹ Peach. Sett. 24.³ See *Smith v. Lucas*, 18 Ch. D. 531.⁵ *Drury v. Drury*, 2 Ed. 39; *Earl of Buckinghamshire v. Drury*, 2 Ed. 60. But see remarks of Lord Herschell on this case in *Seaton v. Seaton*, 13 App. Cas. p. 67.⁶ 18 & 19 Vict. c. 43.² *Post*, Part IV., Infancy, chap. iv.⁴ *Field v. Moore* 24 L. J. Ch. 161.⁷ 20 & 21 Vict. c. 57.

within its application, though she subsequently recognized the settlement by various acts, it was held that neither the sanction of the court nor the effect of the Infants' Settlement Act could make the settlement of the reversionary interest binding upon her; and that no acts of acquiescence and confirmation will have that effect unless they amount to an actual disposition by her of the property when discovered.¹ Notwithstanding the decision of Selborne, L.C., and Fry, L.J. (Cotton, L.J., dissenting), in *Sampson v. Wall*,² and the case of *Re Phillips* (An Infant),³ doubt has been thrown upon the question whether the Infants' Settlement Act applies to a post-nuptial settlement.⁴ The marriage settlement of an infant is not within the Infants' Relief Act, 1874.⁵

Operation of a marriage settlement.

The operation of a marriage settlement when executed is to affect all the property comprised in it or affected by its provisions, such as property to be acquired in the future, and agreed between the parties to be settled in a particular manner. All classes of property may be brought into settlement, and regulated by it in various ways, and its directions will be carried out where they do not violate legal principles. The respective rights of husband and wife as to future property depend upon the terms of the settlement; the husband did not in the past, nor will in the future, become entitled to his wife's future property because a settlement has been made on her by him, without a stipulation to that effect.⁶

Rights of husband and wife defined.

Costs of settlement.

The husband was usually deemed liable to pay the costs of the marriage settlement,⁷ but the court will sometimes order the costs to be paid out of the funds of the wife where she is a ward of court.⁸

SECTION 2.

Settlements generally.

Settlements founded on valuable consideration.

(a) *Settlements founded on Valuable Consideration.*—The consideration of marriage is not only what is known as "valuable," but is one of the highest known to the law, and supports contracts and engagements without any further consideration, pecuniary or otherwise. These settlements, founded on valuable consideration, whether that of marriage, or pecuniary, may be thus subdivided:—

Ante-nuptial agreements. Marriage articles.

i. Ante-nuptial agreements, including (a) Inchoate or imperfect settlements, that is, marriage articles, or heads of agreement not

¹ *Seaton v. Seaton*, 13 A. C. 61, affirming *S. C. Buckmaster v. Buckmaster*, 35 Ch. D. 21.

² 25 Ch. D. 482.

³ 34 Ch. D. 469.

⁴ *Seaton v. Seaton* (ubi sup.).

⁵ *Duncan v. Dixon*, 44 Ch. D. 211.

⁶ *Garforth v. Bradley*, 2 Ves. Sen. 677; *Carr v. Taylor*, 10 Ves. 574.

⁷ *Helps v. Clayton*, 17 C. B. (N. S.) 553.

⁸ *De Staepoole v. De Staepoole*, 37 Ch. D. 139.

under seal, in which the trusts are executory; (b) Complete and final settlements under seal, in which the trusts are executed; and these may be further subdivided, as being made (a) in pursuance of marriage articles; or (β) not in pursuance of marriage articles.

Final settlements.

ii. Post-nuptial settlements, if made in pursuance of marriage articles, or if founded on valuable consideration, pecuniary or otherwise.

Post-nuptial settlements.

i. (a) Marriage articles are usually drawn up between the contracting parties and others interested in the marriage, when for some reason there is a hindrance to the drawing up of a more elaborate and complete settlement. Risks attend this course, and especially in the case of real property, and it were better that a complete and final agreement should be settled before the marriage. In preparing articles of settlement, as little as possible should be left to construction, and the limitations and provisions should be as formally and fully expressed as possible.

Marriage articles.

These minutes or articles forming the agreement or promise need not be contained in one document, but may be gathered from several letters, though written to a third person;¹ they may also be contained in a bond.² There is no necessity for their being of a formal character, provided that they are complete in themselves.³ The promise must be absolute, and not one which is left to the option of the promisor to carry out or not;⁴ and a mere expression of a desire or intention to carry out a particular arrangement will not, as a rule, amount in equity to a binding promise or agreement.⁵ But a representation reduced into writing and made by one party for the purpose of influencing the conduct of the other party will in general entitle the party to which it has been made to the assistance of the court for the purpose of realizing such representation,⁶ on the principle that where one makes a representation to another, in consequence of which that other contracts engagements, or alters his position, or is induced to do any other act which either is permitted or sanctioned by the person making the representation; the latter cannot withdraw from the representation, but is bound by it.

Form of articles immaterial.

Marriage settlements are excepted out of the provisions of the Bills of Sale Act, 1878,⁷ and do not require registration.⁸

Marriage settlement not a bill of sale.

(b) *Complete and Final Settlements under Seal*.—It is this class of settlements that ought, whenever practicable, to be entered into,

Final settlements under seal.

¹ *Luders v. Anstey*, 4 Ves. 501.

² *Acton v. Pierce*, 2 Vern. 480.

³ *Lady Thynne v. Earl of Glengall*, 2 H. L. Cas. 131.

⁴ *Randall v. Morgan*, 12 Ves. 67.

⁵ *Maunsell v. White*, 4 H. L. Cas. 1039; but see *Alt v. Alt*, 4 Giff. 84; *Walford v. Gray*, 12 L. T. 437.

⁶ *Hammersley v. De Biel*, 12 Cl. & Fin. 45; *Coverdale v. Eastwood*, L. R. 15 Eq. 121. But see *Re Fickus*, *Farina v. Fickus*, [1900] 1 Ch. 331.

⁷ 41 & 42 Vict. c. 31.

⁸ Sect. 4. See *Reis*, *ex parte Clough*, [1904] 2 K. B. 769.

for security and convenience are obtained thereby ; and less room for doubt and consequent litigation exists. These settlements are made either in pursuance of marriage articles, or not in pursuance of them.

Difference between articles and a final settlement.

(a) *In Pursuance of Marriage Articles.*—The difference between marriage articles and a settlement is, that the former contemplate some further and future settlement ; while a settlement, on the contrary, is the expression of a past agreement between the parties, though such may be incomplete or defective. The result is that the strict legal construction of the words in articles will not be regarded, but the intention of the parties will have effect given to it as nearly as may be ; but a final settlement though defective, will not be treated as executory, and will not in general, unless there are grounds for reforming it, be varied or altered, but must be construed as at law.¹ But where a settlement directed to be made by a testator was improperly framed, it was corrected and altered by the intention of the testator, as expressed in his will.²

Settlements not in pursuance of marriage articles.

Heads of proposals by intended husband and wife.

(β) *Settlements not in pursuance of Marriage Articles.*—Settlements executed before the marriage, and not based upon previous articles, form the usual arrangements between the intended husband and wife, and those interested in their union. Where both sides purpose bringing property into settlement, the ordinary course pursued is for the woman to make proposals for settling her property ; these are submitted to the man, who either accepts them *in toto*, or suggests alterations. He then carries in his proposals, and if the property settled on both sides is personalty, the settlement is usually contained in one deed. If, on the other hand, realty and personalty are settled, there is frequently a separate deed dealing with each class of property ; so, also, where there exist complicated arrangements affecting the property to be brought into settlement by one side, such property is usually dealt with in a separate deed.

What may form the subject of a settlement.

“Every description of property, real or personal, may form the subject of a marriage settlement, but a family settlement having for its object to preserve the family property is almost always the settlement of a landed estate. The two distinct objects of appropriating a fund to answer the purposes of a family provision, and of settling an estate so as to preserve it entire, and at the same time charge it with answering the moral obligations of its successive owners, with jointures for their widows and portions for their younger children, gave rise to two types or classes of settlements, commonly distinguished as settlements of personal estate, and settlements of real estate ; not that the

¹ *White v. Thornborough*, 2 Vern. 702.

² *Lord Glenorchy v. Bosville*, Ca. t. Talb. 3 ; 1 Wh. & T. L. C. 1.

subject-matter of settlements of the former class is invariably personal estate, or of the latter real estate, for through the artifice of a trust for sale and declaration of the trusts of the proceeds, land is often the subject of a settlement, which for most purposes must be classed with money settlements; and, on the other hand, personal estate is occasionally, though less frequently, settled by means of a trust for the purchase of land, or otherwise, in such a manner as that the bulk of the property, subject only to deductions to meet charges of the same nature as those ordinarily imposed upon real estate, shall devolve entire upon the successive takers in the way of strict settlement; or in modes bearing more or less of resemblance to a strict settlement, but of the two classes of settlement what may be looked upon as the type or standard example of the former class is a marriage settlement of stock or of money under some other usual form of investment; while a strict settlement of real estate, that is, a settlement with at least one life estate followed by successive estates tail, and provisions appropriate to this mode of devolution, constitutes the standard form of the latter class of settlement.”¹

The framework of modern settlements has been much curtailed by the Conveyancing and Law of Property Act, 1881,² and the Settled Land Act, 1882,³ which confers upon trustees various powers which need not be expressed, but which shall be deemed to be inserted in the settlements, unless the contrary intention is expressed.⁴

Trusts for conversion.

Types of settlements.

Effect of the Conveyancing and Law of Property Act, 1881 and Settled Land Act, 1882.

ii. Post-nuptial settlements are founded on valuable consideration, (a) where they are based on ante-nuptial articles; (β) or where valuable consideration moves after the marriage has taken place.

Post-nuptial settlements founded on valuable consideration.

(a) *Post-nuptial Settlements based on Ante-nuptial Articles*.—If the post-nuptial settlement be made in pursuance of articles entered into before the marriage, valuable consideration will be imported, and the settlement will not be voluntary, whether it mentions or omits any reference to the articles. The ante-nuptial agreement must not merely be parol, but in writing,⁵ unless there has been an actual transfer to trustees of the property so agreed to be transferred, and held by them on the trusts declared;⁶ for agreements in consideration of marriage are within the fourth section of the Statute of Frauds. The articles are founded upon the valuable consideration of marriage, and so carry it on to the post-

Post-nuptial settlements based on ante-nuptial articles.

Ante-nuptial agreement must be in writing.

¹ 3 Dav. Prec. Pt. I. p. 3. For the frame of settlements, both personal and real, see the same vol. pp. 6 and 257.

² 44 & 45 Vict. c. 41.

³ 45 & 46 Vict. c. 38.

⁴ For the modern forms under this Act, see Wolstenholme's Forms and Precedents, and Cavanagh on Modern Conveyancing; Bythewood and Jarman on Conveyancing (4th edit.), vol. vi.; and Vaizey on Settlements.

⁵ *Warden v. Jones*, 26 L. J. Ch. 427, overruling *Dundas v. Dutens*, 1 Ves. 196.

⁶ *Cooper v. Wormald*, 7 W. R. 402.

nuptial and otherwise voluntary arrangement. Thus it follows that a post-nuptial settlement, based upon marriage articles, must conform strictly to them, for wherever it does not do so, it will be purely voluntary.¹ A mere recital in the post-nuptial deed of ante-nuptial articles is insufficient evidence of their existence, and the deed will not be supported against a subsequent purchaser for value.² But a post-nuptial settlement following an ante-nuptial parol agreement by one of the parties recited in the post-nuptial settlement is good and valid so far as the Statute of Frauds is concerned; for the executed settlement is a sufficient note or memorandum of the contract to be enforced against the party sought to be charged within section 4 of the statute, and may be enforced against his creditors.³ So, too, any document stating the facts and terms of the antenuptial contract but signed by the party sought to be charged even after the marriage has taken place will be a sufficient compliance with the statute.⁴ An agreement for a marriage settlement, or marriage articles, though informal, are within the exception of section 4 of the Bills of Sale Act, 1878,⁵ and do not require registration as a Bill of Sale.⁶ Marriage articles may be varied by other stipulations made before marriage;⁷ but it is doubtful if a settlement containing a covenant to settle after-acquired property can be superseded by a subsequent settlement though both are executed before marriage.⁸

Marriage articles not a bill of sale.

Post-nuptial settlements where consideration moves after marriage. Consideration moving from strangers.

(B) *Post-nuptial Settlements where Valuable Consideration moves after Marriage*.—Post-nuptial agreements not made in pursuance of ante-nuptial articles, but for valuable consideration, are also binding and good. The consideration may move either from third parties, or from the husband, or the wife. If the father of the wife, or any third person, in consideration of the husband making a settlement, advance a sum of money, such a settlement will be good, and for valuable consideration,⁹ and in such a case the post-nuptial settlement will be binding upon the third person.¹⁰ A post-nuptial settlement has been held good against creditors, by a third person agreeing to advance money to pay the debts of the husband on condition of his settling his property for the benefit of his family, though the latter concealed that he owed a particular debt, which was not satisfied in accordance with the agreement.¹¹

¹ *Legg v. Goldwire*, Ca. t. Talb. 20.

² *Cordwell v. Mackrill*, 2 Ed. 344.

³ *Re Holland, Gregg v. Holland*, [1902] 2 Ch. 360.

⁴ *Barkworth v. Young*, 4 Drew. 1.

⁵ 41 & 42 Vict. c. 31.

⁶ *Wenman v. Lyon & Coy.*, [1891] 2 Q. B. 192.

⁷ See *Legg v. Goldwire* (*ubi sup.*).

⁸ *Re Gundry, Mills v. Gundry*, [1898] 2 Ch. 504.

⁹ *Wheeler v. Caryl*, Amb. 121; *Hance v. Harding*, 20 Q. B. D. 732.

¹⁰ *Townsend v. Toker*, L. R. 1 Ch. App. 446.

¹¹ *Holmes v. Penney*, 26 L. J. Ch. 179 See also *Pott v. Todhunter*, 2 Coll. 76.

The consideration may also move from either husband or wife. A settlement was held good where a vested reversion was settled by the husband and wife on the wife for her separate use, the husband surrendering his right to receive the rents and profits during coverture;¹ also, where the wife relinquished a valuable interest—her jointure—in consideration of a provision made by the husband.² A post-nuptial settlement by one who was an infant at the time of his marriage, in pursuance of a promise to settle his estate when he became of age, was held good on proof of the settlement having been made in pursuance of the promise.³ Very slight consideration will support a post-nuptial settlement.⁴ A covenant in a post-nuptial settlement by a husband to settle on the wife after-acquired property, in order to avoid proceedings being taken against him for contempt of court in marrying his wife, who was a ward of court, without leave is enforceable.⁵ Under the Married Women's Property Act, 1882, the consideration moving from husband or wife must be of a valuable nature, for mere relinquishment of rights or interests will no longer have any efficacy; for neither spouse has any real and enforceable right or interest in each other's property, but a *spes successionis*, or a mere expectation of an interest on survivorship, in the event of the deceased not having disposed of his or her property.⁶

Consideration moving from husband or wife.

Under M.W.P. Act, 1882, consideration moving from husband or wife must be valuable.

(b) *Voluntary Settlements*.—Voluntary settlements are those which are made after marriage, and not in pursuance of ante-nuptial articles, nor as founded on valuable consideration. A post-nuptial settlement, that is, one executed after marriage, is not a marriage settlement in the proper sense of the term, though expressed to be in consideration of the marriage, but is merely voluntary, unless it rest upon some fresh consideration.⁷ Where ante-nuptial articles on which to base the subsequent settlement are wanting, it is the absence of the valuable consideration of marriage (for *ex vi termini* it has already taken place) which renders these settlements voluntary. A voluntary settlement is not altogether void, for it binds the settlor and all volunteers (that is, those whose interest is not founded on valuable consideration) claiming under or through him. A voluntary settlement of real estate is void as against purchasers for value, even though they had notice of the voluntary settlement.⁸ The settlor himself will not be assisted by the court to defeat his settlement as against an unwilling purchaser;⁹ but he will be compelled to

Voluntary settlements.

Post-nuptial settlements.

Voluntary, unless founded on fresh consideration;

but not against settlor or volunteers.

¹ *Hewison v. Negus*, 22 L. J. Ch. 655.

² *Cottle v. Tripp*, 2 Vern. 220.

³ *Lavender v. Blackstone*, 2 Lev. 146.

⁴ See *Scott v. Bell*, 2 Lev. 70.

⁵ *Stephens v. Green*, [1895] 2 Ch. 148.

⁶ See *Shurmur v. Sedgwick*, 24 Ch. D. 597.

⁷ 27 Eliz. c. 4. *Pulvertoft v. Pulvertoft*, 18 Ves. 84; *Buckle v. Mitchell*, 18 Ves. 100.

⁸ *Smith v. Garland*, 2 Mer. 123.

⁷ Wats. Comp. Eq. 550.

convey where the purchaser is willing to complete the bargain.¹ So, too, a voluntary settlement of personal property is void as against creditors, where it has been executed in fraud of them,² or is void under the bankruptcy laws.³ But this subject will be more fully treated of in subsequent pages.⁴ Where a husband or a wife makes a post-nuptial settlement on the other, without any consideration moving from that other, though without any intent to defeat or defraud creditors, it will be held to be voluntary and void as against the latter; but as between themselves, the settlor could not allege as against the other that it was voluntary only, and not binding, on the ground of the absence of consideration.⁵

A voluntary settlement may become valid by subsequent dealing; thus, if a father make a voluntary settlement upon a child, who afterwards marries, the circumstance of the settlement leading to the marriage makes the settlement good, though it would have been bad as against creditors and subsequent purchasers, if no marriage had taken place.⁶

The Husband's Interest under the Settlement.—It has been thought worth while to treat shortly at this point the special subject of the interest of the husband under the settlement, for without a settlement he now takes no interest in his wife's property, at any rate during her life. When real estate of the husband is settled, he almost, as a matter of course, takes a life-interest in it, without impeachment of waste; and usually after intermediate limitations, sometimes to the wife for life, and the issue of the marriage, and sometimes to the issue only, he takes the ultimate remainder in default of issue. Frequently, also, he takes a life-interest in his wife's real estate, subject to her prior life-interest. With reference to personal property, or real estate directed to be converted and the proceeds invested, he usually takes the first life-interest in his own property, and a life-interest subject to her prior life-interest in her property. Not unfrequently there is a clause of forfeiture in the event of his becoming bankrupt, or assigning, charging, or encumbering his life-interest. Without such a clause the husband's life-interest, or any other interest which he may take under the settlement, will vest in his trustee in bankruptcy;⁷ but the validity of such a clause depends upon its surrounding circumstances.⁸

An ante-nuptial settlement may operate to entitle the husband

How
voluntary
settlement
may become
valid.

Husband's
interest under
the settlement.

Realty.

Personalty.

Increased
rights of the

¹ *Peters v. Nicolls*, L. R. 11 Eq. 391.

² 13 Eliz. c. 5.

³ 46 & 47 Vict. c. 52, s. 47.

⁴ See *post*, Revocation and Setting Aside of Settlements, p. 154.

⁵ See *Shurmur v. Sedgwick*, 24 Ch. D. 597.

⁶ *Brown v. Carter*, 5 Ves. 862; see *Roddy v. Williams*, 3 Jo. & Lat. 18.

⁷ 46 & 47 Vict. c. 52.

⁸ Wats. Comp. Eq. 577. For a further consideration of this subject, see next section, p. 131, and Revocation and Setting Aside of Settlements, *post*, p. 154.

as purchaser to property of his wife which would not legally have fallen under his marital right.¹ Where there is a gift to the wife for the purposes of the settlement, and the trusts of the settlement fail, the husband takes no interest in the gift, but there is a resulting trust for the benefit of the settlor.²

husband under the settlement.

SECTION 3.

Covenants in Settlements.

The subject-matter of this section will be treated of as follows: Covenants in settlements.
(1) Covenants or promises by third persons; (2) Covenants by the husband; (3) Covenants by the wife; (4) Covenants to settle after-acquired property.

(1) Covenants or promises by third persons or strangers, based upon the consideration of marriage, are valid and can be enforced; the most common instance of covenants of this nature are those by parents, or persons *in loco parentis*, who covenant to make a settlement on the marriage of their children.³ If the promise or covenant is made after marriage, it is, of course, voluntary, the marriage consideration being wanting; but if made before the marriage, which takes place on the faith of it, that which was otherwise merely voluntary is converted into a promise based on valuable consideration.⁴ Where the covenantor, whether parent, or person *in loco parentis*, does that which amounts to a substantial compliance with his covenant, the court will deem him to have satisfied it; ⁵ but where there are substantial differences between the provisions made by the settlement and those subsequently made by the covenantor, the presumption is against his having satisfied his liability on the covenant.⁶ In such a Election.
case the parties interested are often put to their election as to whether they will abide by the covenant in the settlement, or by the provision in the later instrument.⁷

(2) The husband may covenant to settle on his wife all or any part of his property, whether it exist at the time of the marriage, or is to come into existence afterwards, or whether he be entitled in his own right, or in that of his wife; and if the covenant has not been satisfied during his lifetime, the persons entitled under it may proceed against his estate for its due performance.⁸

Covenants by husband.

¹ *Lanoy v. Duchess of Athol*, 2 Atk. 444.

² *Re Nash's Settlement*, 51 L. J. Ch. 511.

³ *Jones v. How*, 7 Ha. 267; see *Re Brookman's Trust*, L. R. 5 Ch. App. 182.

⁴ 1 Bish. Mar. Wom. s. 788.

⁵ *Lord Chichester v. Corentry*, L. R. 2 H. L. 71; *Mayd v. Field*, 3 Ch. D. 587.

⁶ *Re Tussaud's Estate*, *Tussaud v. Tussaud*, 9 Ch. D. 363.

⁷ *Russell v. St. Aubyn*, 2 Ch. D. 398.

⁸ See *Smith v. Smith*, 1 Y. & C. Ex. 338.

Covenants by
wife.

(3) A wife will, under the present state of the law, be now able to enter into like binding covenants for the settlement of her property on her husband, both that which she possesses at the date of the marriage, and that which devolves upon her during coverture, except such as she may be restrained from anticipating, and if she fail to satisfy her covenant during her life, her estate may be proceeded against for the purpose of enforcing it.¹

Covenants to
settle wife's
after-acquired
property.

(4) *Covenants to settle after-acquired Property.*—Marriage settlements frequently contain an agreement and declaration, operating as a covenant on the part of the husband, to settle all the after-acquired property of the wife. Most of the cases which have been decided upon covenants of this description have arisen in the endeavour to adapt the covenant to the presumed intention of the parties. The great difficulty experienced is to determine the construction to be placed upon the language used, the court having no authority to extend the language of the settlement beyond the fair construction of the words. In every case, therefore, the question can be simply one of intention, which intention is to be collected from the terms of the instrument.² The object of this agreement was to curtail the interest of the husband, and protect the wife, whose property coming to the husband *jure mariti* was sought to be removed out of his control by impressing upon it the trusts of the settlement;³ and its operation has been on the whole more beneficial than the reverse. This agreement and declaration operating as a covenant was wont to be made by the husband alone, or by the husband and wife. If by the husband alone the wife was not bound by it,⁴ and it did not attach to her separate personal property, for her husband took no interest in it,⁵ nor to her real estate, for his interest in it was only a limited one,⁶ nor to reversionary interests not reduced into possession during the coverture.⁷ Thus, where in a settlement on the marriage of a female infant the husband covenanted with the trustees, that if his wife, or himself in the right of his wife, became entitled to real or personal property above a certain amount, to do everything to effect the vesting of the property in the trustees of the settlement, and property above the agreed amount was settled on the wife by her mother to her separate use, it was held by the Court of Appeal (reversing Fry, J.) that the wife was not bound to bring the property into settlement, as

Object of the
covenant.

Who bound by
the covenant.

Covenant by
husband alone
does not bind
wife's separate
estate.

¹ See *Re Parkin, Hill v. Schwarz*, [1892] 3 Ch. 510.

² *Peach. Sett.* p. 523.

³ See *Re Edwards*, L. R. 9 Ch. 97.

⁴ *Young v. Smith*, L. R. 1 Eq. 180.

⁵ *Ramsden v. Smith*, 2 Dr. 298; *Simson v. Jones*, 2 R. & M. 365, 376; *Re Macpherson, Macpherson v. Macpherson*, 55 L. J. Ch. 922.

⁶ *Simson v. Jones* (*ubi sup.*).

⁷ *Reid v. Kenrick*, 24 L. J. Ch. 503.

it was the husband's covenant alone.¹ Where the husband and wife jointly agreed, or did that which amounted to a joint agreement, whether openly on the face of the document, or by implication from its words, then the wife was bound,² even as to her separate property,³ unless specifically excluded;⁴ she was likewise bound where she assented to the covenant;⁵ and the execution of the settlement deed is such assent.⁶ But where the settlement was post-nuptial, and there did not exist any ante-nuptial agreement binding on the wife, she was not bound by her husband's covenant to settle.⁷ The effect of this joint covenant by husband and wife operated to sever the wife's joint interest in personal estate to which she became entitled by a subsequent instrument.⁸

Joint covenant
by husband
and wife—wife
bound.

An ante-nuptial agreement by husband and wife for the settlement by husband and wife of the latter's after-acquired property is a covenant by the wife as well as by the husband, whether she be a minor or of full age. If the wife be a minor, and the covenant be for her benefit (being voidable only and not void), it is binding upon all property coming to her during the coverture for her separate use, without a restraint upon anticipation, until she avoid and disaffirm the covenant as to such property. If being such a minor a sum of money is settled on her, the income of which she is restrained from anticipating, and by the same instrument she covenants to bring after-acquired property into the settlement, she cannot be compelled to elect whether she shall give up the income of the settled fund, or bring the after-acquired property into the settlement, but she is entitled to keep both.⁹ To make such a covenant absolutely binding upon a female infant, the consent of the Court of Chancery, if she be over seventeen years of age, must be first obtained to the settlement under the Infants' Settlement Act, 1855.¹⁰ If an infant

Covenant by
wife during
minority void-
able.

¹ *Daves v. Tredwell*, 18 Ch. D. 354; and see *Viditz v. O'Hagan*, [1900] 2 Ch. 87, as to a sum of money covered only by the husband's covenant to settle his wife's after-acquired property.

² *Butcher v. Butcher*, 14 Beav. 222; *Hammond v. Hammond*, 19 Beav. 29; *Re D'Estampes' Settlement*, 53 L. J. Ch. 117. Where there is any ambiguity in the body of the deed the court is entitled to look at the recitals for information as to what was agreed upon by the parties to the intended marriage. *Re De Ros' Trust*, *Hardwicke v. Wilmot*, 31 Ch. D. 81.

³ *Milford v. Peile*, 2 W. R. 181.

⁴ *Coventry v. Coventry*, 32 Beav. 612; *Kane v. Kane*, 16 Ch. D. 207; *Re Berens Settlement Trusts*, *Berens v. Benyon*, 59 L. T. 626.

⁵ *Lee v. Lee*, 4 Ch. D. 175.

⁶ *Re Haden*, *Coling v. Haden*, [1898] 2 Ch. 220.

⁷ But see *Anderson v. Abbott*, 23 Beav. 457.

⁸ *Re Hewett*, *Hewett v. Hallett*, [1894] 1 Ch. 362.

⁹ *Re Vardon's Trusts*, 31 Ch. D. 275. This decision overrules *Re Queade's Trusts*, 54 L. J. Ch. 786, and *Willoughby v. Middleton*, 2 J. & H. 344, on this point. See *Codrington v. Lindsay*, 8 Ch. App. 578; *Smith v. Lucas*, 18 Ch. D. 531; and *Cahill v. Cahill*, 8 App. Cas. 420, 427.

¹⁰ The consent of the court to a post-nuptial settlement by an infant married woman has been given under this Act; see *Sampson v. Wall*, 25 Ch. D. 482; but whether rightly or wrongly is open to doubt.

with an English domicile enter into such a covenant, and then marries a foreigner by the law of whose domicile she is prevented from making such a covenant so as to be irrevocable, the mere fact that she does not disaffirm the covenant within a reasonable time after attaining majority is not to be treated by the English courts as an affirmance of it.¹

Post-nuptial
covenant.

There is a difference between a post-nuptial and an ante-nuptial covenant made by a woman solely to settle her after-acquired property so far as affects those who were married under the old law. Such a post-nuptial covenant was ineffectual to bind subsequently acquired property, for her contract only bound her property existing at its date. If, then, the covenant had been made by an infant, and after attaining majority she affirmed it, she would only bind that property to which she was entitled at the date of the confirmation.² But since the Married Women's Property Act, 1882, such post-nuptial covenant would be binding upon her generally, for her contract will now bind subsequently acquired property.³

Operation of
covenant may
be limited,
either by ex-
press terms, or
by implication.

The wife's covenant to settle after-acquired property may be limited in its operation, either by direct words, or from an implication to be inferred from the general tenor and effect of the instrument in which she covenants.⁴ A woman on marriage may covenant to bring into settlement all property which shall come to her other than that settled to her separate use; and if property settled to her separate use does come to her during coverture, the property will not be bound by her covenant;⁵ or she may covenant in one part of the instrument in wide and broad terms to settle her after-acquired property, but in another part use expressions from which it may be inferred that the operation of her covenant is to be limited in its effect to property of a particular nature and description.⁶ A covenant by an intended wife to settle her after-acquired property is not a "usual" clause in a marriage settlement; that is, the actual assent of the woman to its being inserted is necessary.⁷

It is now a rule of construction that where the after-acquired property is found not to fit the trusts of the settlement, it may be assumed as a consequence that such property was not intended to come within the covenant to settle.⁸ Where a covenant has

¹ *Viditz v. O'Hagan*, [1900] 2 Ch. 87.

² See *Re Vardon's Trusts*, 31 Ch. D. 275.

³ See *post*, p. 135.

⁴ See *Re Stephenson*, 3 De G. M. & G. 969.

⁵ See *Brooks v. Keith*, 1 Dr. & Sm. 462; *Corentry v. Corentry*; 9 Jur. (N. S.) 313.

⁶ *Re Mainwaring's Settlement*, L. R. 2 Eq. 487.

⁷ See *Re Maddy*, *Maddy v. Maddy*, [1901] 2 Ch. 820.

⁸ So far as the above canon is the basis of the decision of *Re Mainwaring's Settlement*, that case may be taken to be good law; but if the language of the learned judge who decided it goes to the extent that the intention of a subsequent donor of property to a married woman can operate upon it contrary to the trusts of the settlement, then

been entered into for the settlement of the future property of a married woman, and a gift is afterwards made to her of such a nature as to come within the terms of the covenant, no expression of the intention of the donor that it shall not be settled will exclude it from the operation of the covenant.¹ The only case in which the wife's covenant would not operate would be in that of a gift which she was restrained from alienating, and would forfeit if she did aliene; and her assignment to the trustees of her settlement would amount to such alienation, and so create a forfeiture.²

Wife's covenant should prevail, except where it would be a forfeiture of the gift.

The Married Women's Property Act, 1882, has much modified the law on this subject, and the covenant by the husband, which was framed for the protection of the wife's property and to exclude the marital right, would seem, since the Act came into force, to be not only unnecessary, but actually nugatory. The covenant by the wife will be retained only in cases where it is desired to restrain her from in any way anticipating or alienating her property, except by way of assignment to her trustees. So far as her husband is concerned, a married woman is mistress of any property which may come to her during coverture; and unless she has entered into a covenant to settle property coming to her during marriage, she can dispose of it as she pleases, unless restrained by the terms of the instrument through which she acquires it. The husband, therefore, in future settlements, need not enter into any covenant in the matter, for he has no more power over his wife's property than she has over his. The practical effect of this covenant is to withdraw the wife's property from the control of her future creditors. As a married woman is mistress of her property when unrestrained, the morality of this provision is questionable. If the wife intends to bring into settlement property to which she may become subsequently entitled, it would seem that she alone need covenant with the trustees or other parties to that effect;³ but it has been held to the contrary that if a husband covenant with the trustees of his marriage settlement to settle the property of his intended wife, which has not originally been settled by deed or will to her separate use, and she agrees to such settlement, even though she was an infant at the time of the marriage, yet the husband's covenant binds her.⁴

Effect of M.W.P. Act, 1882.

Husband need not enter into joint covenant with wife;

except where she is an infant.

it cannot be supported. *Re Allnutt, Pott v. Brassey*, 22 Ch. D. 275; *Scholfield v. Spooner*, 26 Ch. D. 94.

¹ *Re Allnutt, Pott v. Brassey* (*ubi sup.*); *Scholfield v. Spooner* (*ubi sup.*).

² See *Brooks v. Keith* (*ubi sup.*).

³ *Stevens v. Trevor-Garrick*, [1893] 2 Ch. 307.

⁴ *Buckland v. Buckland*, [1900] 2 Ch. 534, following *Stevens v. Trevor-Garrick* (*ubi sup.*). With all submission these decisions do not seem well founded in law; for though section 19 of the Married Women's Property Act, 1882, is not to affect or interfere with settlements made or to be made, yet its application must be in accordance with the recognized principles of the law, one of which is that the husband has

Where a woman married before this Act came into force has covenanted to bring into settlement after-acquired property not limited to her separate use, acquires by deed or will after the commencement of the Act any such property which, by the terms of the instrument of donation *is not limited to her separate use*, she is bound by her covenant to bring it into settlement on the ground that though the 5th section of the Act attaches to such property the statutory separate use, yet section 19 limits the operation of section 5, by preventing the provisions of marriage settlements being interfered with or affected by withdrawing that which, independently of the Act, must have been brought into settlement.¹ But where a woman has so covenanted, but the after-acquired property coming to her is limited to her separate use *without power of anticipation*, in such case the property so limited is not bound by her covenant.² Where a woman married before January 1st, 1883, had a fund settled upon her with an absolute reversion in the property so settled, with a power to appoint the same by will, or, when discoverd, by deed, and she became discoverd, but did not exercise the power, but married again since January 1st, 1883, but without a settlement, she was held entitled to have the fund transferred to her without a release, because, as section 2 of the Act had added the incident of separate use, section 19 did not exclude its general operation.³

Operation of
covenant only
during cover-
ture.

This covenant *prima facie* lasts only "during coverture," so that any property coming to a woman when discoverd is not affected by it; thus, the effect of a decree of judicial separation is to render inoperative a covenant by a woman to settle after-acquired property; and she takes all property coming to her while the decree is in force as a *feme sole*;⁴ but, on the other hand, to prevent the *jus maritale* attaching to the wife's property, it has been held that a surviving husband is bound by his covenant to bring into settlement his wife's reversionary property that did not fall into possession during her lifetime.⁵ But this construction has been limited to where the property is in a

no marital interest in his wife's property; and a person who has no interest in another person's property cannot effectually bind or dispose of it. The fact of the wife's infancy at the time of the marriage would seem to throw still greater doubt on the accuracy of the decisions. See *Dawes v. Tredwell*, 18 Ch. D. 354. The agreement of the infant wife to settle her property is a contract which she can affirm and ratify after arriving at majority; but if the settlement is one not made under the provisions of the Infants' Settlement Act, 1855, it is one she may disaffirm on reaching majority. See *post*, Part IV. chap. iv.

¹ *Re Stonor's Trusts*, 24 Ch. D. 195; *Re Whitaker, Christian v. Whitaker*, 34 Ch. D. 227; *Hancock v. Hancock*, 38 Ch. D. 78, disapproving of *Re Queade's Trusts*, 54 L. J. Ch. 786.

² *Re Currie, Gibson v. Way*, 32 Ch. D. 361.

³ *Re Onslow, Plowden v. Gayford*, 39 Ch. D. 622.

⁴ *Dawes v. Creyke*, 30 Ch. D. 500.

⁵ *Fisher v. Shirley*, 43 Ch. D. 290; *Re Dowding's Settlement Trusts, Gregory v. Dowding*, [1904] 1 Ch. 441.

reversionary state.¹ The effect of section 8 of the Matrimonial Causes Act, 1858,² is that all property, whether in possession or reversion, coming to a married woman after a decree of judicial separation comes to her as if she were a *feme sole*, and this is so even where she has entered into a covenant to settle her after-acquired property.³ But a distinction is to be drawn between reversionary property which is in existence at the date of the settlement and affected by the covenant, and property her title to which accrues after the decree of separation.⁴

The property capable of being settled in this manner is property coming to a married woman, if it be an absolute interest, and not merely for life,⁵ which vests in, devolves upon, or belongs to her; or over which she can exercise a general power of appointment if so covenanted by her;⁶ if such power is not followed by a gift over in default of appointment, but the property remains absolutely hers whether appointed or no;⁷ but if there is such a gift over, she can defeat her covenant by appointing to herself out of the whole amount several sums, each less than the amount covenanted to be settled by her.⁸ But a life interest, however, may be affected by the covenant, if apt words are used showing that it is intended to be so affected.⁹ A mere *spes successionis* to a share of her husband's property, though coupled with an indemnity by him against disappointment is not "property" within this covenant, for it never vests in the wife during coverture.¹⁰

What property may be settled.

The duration of these covenants, in the absence of expressions to the contrary, is "during coverture"; and where that expression has been omitted, the duration has been restricted to that

Covenants endure during coverture.

¹ See *Re Bankes, Reynolds v. Ellis*, [1902] 2 Ch. 333. See *post*, chap. xv.

² 21 & 22 Vict. c. 108.

³ *Daves v. Greyke* (*ubi sup.*); *Davenport v. Marshall*, [1902] 1 Ch. 82.

⁴ *Davenport v. Marshall* (*ubi sup.*).

⁵ *Townshend v. Harrowby*, 4 Jur. (N. S.) 353.

⁶ *White v. Briggs*, 22 Beav. 176 n. £200 is as a rule the smallest amount of personalty so settled, but £500 is the usual limit; see *Re Mackenzie's Settlement*, L. R. 2 Ch. App. 345, for the mode of ascertaining the value of the wife's interest.

⁷ *Steward v. Poppleton*, W. N. [1887], p. 29; *Re O'Connell, Mawle v. Jagoe*, [1903] 2 Ch. 574.

⁸ *Bower v. Smith* L. R. 11 Eq. 279. In this Report is the omission of the fact that there was a gift over in default of appointment. The proposition in the text would seem to be an accurate description of the law on this subject; but there is a decision of North, J., in *Re Lord Gerard* (58 L. T. 800), which is not in consonance with it. Under what circumstances a married woman who has covenanted to bring into her settlement all money over a particular amount is not bound by, or may defeat the effect of her covenant, see *Re Middleton's Will*, 16 W. R. 1107; *Re Davies, Harrison v. Davies*, [1897] 2 Ch. 204. A legacy within the covenant but reduced by payment of legacy duty to an amount not within the covenant, is not affected by the covenant. *Re Pares, Scott-Chad v. Pares*, [1901] 1 Ch. 708. A legacy out of general estate given by one codicil, and a legacy out of proceeds of sale of real estate given by another codicil are acquired at one and the same time, and their value is to be aggregated to ascertain whether they are within the covenant or no. *Re Pares, Scott-Chad v. Pares* (*ubi sup.*).

⁹ See *Re Dowding's Settlement Trusts, Gregory v. Dowding* (*ubi sup.*).

¹⁰ *Re Simpson, Simpson v. Simpson*, [1904] 1 Ch. 1.

period;¹ and this was so where the property was derived from a specified source.² The ordinary clause is now drawn to include every interest of the wife existing at the time of the marriage, or acquired during the coverture, whether in possession or in reversion, and whether vested or contingent; a reversionary interest in a legacy in default of appointment which vested in the wife during the coverture, though liable to be divested by the exercise of a power of appointment, was held to be property within such a covenant.³ If the clause is confined to property in existence at the date of the settlement, a new interest acquired by the wife subsequently to that date will not be bound by the covenant.⁴ A clause so drafted obviates any speculation which used to attach to the words of futurity "should become entitled," and kindred expressions. As already stated, this subject has lost much of its importance, but as it is possible that some clauses may not have been so drafted as to avoid doubts, it may not be without some advantage to note shortly how unsettled the opinions of the judges have been on this subject, and to what conclusion the balance of opinion tends.

The doctrine that the wife's property at date of marriage is affected by the covenant

In *Graftley v. Humpage*,⁵ *James v. Durant*,⁶ *Re Hughes' Trusts*,⁷ and the latter case of *Re Viant's Trusts*,⁸ it was held that the words of futurity were satisfied by the circumstance that the husband's marital right accrued upon the marriage, so as to bring property belonging to the wife at the date of the settlement within the operation of the covenant. But this doctrine has been expressly disapproved in *Archer v. Kelly*,⁹ *Re Browne's Will*,¹⁰ *Re Pedder's Trusts*,¹¹ and *Re Jones' Will*,¹² which virtually overrules *Re Viant's Trusts*, which case can no longer be considered law; and property belonging to the wife at the date of the marriage, and not affected by the terms of the covenant, will not be brought into settlement, even though she was ignorant of its existence at the time of entering into the contract.¹³ It is almost needless to observe that now this point cannot be debated where the husband dies in the lifetime of the wife and before the fund falls into possession, or where the wife dies before it falls into possession.¹⁴ It has been held that income not originally included in the covenant might be so invested as to indicate a permanent intention on the part of the owner to turn it into capital, in which

cannot now be considered the law.

¹ *Re Edwards*, L. R. 9 Ch. App. 97; S. C. 43 L. J. Ch. 265; *Re Coghlan, Broughton v. Broughton*, [1894] 3 Ch. 76. An assignment on marriage of after-acquired property is now governed by the rules laid down in *Re Edwards*; see *Holloway v. Holloway*, 25 W. R. 575.

² *Re Campbell*, 6 Ch. D. 686.

³ *Re Ware, Cumberledge v. Cumberledge-Ware*, 45 Ch. D. 269.

⁴ See *Sweetapple v. Horlock*, 11 Ch. D. 745.

⁵ 1 Beav. &c., 46.

⁶ L. R. 18 Eq. 436.

⁷ L. R. 10 Eq. 585.

⁸ *Re Garnett, Robinson v. Gandy*, 33 Ch. D. 300; and see *Williams v. Mercier*,

10 App. Cas. 1.

⁹ 1 Dr. & S. 300.

¹⁰ L. R. 7 Eq. 231.

¹¹ 2 Ch. D. 362.

¹² 2 Ch. D. 50, overruling 6 Ch. D. 618.

¹³ 4 Giff. 432.

case it would become subject to the covenant, if its terms are capable of including it.¹ But in more recent cases it has been decided that unless it appears clearly intended that the income derived by a married woman from her settled property shall be within the terms of such a covenant, any investments made by her during coverture of the proceeds of such income do not become subject to the covenant.²

Words of futurity in the covenant clearly exclude property existing at the time of making the covenant.³

The foregoing remarks deal with property already in possession ; now with reference to reversionary or contingent interests, it may (with caution where so much must in each individual case depend on the terms of the instrument) be inferred that if falling into possession during the coverture they will be considered as after-acquired property within the meaning of a covenant for the settlement of such property ; but that they would not be affected by the covenant where they did not accrue during the coverture, whether the wife were or were not a party to it.⁴

A contingent or reversionary interest of the wife, existing at the date of the marriage, which falls into possession during coverture, would fall within the operation of a covenant to settle all property of whatsoever kind to which she became entitled during the coverture, unless there were words in the covenant to cut down the effect of the covenant, and so exclude its full operation ;⁵ and such a reversionary interest vested in the wife at the date of marriage is within the covenant, though it is liable to be divested by the exercise of a power of appointment.⁶

As to reversionary or contingent interests.

Contingent or reversionary interest falling into possession during coverture affected by covenant ;

even where liable to be divested.

In *Re Clinton's Trusts*⁷ it was held that the words frequently used in the covenants under discussion, "become entitled to," may mean an acquisition of property in which the wife had no interest at the time of marriage, but which vests in her absolutely during the coverture, and would include a reversionary interest which fell into possession during coverture. But in a very recent case⁸ the same words, "become entitled," were held not to include property to which the wife was entitled in reversion at the date

¹ *Re Bendy, Wallis v. Bendy*, [1895] 1 Ch. 109.

² *Finlay v. Darling*, [1897] 1 Ch. 719. *Re Clutterbuck's Settlement, Bloxam v. Clutterbuck*, 73 L. J. Ch. 698. In these cases *Re Bendy* (*ubi sup.*) was not followed. The cases of *Finlay v. Darling* (*ubi sup.*) and *Re Clutterbuck's Settlement* (*ubi sup.*) have been recently approved of by the House of Lords sitting as a Scotch tribunal. See *Mackenzie v. Allardes*, [1905] A. C. 285, 296.

³ *Re Clinton's Trusts*, L. R. 13, Eq. 295 ; *Re Pedder's Trusts* (*ubi sup.*).

⁴ *Dav. Prec.* vol. iii. Pt. I. p. 211 ; *Re Welstead, Welstead v. Leeds*, 47 L. T. 331.

⁵ *Re Mackenzie's Settlement Trusts*, L. R. 2 Ch. App. 345.

⁶ *Re Jackson's Will*, 13 Ch. D. 189 ; *Sweetapple v. Horlock*, 11 Ch. D. 745, corrected by *Re Jackson's Will* (*ubi sup.*).

⁷ *Per Wickens, V.C.* (*ubi sup.*)

⁸ *Per Kekewich, J., In re Bland's Settlement, Bland v. Bland*, [1905] Ch. 4. His Lordship held that the words "become entitled" were words of futurity and excluded property in existence at the date of the marriage.

of the marriage, even though it might fall into possession during the coverture.

Summary.

To sum up, the property (whether in possession or reversion) included in the operation of the covenant as ordinarily drawn, will be such as is comprised in its terms, and acquired by the wife during coverture, while that will be excluded which, though possibly, and even quite within its terms, yet is not so acquired while the coverture lasts.

Husband's covenant to settle his after-acquired property.

Not only are such covenants as these entered into with respect to the wife's property, but sometimes there is an agreement or covenant by the husband to settle his own after-acquired property. A general assignment of property is rightly regarded with suspicion; but the marriage consideration is so strong, that a covenant of this nature made by an insolvent, but without the appearance of fraud, was upheld against his assignees in bankruptcy.¹ A covenant on marriage by a man to settle his after-acquired property, excepting his business assets, is good and may be enforced; and a post-nuptial assignment of chattels in pursuance of such covenant is not a bill of sale requiring registration, but a marriage settlement within the exception in section 4 of the Bills of Sale Act, 1878.²

46 & 47 Vict.
c. 52, s. 47.

But there are circumstances under which the assignment by the husband would not operate as a valid conveyance to defeat the claims of his creditors;³ and the Bankruptcy Act of 1883 provides for this contingency. Section 47 (2) enacts that "any covenant or contract made in consideration of marriage, for the future settlement on or for the settlor's wife or children of any money or property wherein he had not at the date of his marriage any estate or interest, whether vested or contingent, in possession or remainder, and not being money or property of or in right of his wife, shall, on his becoming bankrupt before the property or money has been actually transferred or paid pursuant to the contract or covenant, be void against the trustee in the bankruptcy. 'Settlement' shall, for the purposes of this section, include any conveyance or transfer of property." The question may be raised whether, if a husband who has entered into a covenant to settle his after-acquired property becomes bankrupt and obtains his discharge, he is free from his liability on the covenant. His liability will, in all probability, be deemed to continue; for though in the case of other creditors it would be a provable matter, and so barred by the discharge, yet matrimonial relations are different from ordinary business transactions, and the interests of others, the children, would be taken into consideration.⁴

Discharge of bankrupt husband discharge of liability under his covenant, *quære*.

¹ *Hardey v. Green*, 12 Beav. 182.

² *Re Reis, Ex parte Clough*, [1904] 2 K. B. 769.

³ See *post*, Revocation and Setting Aside of Settlements, p. 154.

⁴ See *Collyer v. Isaacs*, 19 Ch. D. 342, 352.

The property which comes to the husband,¹ whether in possession or reversion, and whether settled on him by the wife, or derived from other adventitious sources, may be so settled on him as to divest on his bankruptcy or insolvency, but the settlement must be so framed as to make the divesting absolute for a limited estate.² Though to an absolute gift of property to a man or a *feme sole* it is not possible to attach a clause of forfeiture and a gift over if the donee alienates or assigns the property, as such would be inconsistent with the terms of the gift, yet where the gift is for a limited estate then such divesting clause becomes operative. A man may settle property upon himself for life with a clause forfeiting his interest in the event of alienation or attempted alienation, provided such alienation affects only a particular alienee; thus, where real estate was settled upon trust to pay the rents to the settlor for life, or until he should encumber it, or become bankrupt, and then to pay an annuity to his wife, and he first mortgaged the property, and then became bankrupt, the limitation was upheld, as the forfeiture arose upon the mortgage;³ and where the settlor settled his own property on trust to pay the income to himself during his life or till he should become bankrupt or suffer something whereby the same would, through his act, default, or by operation or process of law, if belonging absolutely to him become vested in or payable to some other person or persons, the limitation over was upheld in an involuntary alienation of the husband's income in favour of a judgment creditor, who had obtained an order appointing a receiver of such income.⁴ But a man cannot settle his property in such a way as to divest on his bankruptcy, as such would be a fraud on the bankruptcy law;⁵ and where a husband covenanted in his settlement to pay a sum of money in the event only of his failing in his circumstances, his trustees were not allowed to prove as creditors in his bankruptcy.⁶

A husband by a mere post-nuptial settlement cannot so settle his wife's reversionary estate to which he might become entitled that his life interest in such fund, when fallen into possession, should become determinable on his bankruptcy; for if he does become bankrupt, such settlement is void against his trustee in bankruptcy under 13 Eliz. c. 5.⁷

¹ *Sharpe v. Cosserrat*, 3 W. R. 473.

² See *Lockyer v. Savage*, 2 Str. 947; *Whitmore v. Mason*, 2 J. & H. 214; *Montefiore v. Behrens*, L. R. 1 Eq. 171 (post-nuptial settlement); *Re Akeroyd's Settlement*, *Roberts v. Akeroyd*, [1893] 3 Ch. 363; *Mackintosh v. Pogose*, [1895] 1 Ch. 505.

³ *Brooke v. Pearson*, 27 Beav. 181; see also *Knight v. Browne*, 30 L. J. Ch. 649.

⁴ *Re Detmold*, *Detmold v. Detmold*, 40 Ch. D. 585.

⁵ *Higinbotham v. Holme*, 19 Ves. 88; *Ex parte Hodgson*, 19 Ves. 206; *Lester v. Garland*, 5 Sim. 205. *Re Brewer's Settlement*, *Morton v. Blackmore*, [1896] 2 Ch. 503; and see *Merry v. Poynall*, [1898] 1 Ch. 306.

⁶ *Ex parte Murphy*, 1 Sch. & Lef. 44.

⁷ *Re Holland*, *Gregg v. Holland*, [1901] 2 Ch. 145.

Divesting of property coming to husband on bankruptcy or insolvency must be absolute.

But a settlement of damages obtained by the settlor in a divorce suit sanctioned by the Divorce Court cannot be set aside as voluntary or as made with intent to defeat creditors, though at the time of the settlement he was in financial difficulties.¹

Same rules,
how far
applicable to
married
women.

In like manner, a married woman is not permitted by bringing property, or by covenanting to bring it, into settlement with a restraint on anticipation (which would have the same effect as the divesting of the husband's property), to withdraw the means of satisfying the claims of her ante-nuptial creditors, and if she is in trade her post-nuptial creditors as well.² The claims of her ante-nuptial creditors have been recognized for some time in cases where the woman indebted at the time of her marriage has settled property to her separate use without power of anticipation, and her ante-nuptial debts have been made a charge upon such property.³ This principle has now received legislative sanction.⁴

M.W.P. Act,
1882, s. 19.

SECTION 4.

Construction of Settlements.

This section will be divided into two sub-sections—(1) The construction of marriage articles; (2) The construction of settlements generally.

Construction
of marriage
articles.

(1) The guide for the construction of marriage articles is the presumed intention of the parties who have executed them. Articles duly signed, not followed by any settlement, form a binding contract, capable of being enforced at the instance of any person who may be entitled to enforce any claim under the settlement, had such settlement been made in pursuance of the articles. While the form of the articles is immaterial, they will be specifically enforced, and the insertion of penalties in a bond did not and will not exclude the jurisdiction of equity.⁵ Sometimes in marriage articles trusts are inserted which are in their nature *executory*—*i.e.*, where they remain to be carried out in the future; and such will be carried out according to the presumed

Executory
trusts.

¹ *Re Stephenson, Ex parte Brown v. Stephenson and others*, 45 W. R. 416.

² *Ex parte Bolland, Re Clint*, L. R. 17 Eq. 115.

³ *Sanger v. Sanger*, L. R. 11 Eq. 470; see *post*, chap. xv. Separate Estate.

⁴ 45 & 46 Vict. c. 75, s. 19. But if a married woman, solvent at the time of her marriage, and not a trader, makes a settlement whereby she deprives herself of the power of anticipation, and covenants to bring into settlement all after-acquired property, and contracts debts, and subsequently becomes entitled to property, the claims of her trustees to such property will be held superior to those of her post-nuptial creditors, as section 19 of the above Act leaves untouched the effect of restraint upon anticipation so far as debts contracted after marriage are concerned. See *Hemingway v. Braithwaite*, 61 L. T. 224. In this case, a woman while an infant married and contracted a debt, for which judgment was recovered against her separate estate. On attaining her majority, she executed a post-nuptial settlement, by which she restrained herself from anticipating her property; and it was held that the settlement was good against her creditors by virtue of section 19 of the above Act.

⁵ *Chilliner v. Chilliner*, 2 Ves. Sen. 528; *Prebble v. Boghurst*, 1 Swanst. 309.

intention of the parties, but in a careful and accurate manner.¹ But if the trusts are *executed*, they will be construed strictly according to their legal limitations;² and as a result of this principle the Courts of Equity have decreed strict settlements, as giving most effect to the presumed intentions of the parties to provide for the issue of the marriage; but this does not hold good in all cases.³ Lastly, the intentions of the parties, as expressed in the articles, ought for safety to be embodied in the more formal settlement. But under certain circumstances, as where the proportions of the property are slender, in order to avoid expense, the court will declare the true meaning of the articles without causing a formal instrument to be prepared and executed.⁴

Executed trusts.

(2) In construing final settlements the court will look as closely as it can to the intention of the parties; and though bound to give effect to clear and positive limitations, will allow the language of the instrument, when feasible, to be controlled by its general intention.⁵ Thus, the plain meaning of the words must have effect given to them, unless they are clearly inconsistent with the general drift and intention of the document; and to effect this general intention words will be put in,⁶ or be construed in a sense other than their natural one.⁷

Construction of final settlements.

The court, in construing settlements, looks with favour upon the interests of the children,⁸ but of course has no authority to extend the language of the settlement beyond the fair construction of the words,⁹ and cannot take into consideration the hardship of any individual case, but must judge upon the documents as it finds them. The safe rule of construction in general is to interpret the words both of deeds and wills according to their plain natural import, unless by so doing some manifest absurdity or inconvenience would follow, which will be sufficient to satisfy the court that the person using the words must have used them in some sense different from that which would be their ordinary meaning.¹⁰

In favour of children.

¹ *Trevor v. Trevor*, 1 P. Wms. 622.

² *Jervoise v. Duke of Northumberland*, 1 Jac. & W. 559.

³ See *Howel v. Howel*, 2 Ves. Sen. 358.

⁴ *Byam v. Byam*, 24 L. J. Ch. 209. Where articles directing the settlement of personal property have not been carried out and executed in a more formal manner, the court will take upon itself to direct a settlement of the property; thus, where articles direct personal property to be settled upon trust for the husband "during their lives," they will be carried into effect by giving the wife the first life-interest. For the mode of settling a wife's fortune which is usually approved by the Court of Chancery, see *Cogan v. Duffield*, 2 Ch. D. 44.

⁵ *Currie v. Larkins*, 10 L. T. 47; *Jeyes v. Savage*, L. R. 10 Ch. 555, reversing 23 W. R. 742.

⁶ *Kentish v. Newman*, 1 P. Wms. 234.

⁷ *Re Palmer*, L. R. 19 Eq. 320; *Re Daniel's Settlement Trusts*, 1 Ch. D. 375.

⁸ *Currie v. Larkins* (*ubi sup.*).

⁹ *Reid v. Kenrick*, 1 Jur. (N. S.) 897.

¹⁰ See *Scarisbrick v. Lord Skelmersdale*, 4 Y. & C. Ex. 78. S. C. on appeal, *Bootle v. Scarisbrick*, 1 H. L. Cas. 67.

Contractual
capacity
depends on *lex*
domicilii.

The general capacity to enter into a binding contract based on the consideration of marriage depends upon the *lex domicilii* of the parties;¹ and by the same law the validity of a contract of settlement is to be decided in the absence of stipulations to the contrary.²

Foreign law.
Intention of
parties
followed.

Settlements involving questions of foreign law will be construed by the law of that country which was intended by the parties to govern their agreement,³ and if English subjects contract that their marriage rights shall be regulated by a foreign law, the English courts will give effect to such stipulation,⁴ and, conversely, if persons of foreign domicile contract that their marriage rights shall be regulated by English law, the English courts will give effect to such stipulation.⁵ In other words, the parties to a marriage contract are free to agree that the law of any country shall govern their proprietary rights;⁶ but if the parties are domiciled English subjects and the provisions of the foreign law are repugnant to English law, the courts of this country will not give effect to them.⁷ Where a contract of marriage was executed in Scotland (where the marriage took place) by a domiciled Englishman described as residing in Scotland, and a Scotchwoman described as residing there, and whose domicile was Scotch; and trusts were declared of English real property of the husband in English form, and of personalty in Scotland belonging to the wife in English form, the trusts of the husband's property were construed by English law.⁸ So, too, where on the marriage of an Englishwoman in England with a domiciled Frenchman, her personal property was settled in English form with English trustees, the settlement and the rights arising under it were construed by English law.⁹ The form and effect of the construction of the document are important factors in determining by what law it should be governed.¹⁰

A contract of marriage made in England in the Scotch form between a domiciled Scotchman and an Englishwoman (the marriage taking place in England) will be construed according to Scotch law.¹¹ But the mode of enforcing such contract must be in accordance with the law of the country to the tribunal of which recourse has been made.¹²

¹ *Cooper v. Cooper*, 13 App. Cas. 88.

² *Re Cooke's Trusts*, 56 L. J. Ch. 637.

³ *In the Goods of Reid*, 1 L. R. P. & D. 74; *Colliss v. Hector*, L. R. 19 Eq. 334.

⁴ *Este v. Smyth*, 23 L. J. Ch. 705.

⁵ *Re Hernandez, Hernandez v. Sawtell*, 27 Ch. D. 284.

⁶ See *Van Grutten v. Digby*, 32 L. J. Ch. 179; *Viditz v. O'Hagan*, [1900] 2 Ch. 87.

⁷ *Re Fitzgerald, Surman v. Fitzgerald*, [1903] 1 Ch. 933. This case, though not the proposition in the text, was reversed, [1904] 1 Ch. 573.

⁸ *Chamberlain v. Napier*, 15 Ch. D. 614. See *Re Barnard, Barnard v. White*, 56 L. T. 9.

⁹ *Re Megret, Tweedie v. Maunder*, [1901] 1 Ch. 54.

¹⁰ *Re Bankes, Reynolds v. Ellis*, [1902] 2 Ch. 333.

¹¹ *Duncan v. Cannan*, 23 L. J. Ch. 265.

¹² *Don v. Lipmann*, 5 Cl. & F. 1.

The law of the husband's domicile governs the rights of the spouses to all movable property which is affected by an express contract entered into by them at the date of the marriage; so, too, where the law of the husband's domicile at the time of marriage provides in the absence of an express contract a statutory settlement of the property of the spouses, such statutory settlement prevails for all time, whether the spouses preserve their original domicile or change it from time to time.¹ It cannot be said that the law on this point is in a satisfactory condition; for there is yet another state of things in which a different principle is applied, viz., where the law of the original domicile is silent about, or does not clearly define, the proprietary rights of the spouses in the absence of an express contract (which is difficult to conceive). In this case the rights of the spouses may vary with their domicile from time to time.² It may be asked whether in such a case, could a husband acquire larger rights against his wife by change of domicile as she can against him? On principle he ought to be able to do so, but it may be doubted whether he would be permitted. The more logical and satisfactory principle to lay down would seem to be, where the parties on their marriage have expressly contracted to stand in certain proprietary relations to each other then no change of domicile should be allowed to affect or prejudice that contract. If, on the other hand, the spouses do not enter into any such express contract, then they should be deemed to have contracted that their proprietary relations should be governed by the law of their matrimonial domicile at the time when questions between them as to their respective rights should arise.

Lex domicilii
governs the
rights of the
spouses as to
movable property.

The *lex rei sitæ* governs the relations of the spouses with regard to their real property;³ but if the regulations and provisions of the law of the matrimonial domicile are not inconsistent with those of the law of the situation effect will be given to them.⁴

Lex rei sitæ
primâ facie
prevails as to
real property

SECTION 5.

Enforcement of Settlements.

Promises and agreements *in consideration of marriage* (but not *promises to marry*) are within the provisions of the fourth section of the Statute of Frauds. That section runs, so far as it is applicable to the subject under discussion, as follows: "No action shall be brought . . . whereby to charge any person upon any agreement made upon consideration of marriage . . . unless the agreement upon which such action shall be brought,

Promises in
consideration
of marriage
within the
Statute of
Frauds.

¹ *De Nicols v. Curlier*, [1900] A. C. 21.

² *Lashley v. Hog*, 4 Pat. 581; and see *De Nicols v. Curlier* (*ubi sup.*), in which case *Lashley v. Hog* is distinguished.

³ *Re De Nicols, De Nicols v. Curlier*, [1900] 2 Ch. 410.

⁴ *Ibid.*

or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." Thus, promises and settlements in consideration of marriage must conform to the requirements of the statute to be binding, and, if necessary, to be specifically enforced. There is no magic in any particular formality to be observed in drawing up the intentions of the parties,¹ yet the promise must be absolute, and contained in some writing or writings signed by the person who has made the promise, or by some agent whom he has lawfully and properly authorized to act for him.² Knowledge of the promise on the part of the person seeking to enforce it is necessary, for otherwise the marriage cannot be said to have taken place on the faith of it.³ It is now well settled that a written agreement after, in pursuance of a parol agreement before, marriage is a sufficient memorandum within the statute.⁴

Marriage alone is not part-performance of a contract made in relation to it.

Marriage is not for the purposes of specific performance considered as a part-performance of a parol contract in relation to it, and for which it forms the consideration, for to hold this would be to overrule the Statute of Frauds, which (as is pointed out above) enacts that every agreement in consideration of marriage to be binding must be in writing.⁵ So, where there was no ante-nuptial contract, but only a parol promise, and the settlement was made shortly after marriage, the settlement was set aside as being void as against creditors.⁶ But the recital of a parol ante-nuptial contract in consideration of marriage in a post-nuptial settlement is a sufficient note or memorandum within the fourth section of the Statute of Frauds as to render the post-nuptial contract enforceable both as against the settlor and his trustee in bankruptcy.⁷ Again, the execution of a will made in the place of a marriage settlement, but revoked, is not a sufficient part-performance.⁸ But as between the parties themselves or their representatives the parol agreement is not void, and acts connected with the marriage, which independently of it

¹ See *ante*, p. 125.

² *Hammersley v. De Biel*, 12 Cl. & F. 45; *Coverdale v. Eastwood*, L. R. 15 Eq. 121; but see *Ré Fickus, Farina v. Fickus*, [1900] 1 Ch. 331. This memorandum must be in existence at the time when the action to enforce the agreement is brought. *Lucas v. Dixon*, 21 Q. B. D. 317.

³ *Ayliffe v. Tracy*, 2 P. Wms. 66.

⁴ *Dart, V. & P.* 250; *Taylor v. Beech*, 1 Ves. Sen. 297; *Hammersley v. De Biel*, 12 Cl. & F. 64 n.

⁵ *Fry, Sp. Perf.* 268; *Dart, V. & P.* 1140; *Montacute v. Maxwell*, 1 P. Wms. 618; *Lassence v. Tierney*, 1 Mac. & G. 551.

⁶ *Warden v. Jones*, 23 Beav. 487, in effect overruling a dictum of Lord Thurlow in *Dundas v. Dutens*, 1 Ves. 196; and see remarks of Sir G. Jessel in *Trowell v. Shenton*, 8 Ch. D. 324.

⁷ *Re Holland, Gregg v. Holland*, [1902] 2 Ch. 360.

⁸ *Caton v. Caton*, L. R. 2 H. L. 127. In this case Lord Cranworth seems to have thought that the acts of specific performance could not be by the party sought to be charged.

would be acts of part-performance, are not the less so from being done in connection with it, and therefore differ from cases where marriage is the sole act relied on. Thus, where there is a written agreement after in pursuance of a parol agreement before marriage, or where after the marriage possession of the property is given up, or some other act is done, in pursuance of the parol agreement, which independently of the marriage would constitute part-performance, the contract may be enforced;¹ and where a marriage was followed by the delivery up by the settlor of possession of the things verbally promised to be conveyed, the operation of the statute was held to be defeated.² Again, as a representation made by one party for the purpose of influencing the conduct of the other party will in general be sufficient to entitle him to the assistance of the court for the purpose of realizing such representation, so if a person in the case of a marriage acting on the faith of such representation celebrates the marriage, equity will give effect to such representation, which, however, must have been reduced into writing.³ And where one party has put it out of his power to perform the contract, there is a breach in respect of which the other party has an immediate right of action to recover damages.⁴ Where a proposal in writing to leave property by will made to induce a marriage, is accepted and the marriage takes place on the faith of it, if the proposal relates to a defined piece of real property the court may decree a conveyance of that property after the death of the person making the proposal against all who claim under him as volunteers.⁵ But both the contract⁶ and the acts in part-performance must be certain.⁷

If marriage articles are in their nature such as can be enforced, the courts will enforce them at the instance of those who are entitled to ask for them to be specifically performed. Thus, the husband and wife, and the issue of the marriage, can call upon those who are bound by them to perform their covenants, or upon their real or personal representatives, and volunteers claiming under them,⁸ and purchasers with notice⁹ but not upon purchasers without notice.¹⁰ If a stranger is a purchaser under the articles of any benefit or interest, and his equity is as capable of being enforced as if he claimed directly under the marriage consideration, he can claim to have them

Specific
performance
of marriage
articles.

¹ *Walford v. Gray*, 13 W. R. 761; see also *Taylor v. Beech*, 1 Ves. Sen. 297; and *Barkworth v. Young*, 4 Drew, 1; *Re Holland, Gregg v. Holland*, [1902] 2 Ch. 360.

² *Surcome v. Pinniger*, 3 De G. M. & G. 571; *Ungley v. Ungley*, 5 Ch. D. 887; *Sharman v. Sharman*, 67 L. T. 834.

³ *Hammersley v. De Biel*, 12 Cl. & F. 45.

⁴ *Synge v. Synge*, [1894] 1 Q. B. 466.

⁵ *Ibid.*

⁶ *Randall v. Morgan*, 12 Ves. 67.

⁷ *Gulliver v. Gulliver*, 2 Jur. (N.S.) 700.

⁸ *Trevor v. Trevor*, 1 P. Wms. 622; *Pulvertoft v. Pulvertoft*, 18 Ves. 84.

⁹ *Davies v. Davies*, 4 Beav. 54. ¹⁰ *Warwick v. Warwick*, 3 Atk. 293.

enforced.¹ It is, however, a rule of equity that the articles must be specifically executed *in toto* or not at all; and this will be done without regard to the results thereby brought about, provided the interests of purchasers for value be not affected.² Non-performance of the articles on one side is not as a rule an excuse for their non-performance on the other;³ unless the performance on the one side is clearly a condition precedent to the performance on the other.⁴

Covenants entered into by the husband and wife respectively will be enforced; and not only will the covenants of such be enforced, but those of third persons; for where a person agrees or covenants to do a thing, equity will treat it as done, and will decree its specific performance, either against him personally, or against his estate.⁵

It is necessary to consider next by whom, and on whose behalf marriage settlements can be enforced. An agreement or promise in consideration of marriage is regarded very strictly and differently from the majority of other contracts, in that the breach of the obligation on the one side is not a sufficient excuse for non-performance on the other;⁶ and if the covenants are mutually dependent upon each other, such dependence must be expressed in clear and explicit terms.⁷ By marriage the interests of others than the contracting parties, viz., the possible issue, are affected, and their rights are regarded with jealousy; indeed "children born of the marriage are equally purchasers under both father and mother."⁸ The marriage must be one recognized as legal, as otherwise unexecuted voluntary trusts will not be enforced, and the beneficial interest in the settled property will remain in the settlor,⁹ but if a settlor confers on a stranger the absolute beneficial interest in property legally vested in trustees, though for an illegal consideration (*e.g.*, marriage with a dead wife's sister), such settlement will be upheld as against the settlor or his representative;¹⁰ but where the trustees of such a settlement seek the advice of the court as to how to dispose of the trust funds, then the court will not enforce the trust as being *contra bonos mores*.¹¹ The execution of these covenants may be enforced by all interested parties; thus, by the husband,¹² and the wife and her trustees against the husband,¹³ and she will be allowed

Settlements
enforceable by
whom, and on
whose behalf.

Husband.
Wife.

¹ *Heap v. Tonge*, 9 Ha. 104.

³ *Jeston v. Key*, 6 L. R. Ch. 610.

⁵ *Graham v. Wickham*, 1 De J. G. & S. 474. See *ante*, section 3, Covenants in Settlements, p. 131.

⁶ *Jeston v. Key* (*ubi sup.*).

⁸ *Harvey v. Ashley*, 3 Atk. 610.

⁹ *Chapman v. Bradley*, 4 De G. & S. 71; *Pawson v. Brown*, 13 Ch. D. 202.

¹⁰ *Ayerst v. Jenkins*, L. R. 16 Eq. 275. In this case there was a considerable lapse of time before attempting to impeach the settlement.

¹¹ *Phillips v. Probyn*, [1899] 1 Ch. 811.

¹² *Lee v. Lee*, 4 Ch. D. 175.

² *Davenport v. Bishopp*, 1 Ph. 698.

⁴ *Lloyd v. Lloyd*, 2 Myl. & Cr. 192, 204.

⁷ *Lloyd v. Lloyd* (*ubi sup.*).

¹³ *Hastie v. Hastie*, 2 Ch. D. 304.

to enforce the terms of an ante-nuptial contract for a settlement, where in ignorance of her rights she has since the marriage accepted a much smaller sum in satisfaction.¹ The trustees can Trustees. enforce them against the wife and children; though the wife will not be bound by her husband's covenant to settle her property on her next of kin.² The children of the settlor can Children. enforce their rights, whether as purchasers or as volunteers, and are excepted from the rule that volunteers cannot enforce covenants on their behalf.³

Though the covenants in a settlement are, as a rule, independent of one another, and may be enforced on one side, notwithstanding the other side has not performed those for which it is responsible, yet the defaulting party cannot enforce the covenants against the other party injured by his default.⁴ But if, on the one side, the covenant is contingent, and on the other the right is absolute, the latter may be enforced, though the performance of the contingent covenant is doubtful or impossible.⁵

This leads to the inquiry of what is the nature of marriage as Marriage a valuable consideration. a consideration for contracts based upon it, and its scope and extent. Marriage is a *valuable* consideration, in fact the highest known to the law, and runs through the whole agreement based upon it, supporting every provision with regard to the husband, the wife, and the issue; and a settlement founded on it will not in general be voluntary or fraudulent either within 13 Eliz. c. 5, and the bankruptcy laws, or 27 Eliz. c. 4, but will have effect given to its terms. The issue of the marriage take as *purchasers* in right of both parents, as though they had given valuable consideration for their rights under it, and can enforce the performance of the covenants contained in it, if default has been made on the one side and the other.⁶ The real difficulties as to enforcing settlements arise when those who are to take under them are collaterals, and so not strictly within the consideration of the agreement; it then sometimes becomes a question whether the trusts in their favour shall defeat the interests of adverse claimants. As a general rule, remainders to collaterals are voluntary, unless there be some limitations subsequent to them within the consideration, which must be supported, or unless a valuable consideration be given.⁷ But to enable volunteers under a post-nuptial settlement, such as children of a former marriage, to enforce the trusts, such trusts must have been Rule as to the rights of collaterals to enforce limitations in their favour.

¹ *Gilchrist v. Herbert*, 26 L. T. 381.

² *Gibbs v. Grady*, 41 L. J. Ch. 163.

⁴ *Crofton v. Ormsby*, 2 Sch. & Lef. 602.

⁶ *Crompton v. Ormsby* (*ubi sup.*); *Campbell v. Ingilby*, 27 L. T. (O. S.) 51; *Jeston v. Key*, 6 L. R. Ch. 610.

⁷ *Stackpole v. Stackpole*, 2 Con. & Law, 489, 502; per Sugden, L.C., Ireland, *arguendo*. See also *Kekewich v. Manning*, 1 De G. M. & G. 176; *Wollaston v. Tribe*, L. R. 9 Eq. 44; *Re D'Angibau*, *Andrews v. Andrews*, 15 Ch. D. 228.

³ *Gale v. Gale*, 6 Ch. D. 144.

⁵ *Basevi v. Serra*, 3 Mer. 674.

perfected, and the court will refuse to perfect them in favour of the children who are strangers to the contract, though valuable consideration has moved between the parties to the settlement, where such trusts remain to be perfected; but where the settlement can be said to be for valuable consideration as regards the collaterals, then the court will interfere on their behalf.¹ Where the limitations in favour of volunteers (*e.g.*, children by a former marriage) are intended by the settlor to be covered by those limitations in favour of those who are within the marriage consideration, so that the latter cannot take effect without also giving effect to the former, then in such case the limitations in favour of collaterals or volunteers can be enforced by them, and are good as against subsequent purchasers or assignees for value.² But certain limitations in favour of collaterals are supported against subsequent purchasers as being for valuable consideration; for instance, a settlement by a widow in favour of her issue by a former marriage,³ and even where her issue is illegitimate;⁴ but the limitations in a marriage settlement in favour of a widower's children have been held void and voluntary under 27 Eliz. c. 4, against a subsequent purchaser.⁵ The settlement under which such volunteers claim is voluntary within the meaning of the Customs and Inland Revenue Acts, 1881⁶ and 1889,⁷ so far as the incidence of account duty is concerned.⁸ Limitations in a settlement in favour of the issue of a second marriage have also been held good against a subsequent purchaser for value of the property comprised in the settlement.⁹

This point has given rise to much litigation and dispute, and decisions on it have varied from time to time. The general run of the cases would seem to warrant the conclusion that, as against the settlor and those claiming under him, limitations in favour of collaterals contained in an ante-nuptial settlement are binding,¹⁰

¹ *Green v. Patterson*, 32 Ch. D. 95.

² *De Mestre v. West*, [1891] App. Cas. 264; and see *Mackie v. Herbertson*, 9 App. Cas. 303.

³ *Newstead v. Searles*, 1 Atk. 265; that is, though volunteers in a sense, they are not liable to be defeated by subsequent purchasers, under 27 Eliz. c. 4. See Lindley, L.J., in *Att.-Gen. v. Jacobs-Smith*, [1895] 2 Q. B. 341. See *Mackie v. Herbertson* (*ubi sup.*).

⁴ *Clarke v. Wright*, 6 H. & N. 849. In this case the Court of Exchequer Chamber upheld the principle of decision in *Newstead v. Searles* (*ubi sup.*). But see *Smith v. Cherrill*, L. R. 4 Eq. 390.

⁵ *Re Cameron v. Wells*, 37 Ch. D. 32. In this case, Kay, J., refused to extend the principle of *Newstead v. Searles* (*ubi sup.*), and said: "The only persons who come within the marriage consideration—*i.e.*, the only persons from whom it is assumed that consideration moves—are the husband and wife and the children of the marriage. The phrase that they 'come within the marriage consideration' means that they must be treated as persons from whom consideration moves for the settlement. If there is in the settlement a limitation in favour of collaterals, no consideration moves from those collaterals unless they settle property of their own."

⁶ 44 & 45 Vict. c. 12, s. 38.

⁷ 52 & 53 Vict. c. 7, s. 11.

⁸ *Att.-Gen. v. Jacobs-Smith* (*ubi sup.*).

⁹ *Clayton v. Earl of Wilton*, 3 Madd. 302; Sugd. V. & P. 716 n., 717.

¹⁰ *Davenport v. Bishopp*, 1 Ph. 698.

Issue by former marriage. Illegitimate issue.

As against settlor, limitations in favour of volunteers can be enforced.

on the ground that if two parties in contemplation of a marriage intended, and afterwards had between them, or for any other consideration between themselves, coming under the description of valuable, have entered into a contract together, in which one of the stipulations made by them is a stipulation solely and merely for the benefit of a third person, that third person being even a stranger in blood to each, a stranger to the contract, and a person from whom not any valuable or meritorious consideration moves, has moved, or is to move, it cannot, generally speaking, be competent to the one party to the contract to say that that stipulation shall go for nothing, or shall not have any effect given to it. The court will not apply to the consideration of provisions in favour of volunteers contained in a contract founded on marriage, the principles on which it would act in considering provisions contained in a voluntary settlement.¹

In *Wollaston v. Tribe*,² however, it was held that trusts in favour of the children of a future marriage and of collaterals were purely voluntary, and could be set aside. But the Court of Appeal has since decided that where a trust for volunteers had been executed by the trust fund having been transferred to the trustees of the settlement, the trust cannot be revoked by the settlor, and the claims of the volunteers defeated.³ *Wollaston v. Tribe* has been doubted in the more recent case of *Tucker v. Bennett*.⁴

That marriage will support every settlement made in consideration of it will not hold true, as will be seen further down.⁵ Mr. Dart submits that the proper test of how far these voluntary trusts will be supported as against subsequent *bonâ fide* purchasers is, "that where the limitations over are in favour of collateral relations or connections, not of the settlor, but of the other contracting party [whether wife or husband], the settlement itself may be considered *prima facie* evidence of such other party having stipulated for their insertion. So where, on a settlement of the intended wife's estate, the limitations over are in favour of her own collateral relations in derogation from her husband's marital right by survivorship [in case of personalty], or as tenant by the curtesy [in case of realty]. Where in any case other than that referred to, the limitations over are in favour of the collateral relations or connections of the settlor, such presumption cannot so readily arise; but it might be proved that the other party stipulated for their insertion. If such a stipulation cannot be presumed or proved, the limitations must, it is conceived, be considered voluntary, and void as against a subsequent *bonâ fide*

How far voluntary trusts will be supported as against subsequent *bonâ fide* purchasers.

¹ *Tucker v. Bennett*, 38 Ch. D. 1.

² L. R. 7 Eq. 44; 21 L. T. 449. See also *Gibbs v. Grady*, 41 L. J. Ch. 163.

³ *Paul v. Paul*, 20 Ch. D. 742.

⁴ 38 Ch. D. 1.

⁵ *Post*, p. 154, sub-tit. Revocation and Setting Aside of Settlements.

purchaser.”¹ Again, where a third party has concurred in the settlement, as where on the marriage of the tenant in tail, the tenant for life in possession concurs in barring the entail, and resettling the property, the validity of limitations in favour of other branches of the family, and even of strangers, seems to be unquestionable.²

Summary.

To sum up the foregoing: marriage is of itself a valuable and good consideration, and will support a settlement and disposition of property without any other consideration of a pecuniary or lucrative nature passing. No formal contract of this kind need be entered into; and though the agreement does not show on its face that marriage was the consideration, yet if sufficient evidence can be gathered from the document itself, and from other materials in the case, that it was the consideration, that will be enough.³

SECTION 6.

Rectification of Settlements.

Rectification
of settlements.

The intervention of the court to rectify settlements is not unfrequently requisite in cases where they purport to have been made in pursuance of ante-nuptial articles, and which do not carry out the intentions of the parties by reason of a variance between the original articles and the final settlements. The earlier cases dealing with the rectification of settlements by marriage articles have been followed in modern times.⁴

In pursuance
of marriage
articles.

Variance.

Where articles and a settlement expressed to be made in pursuance of such articles are both made before marriage, and there is any variance, there no evidence is necessary in order to have the settlement corrected, for the settlement will be rectified by the articles.⁵ But where the settlement contains no reference to the articles, yet if it can be shown that the settlement was intended to be in conformity with the articles, and there is clear and satisfactory evidence proving that the discrepancy had arisen from a palpable mistake, the court will receive such evidence and re-form the settlement, and make it conformable to the real and clear intention of the parties.⁶ Thus, where a settlement was drawn up contrary to the terms of the agreement for it, it was held to be settled in accordance with such terms.⁷

Mistake.

Mistake, then, is another ground on which the court will

¹ V. & P. 1014; *Pulvertoft v. Pulvertoft*, 18 Ves. 84.

² V. & P. 1016.

³ *Hammersley v. De Biel*, 12 Cl. & F. 62 n.

⁴ *Cogan v. Duffield*, 2 Ch. D. 44.

⁵ *Bold v. Hutchinson*, 24 L. J. Ch. 285; *Harbidge v. Wogan*, 5 Ha. 258; *Smith v. Iliffe*, L. R. 20 Eq. 666; *Cogan v. Duffield* (*ubi sup.*).

⁶ *West v. Erissey*, 1 Br. P. C. 225; *Rogers v. Earl*, 1 Dick. 294; *Bold v. Hutchinson* (*ubi sup.*).

⁷ *Corley v. Lord Stafford*, 1 De G. & J. 238.

rectify settlements. The equitable relief of rectification is not confined to mere executory contracts, by altering and conforming them to the real intention of the parties, but is extended to solemn instruments made and executed by the parties, whether in pursuance or not of such executory or preliminary contracts, on the principle that where the original intention of the parties has not been carried out, the courts administering equity ought to relieve against a clear mistake.¹ It is necessary that the mistake be common to both parties,² and the court invariably acts with caution in rectifying marriage settlements, and in requiring strong proof of the exact contract which the parties intended to enter into, because it is impossible to undo the marriage, or to remit the parties to the same position in which they were before the marriage;³ and so will be guided by contemporaneous evidence as to what was the intention of the parties at the time of the execution of the deed, and not what would have been their intention if, when they executed it, the result of what they did had been present to their mind.⁴

The mistake need not be common to both parties where there was a fiduciary relation between one of them to the other and where it was the duty of the one to explain to the other the real scope and effect of the deed executed between them. Thus, where the terms of a settlement were not such as the court would have sanctioned in the absence of agreement, and ought to have been explained to one of the parties before its execution, on the death of the other party the settlement was rectified on the uncorroborated testimony of the survivor, who had been deceived, and the burden of proof that the settlement should not be rectified was held to rest upon the representatives of the party who ought to have explained the operation of the settlement.⁵ But where a father is living on affectionate terms with his daughter he is the proper person to recommend and advise her in matters relating to the provisions of her marriage settlement, and there is no occasion for independent legal advice beyond that of the solicitor who is preparing the lady's settlement. But if the father is taking under the settlement a benefit from the daughter, then she ought to be separately advised.⁶

Mistake need not be common to both parties where there is a fiduciary relation between them.

This power of rectification the Court of Chancery has upon a petition under the Trustee Relief Act, 1847.⁷

The mistake will be rectified not only on behalf of the husband

On behalf of issue of the marriage.

¹ St. Eq. Jur. 159; *Smith v. Liffé* (*ubi sup.*); *Higginson v. Kelly*, 1 B. & B. 253.

² *Earl of Bradford v. Earl of Romney*, 6 L. T. 208; *Sells v. Sells*, 1 Dr. & Sm. 42.

³ *Harris v. Pepperell*, L. R. 5 Eq. 1, citing *Earl of Bradford v. Earl of Romney* (*ubi sup.*); *Tucker v. Bennett*, 38 Ch. D. 1.

⁴ *Wilkinson v. Nelson*, 9 W. R. 393; *Tucker v. Bennett* (*ubi sup.*).

⁵ *Lovesy v. Smith*, 15 Ch. D. 655; and see *Johnson v. Bragge*, [1901] 1 Ch. 28.

⁶ *Tucker v. Bennett*, 38 Ch. D. 1.

⁷ 10 & 11 Vict. c. 96, s. 2; *Re Bird's Trusts*, 3 Ch. D. 214.

and wife, but of the issue of the marriage;¹ and although a vested interest may be acquired, yet if a deed was executed in a form in which it ought not to have been, and which the court is satisfied is not in conformity with the intention of the parties, then, regardless of all interests acquired, the court will put the deed into a form which is in accordance with the intention of the parties.²

Parol evidence.

The court will admit parol evidence to rectify the settlement even after a long lapse of time;³ but the longer the lapse the more careful will the court be in scrutinizing the evidence,⁴ yet under certain circumstances, such parol evidence of the survivor of the parties to the deed need not be corroborated.⁵ The defence of the Statute of Frauds (section 4) to an action for rectification of a settlement is not *per se* a good one.⁶

Fraud.

Relief will also be granted by the court on the ground of fraud. It will be granted on the broad and substantial basis that if a person is induced to enter into a contract by the fraudulent statements of another, the persons making such statements should be held to them; and "a representation by one party, for the purpose of influencing the conduct of the other party, will in general be sufficient to entitle him to the assistance of this court for the purpose of realizing such representation."⁷ Mere mistake will not suffice,⁸ and the representation must not be of mere *intention* but of some fact.⁹ Equity will relieve not only on the ground of fraud, but of improvidence.¹⁰

Mere mistake insufficient.

SECTION 7.

Revocation and Setting Aside of Settlements.

The last point to be considered in this chapter is under what circumstances settlements made in consideration of marriage can be revoked, and under what circumstances settlements made in consideration of marriage, or after marriage, can be set aside.

Revocation and cancellation of settlements.
Settlements can be revoked

It is now clear law that a settlement made in contemplation of marriage can be revoked before marriage takes place. In one case, however,¹¹ a settlement revoked before marriage was held

¹ *King v. King-Harman*, Ir. Rep. 7 Eq. 446.

² Per Malins, V.C., in *Welman v. Welman*, 15 Ch. D. 570, 578.

³ *Wolterbeck v. Barrow*, 23 Beav. 423.

⁴ *McCormack v. McCormack*, 1 Ir. Ch. D. 119; *Cook v. Fearn*, 48 L. J. Ch. 63. There is a dictum of Lord Romilly that a settlement will not be rectified or re-formed after too long a period of time. *Gibbs v. Grady*, 41 L. J. Ch. 163.

⁵ See *Lovesy v. Smith*, 15 Ch. D. 655.

⁶ *Johnson v. Bragge*, [1901] 1 Ch. 28.

⁷ *Hammersley v. De Biel*, 12 Cl. & F. 45.

⁸ *Evans v. Wyatt*, 10 W. R. 813.

⁹ *Jorden v. Money*, 5 H. L. Cas. 185; Peach. Sett. 87.

¹⁰ See *Everitt v. Everitt*, L. R. 10 Eq. 405.

¹¹ *Page v. Horne*, 11 Beav. 227.

valid and subsisting; while in other cases¹ the contrary doctrine was upheld; but the parties must act in good faith. In modern settlements, as a rule, the possibility of the marriage not taking place² is provided for by directing the trustees to hold the settled property in trust for those to whom it belongs until the marriage, and thenceforth upon the trusts to arise on that event.³

before marriage takes place.

Where the marriage has taken place, or there is no power of revocation in the deed, the settlement is of course irrevocable.³ If a settlement contain a power of revocation, a conveyance to a subsequent purchaser for value will defeat the settlement, though made for valuable consideration:⁴ but the mere fact of a power of revocation in the settlement being reserved to the husband is not, *per se*, evidence that the settlement was fraudulent.⁵

Settlements, including those on marriage, may be set aside though based on valuable consideration, if they lack *bonâ fides* in their inception, and are made with a fraudulent purpose, but a settlement will not be set aside at the instance of one spouse on the ground of an alleged fraudulent representation of ante-nuptial moral misconduct on the part of the other spouse.⁶ The Court of Chancery can always relieve against the terms of a void settlement.⁷

Setting aside of settlements.

Voluntary settlements, or those in which no consideration, whether meritorious or valuable, moves, may be set aside; thus, if there be anything in the shape of consideration which can be called valuable, the settlement is not voluntary. Voluntary settlements, on the other hand, may be supported and enforced if executed in good faith, and do not prevent the settlors from satisfying the claims of their creditors. Thus, not every arrangement for valuable consideration will be supported, nor every voluntary arrangement set aside, because the valuable consideration is wanting.

As between the parties, a settlement, though voluntary, is perfectly valid, and cannot be set aside at the mere will of the settlor,⁸ except where he has transferred the subject of the settlement to subsequent purchasers for value, and this irrespective of whether the latter had or had not notice of the voluntary arrangement;⁹ but in many instances the settlement

A voluntary settlement cannot as a rule be set aside at the will of the settlor.

¹ *Robinson v. Dickenson*, 3 Russ. 399; *Thomas v. Brennan*, 15 L. J. Ch. 420; *Mitford v. Reynolds*, 16 Sim. 131; *Bond v. Walford*, 32 Ch. D. 238. The circumstances of *Robinson v. Dickenson* were peculiar. The settlement was ante-nuptial; the marriage was discovered to be void; the parties revoked the settlement, and executed another differing in some respects from the first, and then were validly married. The trusts of the second settlement were upheld.

² It is not unusual now to provide that if the marriage does not take place within a given period—*e.g.*, a year—the trust property shall revert absolutely to the settlor.

³ *Vandeleur v. Vandeleur*, 3 Cl. & F. 82.

⁴ 27 Eliz. c. 4, s. 5. See Sugd. V. & P. 721; Peachey, chap. viii. pp. 226 *et seq.*

⁵ *Ex parte Tarn, Re Tarn*, 57 J. P. 789.

⁶ *Johnston v. Johnston*, 52 L. T. 76.

⁷ See *Allcard v. Walker*, [1896] 2 Ch. 369.

⁸ For the same principles of law, see *ante*, section 5, Enforcement of Settlements.

⁹ Under 27 Eliz. c. 4; *Otley v. Manning*, 9 East 59; see *post*, p. 161.

will be supported in favour of the volunteers as against subsequent purchasers for value. Where a settlor seeks to have a voluntary settlement set aside on the ground of mistake, the onus of proof lies upon him, and the court, especially after long acquiescence, will exact very clear and convincing evidence of such mistake; and if it is not forthcoming will refuse to deprive the volunteers of their interests.¹

Settlements
affected by 13
Eliz. c. 5.

Settlements affected by 13 Eliz. c. 5.—A marriage settlement, like any other, is liable to be set aside by those whose claims on the settlor are affected by its dispositions, for though marriage is a valuable consideration, it will not support every settlement. This has been the law since the passing of 13 Eliz. c. 5 (made perpetual by 29 Eliz. c. 5). By the second section of that Act, it was enacted that all and every feoffment, gift, grant, alienation, bargain, and conveyance of lands, tenements and hereditaments, goods and chattels, &c., made with a fraudulent and covinous intent to disturb, hinder, delay, or defraud the rights of others, shall as against such be clearly and utterly void and of none effect. The intention of this statute is to protect the rights of creditors, and the effect of it is that every conveyance or settlement, whether for valuable consideration or voluntary, must be *bonâ fide* in its inception; and a settlement, though made for valuable consideration (marriage not excepted) will, if entered into with the intent to defeat, hinder, and delay the creditors of the settlor, be set aside;² and evidence of such intention must be forthcoming.³ A husband who by a post-nuptial settlement covenants that his life interest in his wife's reversionary estate should, when the property fell into possession, be determinable on his bankruptcy evinces such an intention.⁴ Every voluntary conveyance is not void against the creditors as being fraudulent, but may be good and valid, if there be a reasonable cause for its existence.⁵

Distinction
between ante-
nuptial and
post-nuptial
settlements.
Ante-nuptial
settlements.

A broad and important distinction is to be drawn between ante-nuptial and post-nuptial settlements, on the point of their liability to be set aside as being within the mischief of 13 Eliz. c. 5. To set aside an ante-nuptial settlement it is necessary to prove, which can be done only under the bankruptcy laws, an actual and express intent to defeat creditors.⁶ Fraud of the settlor brings the settlement within the scope of the Act. Where a settlement is based upon valuable consideration, both settlor and purchaser under the deed must concur in the fraud.⁷ In *Campion*

¹ *Henry v. Armstrong*, 44 L. T. 918.

² *Twyne's Case*, 3 Rep. 80 b.

³ *Re Tetley*, W. N. [1896] 86.

⁴ *Re Holland, Gregg v. Holland*, [1901] 2 Ch. 145.

⁵ *Holmes v. Penny*, 26 L. J. Ch. 181; *Beckett v. Tasker*, 19 Q. B. D. 7.

⁶ *Colombine v. Penhall*, 1 Sm. & G. 228; *Penhall v. Elwin*, 1 Sm. & G. 258; *Bulmer v. Hunter*, L. R. 8 Eq. 46.

⁷ *Re Johnson, Golden v. Gillam*, 51 L. J. Ch. 503, affirming 20 Ch. D. 389.

Campion v. Cotton.

*v. Cotton*¹ it was laid down that where there was no evidence of fraud in the purpose of the settlement, an ante-nuptial settlement could not be aside, though the settlor was at the time of the making of it in embarrassed circumstances, and there was a false recital that the settled property belonged to the wife. In the same case it was held that the fact of the settlor's being indebted at the time of the settlement and of the wife knowing him to be so would not affect the validity of the deed.

Again, in *Fraser v. Thompson*,² it was said by Vice-Chancellor Stuart: "Unless the court finds that the sacred nature of that consideration has been profaned, and finds that the ceremony of marriage has been resorted to as a mere pretence and cloak for fraud, and finds clear evidence that it is a fraudulent marriage, there is no case in which any settlement of property made previous to and in consideration of marriage has been set aside on the ground of the insolvency or embarrassed circumstances of the husband, or as fraudulent against his creditors on a subsequent bankruptcy."³

In *Colombine v. Penhall*⁴ this fraudulent intent to defeat the rights of creditors was apparent. In each of these last two cases the wife was aware of her future husband's embarrassed circumstances, and so party to the fraud; and no consideration for the settlement, apart from the marriage, moved from her. Such a settlement is an act of bankruptcy by the settlor: and the marriage consideration will not support a settlement of property which does not fairly and rightfully belong to the settlor but to his creditors.⁵

"A voluntary conveyance by a person not indebted is clearly good against creditors. . . . Fraud vitiates the transaction, but a settlement not fraudulent, by a party not indebted, is valid though voluntary."⁶ Where the settlement is voluntary, or post-nuptial, no actual proof of an intention to defraud creditors need be forthcoming, and it will be set aside if the circumstances are such that it would necessarily have the effect of defeating and delaying their rights.⁷ But it seems that the mere fact that it has in the event prevented a creditor, who was such when it was made, from obtaining payment of his debt, is not of itself sufficient to enable him to set it aside.⁸ No man is allowed to be generous

Fraser v. Thompson.
Under what circumstances the deed will be set aside.

Colombine v. Penhall.

Fraudulent settlement an act of bankruptcy.

Post-nuptial settlements.

¹ 17 Ves. 49.

² 1 Giff. 49, 65. The decision of the Vice-Chancellor was overruled (4 De G. and J. 659), expressly on the ground that there was evidence of fraud and an intention to defeat creditors in that case.

³ See *Parnell v. Steadman*, 1 Cab. & Ell. 153; *Re Pennington*, *Ex parte Cooper*, 59 L. T. 774.

⁴ *Ubi sup.*

⁵ *Fraser v. Thompson*, 4 De G. & J. 659; *Colombine v. Penhall* (*ubi sup.*).

⁶ Per Sir T. Plumer, M.R., in *Battersbee v. Farrington*, 1 Swanst. 113.

⁷ *Freeman v. Pope*, L. R. 5 Ch. App. 538.

⁸ *Ibid.*

before he is just,¹ even if generosity dictate the act; for that which might be a bounteous and generous action towards the recipient might also be fraudulent against the creditors of the settlor. There has been much doubt expressed as to what is the true rule or test to be applied to the validity or invalidity of these voluntary settlements. In *Spirrett v. Willows*,² Lord Westbury laid down: "If the debt of the creditor by whom the voluntary settlement is impeached existed at the date of the settlement, and it is shown that the remedy of the creditor is defeated or delayed by the existence of the settlement, it is immaterial whether the debtor was or was not solvent after making the settlement. But if a voluntary settlement or deed of gift be impeached by subsequent creditors whose debts had not been contracted at the date of the settlement, then it is necessary to show evidence that the debtor made the settlement with express intent to delay, hinder, or defraud creditors, or that after the settlement, the settlor had not sufficient means or reasonable expectation of being able to pay his then existing debts, that is to say, was reduced to a state of insolvency, in which case the law infers that the settlement was made with intent to delay, hinder, or defraud creditors, and is therefore fraudulent and void." These propositions have been treated as going too far, and as not being in harmony with the decided cases; and the true test applicable to the validity or invalidity of a voluntary deed would appear to be, not whether there be any debt in existence which was due prior to the settlement, and which in the result has been unpaid, although the settlor continued solvent after making the settlement; but whether from all the circumstances the court can infer that the settlement was made with the intent actual or constructive of delaying or hindering creditors.³ Thus, where a trader by a post-nuptial settlement settled all his property of every description, both present and future, upon trust for his wife for her separate use for life, remainder for himself for life, remainder for his children, reserving the control of his stock-in-trade to himself, and five years later became bankrupt, the settlement was set aside as being void under the statute, though it did not appear that the settlor was indebted at the time of its execution, except on mortgages on part of the settled property, which had since been satisfied.⁴ So, too, in the case of *Mackay v. Douglas*,⁵ a voluntary settlement by which the settlor took the bulk of his property out of the reach of his creditors shortly before engaging in a trade was set aside in a suit on behalf of creditors who had

Doubt as to the test of the validity of voluntary settlements.

Lord Westbury in *Spirrett v. Willows*.

True test given in *Freeman v. Pope*.

Mackay v. Douglas.

¹ *Copis v. Middleton*, 2 Madd. 410, 430.

² 34 L. J. Ch. 365.

³ *Crossley v. Elworthy*, L. R. 12 Eq. 158; *Freeman v. Pope* (*ubi sup.*) (in this last case *Spirrett v. Willows* was considered, and commented on, as mentioned in the text); *Ex parte Russell, Re Butterworth*, 19 Ch. D. 588.

⁴ *Ware v. Gardner*, L. R. 7 Eq. 317.

⁵ L. R. 14 Eq. 106. See *Re Johnson, Golden v. Gillam*, 51 L. J. Ch. 503.

become such after the settlement, though there were no creditors whose debts arose before the date of the settlement, and there was a doubt at the time of the settlement whether the settlor would or would not engage in the trade. In the same case it was held that in order to set aside a voluntary settlement it is not necessary to show that the settlor contemplated becoming actually indebted; it is sufficient if he contemplated a state of things which might result in bankruptcy or insolvency.

Want of consideration, accompanied by embarrassed circumstances, has generally been considered to be sufficient to bring a deed within the statute 13 Eliz. c. 5. Numerous cases have arisen on this point in courts of equity, especially with reference to post-nuptial settlements. The principles deducible from them appear to be that whilst, on the one hand, it is not necessary that the settlor should be absolutely insolvent at the date of the deed, so, on the other hand, the mere fact of his being indebted is not sufficient to invalidate the deed; but that if, having regard to the debts owing by him at the date of the deed, and the proportion of his property comprised in it, his creditors are defeated or delayed, that is, if, in fact, the property omitted from the settlement and immediately available for the payment of his debts, is not sufficient for that purpose, the deed will be fraudulent and void within the statute.¹ In an American case,² it was held that a settlement on his wife made by a husband when solvent and in a condition to make such a gift, if not unreasonable in amount, and after its making there were abundant assets to pay his debts, was good, and ought to be upheld. So, too, a post-nuptial settlement executed with the approval of the Court of Chancery by an infant wife after she had contracted a debt of no very great amount was upheld as against her creditor.³

Want of consideration and embarrassed circumstances.

Sedgwick v. Place.

If the deed is set aside at the instance of creditors at the date of the deed, subsequent creditors are entitled to the benefit of the suit, and to come in *pari passu* with the antecedent creditors; and a subsequent creditor may maintain a suit to set aside the deed, if any debt owing at its date remain due, or it can be shown that the deed was intended to defeat subsequent creditors;⁴ but the onus of proof of fraud lies on such subsequent creditors.⁵ Where there is no positive evidence of fraud, an intention to defeat or delay his creditors may be inferred from the indebtedness of the settlor, and the want of consideration for the settlement. The mere existence of a debt at the time of the settlement would not

Who may impeach the settlement.

Constructive fraud.

¹ See *Re Ridler, Ridler v. Ridler*, 22 Ch. D. 74.

² *Sedgwick v. Place*, 6 Am. Law. Rev. 181, reported in 25 L. T. 307.

³ *Hemingway v. Braithwaite*, 61 L. T. 224.

⁴ *Stileman v. Ashdown*, 2 Atk. 477; *Barling v. Bishopp*, 29 Beav. 417; *Jenkyn v. Vaughan*, 3 Drew. 419; *Mackay v. Douglas*, L. R. 14 Eq. 106.

⁵ *Crossley v. Elworthy*, L. R. 12 Eq. 158.

necessarily invalidate it,¹ but it must be substantial indebtedness. A voluntary settlement has been upheld which was made by a husband on his wife and children, not indebted at the time, and without any clear fraudulent intention to defeat his creditors;² but a voluntary settlement by a woman was set aside where it deprived her of the means of paying her debts.³ But a voluntary settlement in which provision is made for the payment of the settlor's debts will be upheld as against future creditors, and the mere fact of a single creditor being unpaid will not invalidate it.⁴ When realty which has been settled by a voluntary deed is sold to a purchaser for value the volunteers under the settlement have no title to the purchase-money.⁵

Voluntary settlements of real estate by women.

The voluntary settlement by a woman of her real estate is governed by the like rules as that of a man, except, it would seem, where she was married at the time she entered into it, and was restrained from anticipating or aliening it; during coverture she could not give a valid title to a subsequent purchaser, though, if she became discovert, the voluntary nature of the transaction would enable her to defeat her volunteers.⁶ The foregoing principles are applicable to the settlements of women as well as of men; for by the Married Women's Property Act, 1882,⁷ it is provided that "no settlement or agreement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors." If she by ante-nuptial settlement withdraw property from her existing creditors with the intent to defeat or delay them, the arrangement will be set aside; so, too, if at the time of making a post-nuptial or voluntary settlement she was substantially indebted, in the absence of evidence to show that she actually intended to defraud or delay her creditors, the arrangement will be set aside. But there is this distinction between her case and that of her husband, viz., that while he cannot even by an ante-nuptial agreement for valuable consideration covenant to bring his after-acquired property into settlement, so as to withdraw it from his post-nuptial creditors, she can so validly covenant, and a restraint against anticipation put upon herself for that purpose will be effectuated.⁸

¹ *Kidney v. Coussmaker*, 12 Ves. 148.

² *Battersbee v. Farrington*, 1 Swanst. 106; but see *contra*, *Lush v. Wilkinson*, 5 Ves. 387.

³ *Smith v. Cherrill*, L. R. 4 Eq. 390.

⁴ *Re Johnson*, *Golden v. Gillam*, 20 Ch. D. 389.

⁵ *Daking v. Whympere*, 26 Beav. 568.

⁶ Probable effect of section 19 of Married Women's Property Act, 1882.

⁷ 45 & 46 Vict. c. 75, s. 19.

⁸ Effect of section 19 of Married Women's Property Act, 1882. The latter part of this section, which limits the effect of the restriction against anticipation, and puts a woman's settlement on the same level as a man's in respect of her creditors, is not retrospective, but applies only to settlements made after the Act came into force. *Smith v. Whitlock*, 55 L. J. Q. B. 206.

Settlements affected by 27 Eliz. c. 4.—This statute, which was made perpetual by 30 Eliz. c. 57, was passed for the protection of purchasers, and affects only real estate. It enacted that every conveyance, grant, charge, lease estate and limitation of use of in or out of any lands, tenements, or hereditaments whatsoever, for the intent and purpose to defraud and deceive such persons, &c., as should purchase them, should be wholly void and frustrate against such purchasers, or those who claimed under them. Purchasers under this Act have been held to be such as claim under a post-nuptial settlement made in pursuance of ante-nuptial articles, or of an additional portion,¹ or under a post-nuptial settlement made in consideration of the wife joining to destroy an ante-nuptial settlement,² a husband who gives up his interest in his wife's estate,³ also mortgagees,⁴ lessees, and purchasers under an ante-nuptial settlement. The favour and regard evinced by the law towards marriage are at this point conspicuous; for it is now "settled that if the husband or wife, each of them having interests, no matter how much, or of what degree, or of what quality, come to an agreement which is afterwards embodied in a settlement, that is a bargain between husband and wife which is not a transaction without valuable consideration."⁵ This exposition of the law was quoted by Jessel, M.R., with approval, in *Re Foster and Lister*.⁶ A post-nuptial bargain between husband and wife, in which both give up something in order to make a re-settlement, is not voluntary and void under this statute.⁷ Though a limitation in a marriage settlement in favour of a widower's children is voluntary and void against a purchaser,⁸ yet a settlement by a widower on his second marriage, in which he assigned to his son by a former marriage certain freeholds on trust for himself for life, and after death for his said son, was upheld as being for valuable consideration on the ground of responsibility for the payment of rent, &c.⁹

Who are purchasers under the Act.

To enable volunteers, such as children of a former marriage, under a post-nuptial settlement to enforce the trusts such trusts must have been perfected; and the court will refuse to perfect executory trusts in their favour, though valuable consideration has moved between the parties to the settlement; but where the settlement can be said to be for valuable consideration as regards the collaterals, then the court will interfere on their behalf.¹⁰ But

Volunteers: when capable of enforcing the trusts.

¹ *Dundas v. Dutens*, 2 Cox, 235.

² *Scott v. Bell*, 2 Lev. 70.

³ *Hewison v. Negus*, 22 L. J. Ch. 655.

⁴ *Dolphin v. Aylward*, L. R. 4 H. L. 486.

⁵ Per Bacon, V.C., in *Teasdale v. Braithwaite*, 4 Ch. D. 85, 90, affirmed on appeal 5 Ch. D. 630.

⁶ 6 Ch. D. 87, in which he disapproved of *Butterfield v. Heath*, 22 L. J. Ch. 270.

⁷ *Schreiber v. Dinkel*, 54 L. T. 911.

⁸ *Re Cameron v. Wells*, 37 Ch. D. 32.

⁹ *Price v. Jenkins*, 5 Ch. D. 619.

¹⁰ *Green v. Patterson*, 32 Ch. D. 95.

where the limitations in favour of volunteers (*e.g.*, children by a former marriage) are intended by the settlor to be covered by those limitations in favour of those who are within the marriage consideration, so that the latter cannot take effect without also giving effect to the former, then in such case the limitations in favour of collaterals or volunteers can be enforced by them and are good as against purchasers or assignees for value.¹ But a mere special agreement between the parties to a marriage settlement, acceptance by one of the parties of different interests in the settled property from those which the law would have given, and omission to provide for all or some of the issue of the marriage are insufficient to support a mere limitation in favour of the settlor's illegitimate child and his issue.² It is not necessary that under all circumstances the consideration should be pecuniarily very adequate, or that it should appear on the face of the document if the fact of its existence can be proved,³ except in the instance of an ante-nuptial promise by an infant, which must appear in the post-nuptial settlement, for the purpose of ratification by him under Lord Tenterden's Act.⁴

Consideration need not be pecuniarily adequate, or appear on the face of the document.

Settlements affected by the Bankruptcy Act, 1883.

*Settlements affected by the Bankruptcy Act, 1883.*⁵—Under the Bankruptcy Act, 1869,⁶ the settlements affected by it were confined to those made by *traders* only, but by the more recent Act the distinction between traders and non-traders is abolished and the settlements of both classes of persons are to be construed alike.⁷ Section 47 provides

Section 47.

"Any settlement of property *not being a settlement made before and in consideration of marriage*, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in bankruptcy, unless the parties claiming under the settlement can prove that the settlor was, at the time of the making the settlement, able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof."

When voluntary settlements void.

¹ *De Mestre v. West*, [1891] App. Cas. 264; and see *Mackie v. Herbertson*, 9 App. Cas. 303.

² *De Mestre v. West* (*ubi sup.*).

³ *Bayspoole v. Collins*, L. R. 6 Ch. App. 228.

⁴ *Trowell v. Shenton*, 8 Ch. D. 318.

⁵ 46 & 47 Vict. c. 52.

⁶ 32 & 33 Vict. c. 71, s. 91.

⁷ This Act is, however, not retrospective, and the former distinction between traders and non-traders will be preserved in regard to voluntary settlements made before the Act came into force (January 1, 1884). From and after this date the law is common to both, and the effect of the decisions in cases concerned only with traders under 32 & 33 Vict. c. 71, s. 91, will now be applicable to non-traders as well.

It seems if there is sufficient valuable consideration for the settlement it cannot be impeached under this section.¹ If the purchaser act in good faith that is sufficient, and it is not necessary that both parties to the transaction should act in good faith.² A settlement is void under this section, if the amount put into settlement is such as to leave the settlor, at the time of its execution, unable to pay his debts in full without it,³ or if without such poverty he cannot pay his debts in the way in which he proposes to pay them, namely, by continuing his business.⁴ The settlement to be impeached must be one which passes the property to persons other than the settlor, and not one which leaves the settlor still able to pay his debts, though his means of paying them may be in part derived from the interest he takes under the settlement.⁵ Under sub-section 2 of this section future property, other than money or property of a husband in right of his wife, covenanted or contracted to be settled (*i.e.*, property not in the settlor's possession at the time of marriage) must be actually transferred or paid over by the settlor before becoming bankrupt, or such covenant or contract will become void. The date of "becoming bankrupt" is the earliest to which the title of the trustee in bankruptcy relates back.⁶

The effect of this section is retrospective as to traders, but not as regards non-traders, who are for the first time made liable to its provisions.⁷ Where a voluntary settlement of property is declared void against a trustee in bankruptcy under this section, the avoidance only operates to the amount of the debts and costs of the bankruptcy, and the surplus reverts to the trustees of the settlement.⁸

By the Married Women's Property Act, 1882, a married woman who carries on a trade apart from her husband may be made a bankrupt,⁹ and in consequence a married woman trader may generally be said to be now amenable to the bankruptcy laws, as though she were a single woman, or a man; and her settlements will be set aside if they infringe the spirit of the bankruptcy laws, *e.g.*, a settlement of her property upon herself to be defeasible upon her bankruptcy, "for no settlement or

Married woman separate trader amenable to the bankruptcy laws.

¹ *Re Tetley*, W. N. [1886] 86.

² *Mackintosh v. Pogose*, [1895] 1 Ch. 505. In this case the wife, who was possessed of separate property after marriage, allowed that property to pass into her husband's hands, who, having applied part of it to his own use, settled the residue of it, together with other property of his own, upon trusts, under which he took a life interest, with a proviso for the cessor of his interest in the event of his bankruptcy, and it was held that the proviso was good.

³ *Ex parte Huxtable*, *Re Conibeer*, 2 Ch. D. 54.

⁴ Per Lindley, L.J., in *Ex parte Russell*, *Re Butterworth*, 19 Ch. D. 588.

⁵ *Re Lowndes*, 18 Q. B. D. 677.

⁶ *Re Reis*, *Ex parte Clough*, [1904] 1 Ch. 451.

⁷ See *Ex parte Todd*, *Re Ashcroft*, 19 Q. B. D. 186.

⁸ *Re Sims*, *Ex parte Sheffield v. Prince*, 45 W. R. 189.

⁹ 45 & 46 Vict. c. 75, s. 1, sub-s. 5.

agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors.”¹ But in all other respects the Act is untouched by the Bankruptcy Act.² Since a married woman can be made liable to bankruptcy in respect of her separate trading, her property acquired during coverture will become assets in the hands of her trustee in bankruptcy. If she is in trade at the time of her marriage, and making a settlement, and intends to carry it on apart from her husband, a covenant for the future settlement of her after-acquired money or property, on her becoming bankrupt in respect of such trade, will, in all probability, be held void against her trustee in the bankruptcy.³

A trustee of a voluntary marriage settlement is not a “purchaser” within the meaning of this 47th section.⁴ But where a settlor in pursuance of an arrangement with his father, and to secure a provision for his children, settled property on trustees for the benefit of his children, and became bankrupt within two years, the settlement was upheld, on the ground that the father was a purchaser for valuable consideration.⁵ A voluntary settlement of personal chattels must be duly attested and registered as a bill of sale within seven clear days after its execution, otherwise such bill of sale will be void.⁶

The mark of distinction between the operation of this section and that of section 2 of 13 Eliz. c. 5, is that the former relieves the court from inquiring into questions of *mala fides*, or fraud, but enables it simply to inquire whether at the date of the settlement the settlor was able to pay his debts.⁷ A covenant to assign to trustees all future property acquired by the settlor during coverture comes within the mischief of this statute, and is void against the trustees in bankruptcy.⁸ Another point seems to remain to be considered. It is now established law that a settlement executed after marriage in pursuance of binding ante-nuptial articles is a settlement for valuable consideration;⁹ also that a post-nuptial settlement by the husband may be upheld as against his creditors by consideration moving from the wife or a third party:¹⁰ Will a post-nuptial settlement by the

¹ 45 & 46 Vict. c. 75, s. 19.

² 46 & 47 Vict. c. 52, s. 152.

³ See 46 & 47 Vict. c. 52, s. 4, sub-s. 2.

⁴ *Ex parte Hillman, Re Pumfrey*, 10 Ch. D. 622.

⁵ *Hance v. Harding*, 20 Q. B. D. 732.

⁶ 41 & 42 Vict. c. 31, s. 4; 45 & 46 Vict. c. 43, ss. 8, 15; *Re Count D'Epineuil*, 20 Ch. D. 217; *Fowler v. Foster*, 28 L. J. Q. B. 210; and see *Swift v. Pannell*, 24 Ch. D. 210.

⁷ *Ex parte Huastable, Re Conibeer*, 2 Ch. D. 54.

⁸ *Ex parte Bolland, Re Clint*, L. R. 17 Eq. 115; but see *Ex parte Bishop, Re Tomies*, L. R. 8 Ch. App. 718; *Re Andrews*, 7 Ch. D. 635.

⁹ See *ante*, p. 127.

¹⁰ *Wheeler v. Caryl*, Amb. 121; 2 Br. H. & W. 127; *Mackintosh v. Pogose*, [1895] 1 Ch. 505.

Voluntary settlement of personal chattels to be registered as bill of sale.

Difference in operation between this section and that of 13 Eliz. c. 5, s. 2.

wife, not in pursuance of ante-nuptial articles, be held good as against her creditors where no consideration moves either from her husband or a stranger? Probably not.

At this point it may be useful to discuss very shortly the power of the Divorce Court to vary and alter marriage settlements on the dissolution of the marriage. In the case of dissolution of marriage, the court has had conferred upon it the right to vary not only post-nuptial but ante-nuptial settlements, and to deal with them in any way which may be thought just and expedient.¹ This power is conferred by 22 & 23 Vict. c. 61, s. 5.² Where once the court has made an order varying the settlement, an application to vary it further will not be entertained,³ except in respect of matters which existed before the order was made.⁴ The fact that there is a restraint upon anticipation affecting the wife's property does not oust the jurisdiction of the court.⁵ This section formerly could only be put in force where there were children of the marriage;⁶ but by 41 Vict. c. 19, s. 3, the Divorce Court has jurisdiction over marriage settlements where there are no children; but both husband and wife must be alive at the time of the application to vary.⁷ Post-nuptial deeds include deeds of separation.⁸ This power can be put in force by the court on a decree of nullity,⁹ and extends to all classes of nullity cases.¹⁰ The court has jurisdiction under 20 & 21 Vict. c. 85, s. 45, and 23 & 24 Vict. c. 144, s. 6, before pronouncing a final decree for dissolution of marriage or judicial separation for adultery against a wife, to direct an inquiry as to her property, so that it may be enabled to order a settlement to be made of such property as soon as the final decree is pronounced.¹¹ The application to vary a settle-

Power of the Divorce Court to vary settlements.

On dissolution of marriage.

On decree of nullity.

¹ Per Jessel, M.R., in *Gandy v. Gandy*, 7 P. D. 168, 172.

² "The court, after a final decree of nullity of marriage, or dissolution of marriage, may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage, or of their respective parents, as to the court shall seem fit." Whether the court has jurisdiction to entertain a petition to vary a settlement by the guilty party seems to be a moot point. See *Wootton-Isaacson v. Wootton-Isaacson*, [1902] p. 146. There is nothing in the language of the section which would cut down the power of the court to the case of the innocent party only. The court can exercise this jurisdiction over the interests of parties other than the spouses or children of the marriage if they consent. See *Morrissey v. Morrissey*, [1905] P. 90. This statute only deals with settled and not unsettled property. *Allcard v. Walker*, [1896] 2 Ch. 369. By the earlier statute, 20 & 21 Vict. c. 85, s. 45, the court had power to deal with the wife's settled property where she was the offending party; this section was amended by 23 & 24 Vict. c. 144, s. 6.

³ *Benyon v. Benyon and O'Callaghan*, 15 P. D. 54.

⁴ *Gladstone v. Gladstone*, 1 P. D. 442.

⁵ *Merton v. Merton*, 83 L. T. 223.

⁶ *Graham v. Graham*, L. R. 1 P. & D. 711.

⁷ *Thomson v. Thomson*, [1896] P. 263.

⁸ *Worsley v. Worsley*, L. R. 1 P. & D. 648.

⁹ *A. (otherwise M.) v. M.*, 10 P. D. 178; *Leeds v. Leeds*, 57 L. T. 373.

¹⁰ *Dormer (otherwise Ward) v. Ward*, [1901] P. 20.

¹¹ *Midwinter v. Midwinter*, [1892] P. 28.

ment under section 5 of 22 & 23 Vict. c. 61 and section 3 of 41 Vict. c. 19 is a separate proceeding consequential on and not part of a suit for dissolution.¹ Under these two sections the principles that underlie the exercise of the statutory power of variation are the preserving the rights and liabilities of the wronged and wrong-doing spouses, and the safeguarding the interests of society and public morality; consequently, though the court can exercise its discretion in varying the settlement to the advantage of a wrong-doing petitioner,² yet, as a rule, where a petitioner has been guilty of marital infidelity or other offence, the discretion of the court will not be exercised in favour of such petitioner.³ The court can order a sum to be paid out of the *corpus* of the settled property for the payment of costs.⁴

Interests of
children con-
sidered.

In this matter the interests of the children (if any) are also largely considered,⁵ and a settlement cannot be varied so as to deprive a child of the marriage of an interest under it;⁶ and the interests of other parties will also be safeguarded.⁷ Another principle by which the court is guided in giving effect to section 5 of 22 & 23 Vict. c. 61 is—where the breaking up of the family life has been caused by the respondent, the court ought to place the petitioner and the children in a position as nearly as circumstances will permit the same as if the family life had not been broken up.⁸ Thus, under certain circumstances the court will exercise a power of appointment in favour of the petitioner, though thereby the interests of the children of the marriage will be postponed until after the death of both their parents, on the assumption that if the family life had continued the respondent would have exercised that power in favour of the petitioner;⁹ and the court has varied a settlement by depriving the infant children of the marriage of part of their interests secured to them by it; but, on the other hand, their interests in the remainder were accelerated by another act of the court.¹⁰ The court has also claimed jurisdiction in favour of the petitioner over a settlement even where a child of the dissolved marriage has acquired a vested interest in the settled funds.¹¹ There is power in the court where the husband is the guilty party to make provision for

¹ See *Stanhope v. Stanhope*, 11 P. D. 103; and *Thomson v. Thomson*, [1896] P. 263.

² See *Symons v. Symons*, [1897] P. 167.

³ Per Court of Appeal in *Constantinidi v. Constantinidi*, [1905] P. 253.

⁴ *Douglas v. Douglas*, 74 L. T. 381.

⁵ *Paul v. Paul*, L. R. 2 P. & D. 93. See *Douglas v. Douglas* (*ubi sup.*).

⁶ *Crisp v. Crisp*, L. R. 2 P. M. & D. 426.

⁷ *Smith v. Smith & Graves*, 12 P. D. 102. The interests of the next of kin have been recognized. See *Walpole v. Walpole*, [1901] P. 196.

⁸ See *Crisp v. Crisp* (*ubi sup.*); *Noel v. Noel*, 10 P. D. 179; *Forsyth v. Forsyth*, [1891] P. 363; *Pollard v. Pollard*, [1894] P. 172; *Hartopp v. Hartopp & Akhurst*, [1899] P. 65.

⁹ *Hartopp v. Hartopp & Akhurst* (*ubi sup.*).

¹⁰ *Whitton v. Whitton*, [1901] P. 348.

¹¹ *Blond v. Blond*, [1902] P. 190. This was a strong exercise of the statutory jurisdiction of the court, and would appear to be a straining of the intention of the

the custody, maintenance, and education of children above the age of sixteen, that is, till they attain the age of twenty-one.¹ Where the wife is the guilty party she may be compelled (according to one decision) to make provision for her children for the whole of their lives under section 45 of 20 & 21 Vict. c. 85, on the ground that at Common Law she is under no liability to support them at all.²

The court will also take precautions, as much as possible, to prevent the innocent party from being damnified by the dissolution of the marriage:³ thus an innocent party will be relieved from a covenant to appoint in favour of the guilty.⁴ Where the innocent party has not brought anything in to settlement, he or she will, if possible, be allowed a sum for maintenance on the dissolution of the marriage.⁵ The court will not as a rule insert a *dum casta vixerit* clause in its order,⁶ but will claim the right to insert it whenever it thinks the character of the woman warrants it in so doing.⁷ This power of variation can only be exercised on the application of one of the parties themselves; and the personal representative of either party cannot enforce it.⁸ A post-nuptial absolute assignment of property by a husband on his wife is not a "settlement" within the meaning of section 5 of 22 & 23 Vict. c. 61.⁹

Dum casta clause not a usual one.

The court has also jurisdiction under 23 & 24 Vict. c. 144, s. 5, to deal with powers of appointment, whether in ante-nuptial or post-nuptial settlements.¹⁰ But there is a limitation to the powers of the court in this respect; and in a case where a marriage settlement gave the wife on the death of the husband a power of appointment in favour of a second husband and the children of a second marriage, the court, on the dissolution of her marriage through the misconduct of her husband, declined to vary the settlement so as to enable her to exercise such power of appointment as though he were dead.¹¹

Jurisdiction of court over powers of appointment.

legislature. A child of the dissolved marriage had acquired a vested interest which he did not dispose of either *inter vivos* or by will. The child died intestate and unmarried; the father, the respondent, acquired the child's interest in the settled funds by operation of law. The court deprived the respondent of the whole of his interest. It is clear that if the child had made a disposition in favour of the respondent, the court could not have dealt with it. Forbearance to deal with his property on the part of the child was equivalent to an act of disposition on his part. See Form of Order drawn up by the Court of Appeal.

¹ *Thomasset v. Thomasset*, [1894] P. 295, overruling *Blandford v. Blandford*, [1892] P. 148, and other cases. *Thomasset v. Thomasset* was decided under 20 & 21 Vict. c. 85, s. 35.

² *Midwinter v. Midwinter*, [1893] P. 93. This seems too absurd to be good law, and see 45 & 46 Vict. c. 75, s. 21; *Thomasset v. Thomasset* (*ubi sup.*) puts the power of the Court of Divorce in this matter on the proper footing.

³ *Maudslay v. Maudslay*, 2 P. D. 256; *Noel v. Noel*, 10 P. D. 179.

⁴ *Benyon v. Benyon*, 1 P. & D. 447.

⁵ *March v. March*, 36 L. J. P. M. & A. 65.

⁶ *Harrison v. Harrison*, 12 P. D. 130.

⁷ *Kettlewell v. Kettlewell*, [1898] P. 138.

⁸ *Thomson v. Thomson*, [1896] P. 263.

⁹ *Chalmers v. Chalmers*, 68 L. T. 28; *Hubbard v. Hubbard*, [1901] P. 157.

¹⁰ *Evered v. Evered*, 43 L. J. P. M. & A. 86.

¹¹ *Pollard v. Pollard*, [1894] P. 172.

Restitution of
Conjugal
Rights Act,
1884.

On judicial
separation,
court has no
power to vary
settlements.

The like jurisdiction is given to the court under the Restitution of Conjugal Rights Act, 1884,¹ consequently, where a woman does not comply with a decree for restitution of conjugal rights the court may in its discretion order a settlement out of her property for the benefit of the husband.² The court may take into consideration the general conduct of the parties; but such property must not be subject to a restraint upon anticipation.³ But in a case of judicial separation there is no such power in the court, and the settlement, ante-nuptial or post-nuptial, remains binding,⁴ though it has the power to order the payment of alimony,⁵ and a settlement of the wife's property, if she be in the wrong;⁶ but if the parties have agreed by a deed in the nature of a settlement, one to pay and the other to accept a certain sum in the nature of alimony, it is not in the power of the court on a decree of judicial separation to alter or vary the terms of the deed, though it may be of opinion that the amount agreed between the parties is insufficient, and the parties remain bound by their contract.⁷ Until a decree has been made for dissolution of a marriage, there is no *lis pendens* with reference to the property included in the settlements, so that up to the pronouncing of the decree *nisi* a party has power to charge his or her interest under the settlement.⁸

Alimony;

control of
court over.

Alimony is the allowance which the court orders to be made to the wife when cohabitation has ceased, and is either *pendente lite* or permanent. The court keeps a direct control over the sum it has ordered to be paid as alimony, whether *pendente lite*,⁹ or on pronouncement of a dissolution of marriage;¹⁰ or generally.¹¹ Consequently, when once the court has ordered a husband to pay alimony to his wife, he cannot discharge himself of his duty to pay it, except by an order of the court; it has, therefore, been held not to be a debt within section 37 of the Bankruptcy Act, 1883;¹² and because it is not such a debt, and because it cannot be fairly estimated or valued for proving purposes, the bankruptcy of the husband does not discharge his liability to pay it, whether in respect of arrears,¹³ or of future payments.¹⁴ But

¹ 47 & 48 Vict. c. 68, s. 3.

² *Swift v. Swift*, [1891] P. 129.

³ *Michell v. Michell*, [1891] P. 208.

⁴ *Gandy v. Gandy*, 7 P. D. 168.

⁵ 20 & 21 Vict. c. 85, s. 17.

⁶ *Ibid.* s. 45. See *Midwinter v. Midwinter*, [1892] P. 28.

⁷ *Gandy v. Gandy* (*ubi sup.*).

⁸ *Wigney v. Wigney*, 7 P. D. 228.

⁹ *Bailey v. Bailey*, 13 Q. B. D. 855.

¹⁰ 29 & 30 Vict. c. 32, s. 1.

¹¹ 20 & 21 Vict. c. 85, s. 24.

¹² 46 & 47 Vict. c. 52.

¹³ *Re Hawkins, Ex parte Hawkins*, [1894] Q. B. 25; *Kerr v. Kerr*, [1897] 2 Q. B. 439. In *ex parte Hawkins* the arrears had accrued due after the making of the receiving order; in *Kerr v. Kerr*, before the making of the order.

¹⁴ *Linton v. Linton*, 15 Q. B. D. 239.

alimony is a debt within the meaning of section 5 of the Debtor's Act, 1869,¹ so as to render the husband liable for commitment for non-payment of it, if of ability to do so.² The usual test for ascertaining the amount of the alimony where the wife is the innocent party is what would have been an adequate jointure for the woman as the widow of her divorced husband, taking the pecuniary position of the parties into consideration.³

The court has power to entertain a petition for variation of settlements, though the parties were domiciled in Scotland at the time of the marriage, and the settlements were made in Scotch form;⁴ but it has no power under 22 & 23 Vict. c. 61, s. 5, to entertain such a petition except upon a decree absolute of dissolution or nullity pronounced by itself.⁵

¹ 32 & 33 Vict. c. 62.

² *Linton v. Linton* (*ubi sup.*).

³ *Kettlewell v. Kettlewell*, [1898] P. 138.

⁴ *Nunneley v. Nunneley*, 15 P. D. 186; *Forsyth v. Forsyth*, [1891] P. 363.

⁵ *Moore* (f. c. *Bull*), v. *Bull*, [1891] P. 279.

CHAPTER IX.

PERSONAL RIGHTS OF THE SPOUSES CREATED BY COVERTURE.

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THIS chapter regards the man and woman as husband and wife after a valid ceremony of marriage has been completed between them, and the effect of the marriage on their personal relations to one another. At the outset it may be remarked that the status of the woman is more affected than that of her husband. Even in modern times, when every sexual inequality is attempted to be set aside and removed, this fact still holds good, and a woman on her marriage, except in a few instances,¹ is content in this country to take her husband's name. It may, without lacking gallantry towards women, be affirmed that nature has marked out the man as being the *dignior persona*. He is stronger in intellect, force of character, and physical strength; he is better able to struggle against the force of opposing circumstances, both in the winning of food and the attacks of enemies, and so to govern and to rule. This physical and mental superiority has been recognized by the laws of most countries, perhaps more readily because the male sex has been the law-maker. Nature plainly dictates that it is the duty of the husband to cherish and protect the wife, and that the

Husband *dignior persona*.

¹ Widows of high rank, on marrying again men of inferior rank to their late husbands, are by courtesy allowed to retain their names.

wife on her part should yield not only love and tenderness, but even obedience. Thus, it has been said that the husband is clothed with authority over his wife. "He is to practise tenderness and affection, and obedience is her duty."¹

The happiness of parties and necessities of life compel personal sacrifices and concessions from both parties, and hitherto the greater sacrifice of personal independence has come from the wife. Accordingly, the husband has the choice of the matrimonial domicile. The domicile of the wife becomes that of the husband at the moment of marriage,² and continues to be the same as her husband's, and changes with his throughout their married life.³ But the change must be carried out with an honest purpose, and with no intention of obtaining increased rights over her property, nor must be such as would visit her with unnecessary hardships, or be likely to imperil her life or liberty.⁴ The wife, it would seem, cannot acquire a separate domicile from her husband, though she live apart from him, or has separated from him judicially;⁵ or privately because of his gross misconduct;⁶ and she certainly cannot, where she elects merely to live apart from him; but it seems she may acquire a separate *quasi*-domicil from him in order to institute divorce proceedings, and that by a residence short of actual domicile,⁷ also if she is deserted by him.⁸ A married woman's testamentary capacity as to movables depends altogether, and for the alienation of her movables generally, on the law of her domicile.⁹

Husband's domicile the matrimonial domicile.

Wife cannot acquire separate domicile.

By the theory of the common law of England husband and wife are one person—*vir et uxor sunt quasi unita persona, quia caro una et sanguis unus*.¹⁰ This theory was never carried out to its fullest extent;¹¹ it was the individuality of the wife that was in part suspended during the existence of the marriage tie. While that lasts she is under the *coverture* or protection of her *baron* or husband; in legal language, she is *femina co-operta* or *feme covert*.¹² Coverture created the disabilities at common law, and husband and wife could neither contract with nor make gifts to one

Unity of the spouses.

Coverture.

¹ Per Lord Stowell, in *Oliver v. Oliver*, 1 Hag. Con. Rep. 361, 363.

² See *Viditz v. O'Hagan*, [1900] 2 Ch. 87.

³ *Warrender v. Warrender*, 2 Cl. & F. 488; *Dolphin v. Robins*, 29 L. J. P. & M. 11; *Re Daly's Settlement*, 27 L. J. Ch. 751; 33 & 34 Vict. c. 14, s. 10 (Naturalization Act, 1870).

⁴ To what extent the law of the husband's domicile irrevocably governs the proprietary rights of the spouses, see *De Nicols v. Curlier*, [1900] A. C. 21, 43.

⁵ *Dolphin v. Robins* (*ubi sup.*); *Le Sueur v. Le Sueur*, 1 P. D. 139.

⁶ *Yelverton v. Yelverton*, 39 L. J. P. M. & A. 34.

⁷ *Deck v. Deck*, 29 L. J. P. M. & A. 129; *Niboyet v. Niboyet*, 4 P. D. 1; reversing 3 P. D. 52; *Santo Teodoro v. Santo Teodoro*, 5 P. D. 79.

⁸ *Le Sueur v. Le Sueur* (*ubi sup.*).

⁹ Dicey, Dom. 195.

¹⁰ Bracton, lib. 5, fol. 416, Co. Litt. s. 291.

¹¹ See the first resolution of the majority of the judges in *Manby v. Scott*, 1 Sid. 109, to the effect that "marriage does not give the wife any innate and uncontrollable power to render the husband liable" on contracts entered into by her, which it would give her if the doctrine of the *unitas personarum* were carried to its logical and furthest conclusion.

¹² 1 Bl. Com. 442.

another, ostensibly because the wife had no separate existence, but in reality because the husband on marriage took, *jure mariti*, all his wife's personal property, and consequently she could neither give him, nor contract to give him, what was already his own.¹ But in equity her separate existence in respect of her separate estate was recognized, with respect to which she was competent to contract not only with strangers but her own husband.² The effect of the Married Women's Property Act, 1882, is to enlarge the separate existence of the wife so far as her proprietary rights are involved; but this alteration in the status of the wife would seem to be confined to her rights over property as between herself and her husband; but notwithstanding this Act, this merger is still recognized, especially as regards the relations of third persons with the spouses.³ Husband and wife cannot sue each other for tort, as for an assault;⁴ and publication of a libel by a husband to his wife is no legal and sufficient publication.⁵ In one other respect their unity of person is still regarded in law; that is, the position of a woman who marries a peer of the realm. A woman who marries a peer becomes a peeress, entitled to the same dignity as her husband, and acquires all the rights and privileges of the peerage consistent with her sex.⁶

As regards their *personal* existence, it is not true, in a literal sense, to say that a man and wife became one person in the eye of the law, and their separate existence was recognized in many ways; thus, sending a communication libelling the husband to the wife was held to be a sufficient publication of the libel;⁷ so also, where the wife had an adverse interest to her husband, as, for instance, where she petitioned for a divorce, she might have made a binding agreement with him, notwithstanding coverture.⁸

¹ As regards the wife's real estate, her separate existence was clearly recognized by the Common Law. Land with its feudal incidents was all in all in earlier times, and personal property scarcely existed; consequently the wife's interest (and thereby the lord's) in the really valuable property which she brought to her husband was safeguarded.

² *Hewison v. Negus*, 16 Beav. 594; *Vansittart v. Vansittart*, 4 K. & J. 62; *Woodward v. Woodward*, 3 De G. J. & S. 672.

³ See *Butler v. Butler*, 14 Q. B. D. 831, and 16 Q. B. D. 374; *Re Jupp, Jupp v. Buckwell*, 39 Ch. D. 148.

⁴ *Phillips v. Burnet*, 1 Q. B. D. 436.

⁵ *Wennhak v. Morgan*, 20 Q. B. D. 635.

⁶ Per Barnes, J., in *Cowley v. Cowley*, [1900] P. 122.

⁷ *Wennhak v. Morgan*, 13 C. B. 836. The distinction between this case and that of *Wennhak v. Morgan* (*ubi sup.*) is that in the latter the husband was the defendant, who was alleged to have published a libel by disclosing it to his wife, whereas in the former the statement defamatory of her husband was communicated to the wife by the defendant who was a stranger, and Maule, J., said: "In the eye of the law, no doubt, man and wife are for many purposes one; but that is a strong figurative expression and cannot be so dealt with as that all the consequences must follow which would result from its being literally true. For many purposes they are essentially distinct and different persons, and amongst others, for the purpose of having the honour and feelings of the husband assailed and injured by acts done or communications made to the wife."

⁸ *Bateman v. The Countess of Ross*, 1 Dow, 235.

She may exhibit articles of the peace against him if he illtreats her and she has a reasonable fear of his violence.¹

By the law of England as laid down by more modern authorities, a husband is entitled to a limited control and custody of his wife's person; but he cannot be convicted of a rape upon her,² nor of an assault upon her if he infects her with a venereal disease.³ It was formerly laid down that "the husband hath by law power and dominion over his wife, and may keep her by force within the bounds of duty; and may beat her, but not in a violent or cruel manner."⁴ The latter part of this proposition, if ever, strictly speaking, it was the law of this country, is long since exploded; and if a husband were thus to attempt to correct his wife, he would render himself liable to criminal proceedings; though it is true she cannot bring an action against her husband for damages for assault during the period of coverture;⁵ and the husband is also disentitled to bring a similar action against his wife.⁶ How far the first part of the above proposition, viz., that a "husband hath by law power and dominion over his wife, and may keep her by force within the bounds of duty," in other words, the right of the husband to the control and custody of his wife's person, is true, will be briefly discussed. Any right of custody lasts only till he has been guilty of cruelty towards her, or separation has taken place between them; and it is quite clear that any restraint he may put upon her must not tend to endanger her health or life, or render the cohabitation unsafe, for such conduct might be regarded as amounting to *savitia* or cruelty, entitling her to a judicial separation.⁷

His custody and control were never permitted to amount to imprisonment, though they might amount to confinement;⁸ though the distinction between the two forms of detention seems now too fine for practical working; and at the present time any distinction must be taken to be abolished.⁹ A husband may now detain his wife within the walls of the matrimonial domicile only when apprehensive of her doing some injury to his property or his honour.¹⁰ If the wife is unwilling to live with her husband she may live apart from him, and he cannot now compel her either by decree

Common Law right of husband to control and custody of wife.

Limits to right.

Reg. v. Jackson.

¹ *Shepherd v. Mackoul*, 3 Camp. 326; *Turner v. Rook's*, 10 A. & F. 47.

² 1 Hale, 629; but he may be convicted of criminally aiding and abetting a rape upon her. *Lord Audley's Case*, 3 St. Tr. 401. It was formerly doubtful whether a man who had connection with a married woman by personating her husband was guilty of rape; but by section 4 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), a man who personates a husband and has connection with a married woman, commits a rape upon her.

³ *Reg. v. Clarence*, 22 Q. B. D. 23.

⁴ Bacon's Abr., B. & F. (B.).

⁵ *Phillips v. Barnet* (*ubi sup.*).

⁶ *Ibid.*

⁷ See *Re Cochrane*, 8 Dowl. P. C. 630.

⁸ *Atwood v. Atwood*, Ch. Prec. 492; *Lord Leigh's Case*, 3 Keb. 433.

⁹ *Reg. v. Jackson*, [1891] 1 Q. B. 671; *Re v. Mead*, 1 Burr. 542; *Reg. v. Leggatt*, 18 Q. B. 781; *Re Cochrane*, (*ubi sup.*).

¹⁰ See *Reg. v. Jackson* (*ubi sup.*); *Re v. Lister*, 1 Stra. 478.

Right of
husband to
writ of *hab.
corp.*

Exceptions.

of restitution of conjugal rights,¹ or by writ of *habeas corpus*, or by force,² or by stratagem,³ to resume cohabitation. The husband is only entitled to his writ of *habeas corpus* when his wife is improperly detained out of his custody against her will, but not where he has abandoned his marital right by executing a separation deed;⁴ and if the deed be informal, he cannot justifiably enter the house of a third party to reclaim her as improperly harboured there, without having given notice of his revocation of the licence to live apart.⁵ If the husband treat his wife ill, he will not be entitled to his *habeas corpus*,⁶ or where his wife is living apart from him under no restraint.⁷ The wife, on the contrary, may have her writ if she be improperly restrained, as where she is confined to his house after a deed of separation has been executed between them;⁸ or where he has violently taken possession of her body, and keeps her detained against her will.⁹ Any antenuptial arrangement which would have the force of infringing the husband's rights to this control and custody can be set aside by him, and will not be enforced by the courts. But the power of a husband, whether English or foreign, over the person of his wife while in England, is not affected by the law of his foreign domicile.¹⁰ A husband has no indefeasible right to be appointed committee of her person, if she become lunatic.¹¹

Mutual right
of cohabitation.

Husband and wife are mutually entitled to each other's society, in other words, to live together and cohabit as man and wife; for this right is the foundation of the married state; and even under the Poor Law they are not separated when they become paupers and chargeable to the poor rate.¹² The cohabitation of man and wife is demanded by nature not only for the engendering, but also for the protection and nurture of the offspring. Withdrawal from cohabitation merely on the ground of incompatibility of temper can scarcely ever be justified,¹³ and it is only by reason of some serious breach of duty towards one another that the spouses can properly live apart; and such breach is usually one that is nowadays cognisable by the Divorce Court, whether entitling the injured party to a dissolution of marriage or a judicial separation. The spouses are entitled to protect each other's life and security, for they have a clear interest in each other's safety and comfort; and a husband or a wife may justify for killing in the moment of danger one

1 Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68).

2 *Reg. v. Jackson*, [1891] 1 Q. B. 671.

3 *Re Cochrane*, 8 Dowl. P. C. 630.

4 *Anne Gregory's Case* (*Reg. v. Brooke*, 4 Burr. 1991).

5 *Lewis v. Ponsford*, 8 C. & P. 687.

6 *Reg. v. Brooke*, 4 Burr. 1991.

7 *Ex parte Sandilands*, 21 L. J. Q. B. 342.

8 *Reg. v. Lister*, 1 Stra. 478; see also *Lord Vane's Case*, 8 East, 171 n.

9 *Reg. v. Jackson* (*ubi sup.*).

11 *Re Dacy*, [1892] 3 Ch. 38.

10 *Dacey*, Dom. 193.

12 *Reg. v. Bridgnorth*, 9 Q. B. D. 765.

13 *Yeatman v. Yeatman*, L. R. 1 P. & D. 489.

who was threatening the life of the other ; and it is the same with regard to a battery. A husband who is deprived of the society or *consortium* of his wife may maintain an action based upon its loss ;¹ and a wife who is deprived of the *consortium* of her husband by the wrongdoing of a third person may also be entitled to maintain an action based on its loss.²

Adultery committed with his wife was a wrong done to the husband which formerly entitled him to maintain an action for *crim. con.* against the adulterer for the purpose of obtaining damages ; but the Divorce Act of 1857³ abolished that right of action, though by another section⁴ it practically restored it, for it provides that "any husband may, either in a petition for dissolution of marriage or for judicial separation, or in a petition limited to such object only, claim damages from any person on the ground of his having committed adultery with the wife of such petitioner" ;⁵ the chief difference between the old and present practice being that the injured husband has no longer compulsory recourse to the common law courts to redress his injury by pecuniary damages against the adulterer, but can recover them in the same court as that which gives him the further relief of dissolution of marriage or judicial separation. The husband may condone his wife's adultery, and yet petition for damages against the adulterer.⁶ The wife neither before nor since the Divorce Acts could bring this action against the paramour of her husband ; for before the Acts there is no trace of such an action whether founded on the common law or the practice of the Ecclesiastical Courts ; and since the Acts the substituted remedy of damages against the co-respondent is confined to the husband.

Action for
crim. con.
abolished.

Damages
against co-
respondent.

The enticing away and harbouring of his wife is an injury to the husband which renders the offending person liable to an action,⁷ for the husband may recover her out of the possession of any person who is harbouring her, unless the husband has by his cruelty or misconduct forfeited his marital rights, or turned her out of doors, or by some insult or ill-treatment compelled her to leave him,⁸ or she elects to live apart from him.⁹ The parents of the wife have no more right to entice away and harbour her than a complete stranger, though where the husband

Enticing away
and harbouring
of wife.

¹ 3 Bl. Com. 140. The claim for loss of society must be limited to the life of the wife, and no further damages can be recovered for the fact that she has died in consequence of the tort. *Baker v. Bolton*, 1 Camp. 493.

² See *Lynch v. Knight*, 9 H. L. Cas. 577.

⁴ Sect. 33.

³ 20 & 21 Vict. c. 85, s. 59.

⁵ *Bikker v. Bikker and Whitewood*, 67 L. T. 721. In this case it was held that the measure of damages is not the means of the co-respondent but the injury to the petitioner. See *Lord v. Lord*, [1900] P. 297.

⁶ *Pomero v. Pomero*, 10 P. D. 174.

⁷ *Winsmore v. Greenbank*, Willes, 577.

⁸ *Philp v. Squire*, 1 Peake, 114 ; *Berthon v. Cartwright*, 2 Esp. 480.

⁹ *Reg. v. Jackson*, [1891] 1 Q. B. 671.

is to blame, less misconduct on his part would justify a parent in receiving back a daughter than would justify a stranger. The inducement to leave the husband must be active on the part of the inducer; and if he merely expresses his approval of the wife leaving, such approval does not amount to an inducement or enticing away.¹ In some of the United States it has been held that an action for enticing away a husband does not lie at the suit of a wife;² but in many of the States of the Union this class of action has been held to be maintainable.³ Husband and wife cannot at all times insist upon this right of cohabitation as against each other; thus, the wife is not compelled to be with her husband during his imprisonment or banishment;⁴ or if he propose to take her where serious risks to her life would ensue. If the husband or wife wilfully abstain from each other's society, and refuse to cohabit, such conduct may be the ground of judicial separation; but mere temporary absence, whether for the purposes of trade or in the public service, is not inconsistent with this right of cohabitation.

Exception to
mutual right
of cohabitation.

Lord Camp-
bell's Act.

The Married Women's Property Act, 1882, has not in its effect so severed the interests of husband and wife as to effect a repeal of Lord Campbell's Act;⁵ consequently, either husband or wife may bring an action against a wrongdoer by whose negligence the death of the one has been caused, provided that it is brought within a year from the death, and the survivor can prove that pecuniary loss or damage has resulted from, or a reasonable expectation of pecuniary advantage has been defeated by, the death of the injured party.⁶ Sentimental damages,⁷ or funeral or mourning expenses,⁸ cannot be recovered. This remedy was given because at common law the death of a person cannot be made the subject of an action for damages.⁹ If a widow is a "dependant" of a workman whose death occurs during his employment, and who would be entitled to compensation if he had not died, she is entitled to compensation from the employer under the Workmen's Compensation Act, 1897.¹⁰ The benefit of Lord Campbell's Act is lost to her by her adultery.¹¹

Former right
of husband to
vindicate

Formerly a husband had an indefeasible interest in the personal wrongs or torts done to his wife, whether as to her person, *e.g.*,

¹ *Smith v. Kaye*, 20 T. L. R. 261.

² *Van Arnam v. Ayers*, 67 Barb. 544.

³ *Ex relatione* the late Chief Justice of Ontario (The Hon. G. W. Burton).

⁴ Co. Litt. 133.

⁵ 9 & 10 Vict. c. 93, ss. 1, 2.

⁶ *Ibid.*; Lord Campbell's Act. When there is no reasonable prospect of benefit accruing, see *Harrison v. London & North-Western Railway Co.*, 1 Cab. & El. 540.

⁷ *Blake v. The Midland Railway Co.*, 21 L. J. Q. B. 233.

⁸ *Dalton v. South-Eastern Railway Co.*, 27 L. J. C. P. 227.

⁹ *Osborn v. Gillett*, L. R. 8 Ex. 88. See *post*, Part II., Parent and Child, chap. v.

¹⁰ 60 & 61 Vict. c. 37.

¹¹ *Stimpson v. Wood*, 57 L. J. Q. B. 484

battery, or to her character and reputation, *e.g.*, libel or slander. If they were wrongs done to her *before* marriage, he might join with his wife in an action for their redress, and whatever damages might be recovered belonged to him.¹ Where the wrongs were done *during* marriage, he must have joined with her in the action, for the wrong done to his wife was a wrong done to himself,² and he also recovered for himself whatever damages might have been assessed.³

wrongs done to wife, whether ante-nuptial or post-nuptial.

But now, under the Married Women's Property Act, 1882, a married woman can sue alone, as though she were a single woman, for torts done to herself, and her husband need not be joined in the action, and damages recovered by her become her separate property,⁴ whether the cause of action arose before or after the Act.⁵ Spoken words imputing to her unchastity or adultery do not require special damage to be proved to make them actionable.⁶ In a case where the tort to the wife arises out of a breach of contract with the husband (as in *Longmeid v. Holliday*⁷) it is suggested that equally now as before the change of the law, the joinder of the husband would be necessary in order to ensure success, for there is no misfeasance towards her independently of the contract with her husband.⁸

Under M.W.P. Act, 1882, married woman can maintain sole action for tort.

Generally speaking, a married woman is just as amenable to the criminal law as regards her crimes and delinquencies as a man or a single woman; but she is excused from liability in respect of certain crimes when it is proved that she has been acting under the compulsion or coercion of her husband, on the ground that her acts have not been those of a free agent. When her husband is not present she will not be presumed to have acted under his coercion, even though he may be proved to have procured her to commit the offence.⁹ The mere fact of coverture does not raise

Relation of married woman to the criminal law. Married woman not liable for lesser crimes committed under coercion of husband.

¹ *Dalton v. Midland Counties Railway Co.*, 22 L. J. C. P. 177. This right to sue on the part of the husband was a chose in action, and if the husband died before suit, the right survived to the widow.

² *Newton v. Hatten*, 2 Ld. Raym. 1208.

³ The right of the husband to sue in this case was also a chose in action, and if the wife died during suit, the right survived to her administrator, who probably was her husband. In such actions, if the husband wished to recover special damages for the injury to his wife, he did not declare on the joint tort, but for the loss of his wife's society. *Dengate v. Gardiner*, 4 M. & W. 5.

⁴ 45 & 46 Vict. c. 75, s. 1, sub-s. 2. For example, a married woman travelling on a railway meets with an accident resulting from the negligence of the company; she sues the company and recovers £500. Under this section that sum becomes her "separate property."

⁵ *Weldon v. Winslow*, 13 Q. B. D. 784. This was an action for assault and libel, in which the Act of 1882 was held retrospective as to procedure.

⁶ 54 & 55 Vict. c. 51. But no more costs can be recovered under the Act than damages, unless the judge certifies there was a reasonable ground for bringing the action.

⁷ 6 Exch. 761; and see *George v. Skivington*, L. R. 5 Ex. 1.

⁸ Unless the case would fall within the principle of *Longridge v. Levy*, 4 M. & W. 337, in which an allegation of fraud was sustained. In the United States, under such circumstances, the husband alone need sue. Bish. Laws M. W. sub-s. 275.

⁹ *Ree v. Morris*, Russ. & Ry. 270.

the presumption of coercion by the husband;¹ and if the husband is in the neighbourhood while the crime is being committed by the wife, it is a question for the jury whether she was taking an independent part.²

The coercion must be active, for if the husband be incapable of coercing her, the presumption will not arise in her favour. Thus, if the husband were a cripple and confined to his bed, his presence at the committal of the offence would not be sufficient to exonerate the wife.³ The coercion of the husband must be proved by his presence at the commission of the offence.⁴ She is also fully responsible for crimes which she has committed alone, and which she has voluntarily committed,⁵ or which she is proved to have incited or procured her husband to commit, that is, she may be an accessory before the fact;⁶ and there are certain more serious offences, such as murder and treason,⁷ to the commission of which by her the coercion of her husband forms no defence. It is in the less heinous offences only that she can successfully set up this plea. This plea may also be set up in the offence of uttering counterfeit coin.⁸ But in the inferior misdemeanours the wife may be jointly indicted with her husband, as, for instance, for an assault,⁹ and for keeping a brothel,¹⁰ on the principle that it is an offence as to the government of the house, in which the wife has a principal share; and also such an offence as may generally be presumed to be managed by the intrigues of the sex. In one case where a married woman was indicted for falsely swearing herself to be next of kin and procuring administration, she was held guilty, though her husband was with her when she took the oath.¹¹ Where a wife receives stolen property, it is necessary to show that she took an active part in the receipt, and if she only intended to conceal her husband's guilt, and to screen him from the consequences, it is different; so if she harbours her husband, or endeavours to conceal that which may lead to his apprehension, she ought to be acquitted.¹² A married woman may be accessory after the fact to a felony committed by her husband, if she actively engage in the crime; but if she only receives, comforts, or relieves him, knowing him to have committed a felony, she will not thereby become an accessory after the fact.¹³ It is said that a husband and wife cannot be indicted for a conspiracy, because they are deemed to be as one

Privilege does not extend to the more serious offences.

¹ *Brown v. Att.-Gen. of New Zealand*, 77 L. T. 414.

² *Reg. v. Baines*, 69 L. J. Q. B. 681.

³ *Reg. v. Pollard et uxorem*, cited *Reg. v. Cruse*, 2 Moo. C. C. R. 53.

⁴ *Rex v. Morris*, Russ. & Ry. 270.

⁵ 4 Bl. Com. 29.

⁶ 1 Hale, 516; 2 Hawk. P. C. c. 29, s. 24.

⁷ Robbery has been also included, but with doubtful authority; see *Reg. v. Torpey*, 12 Cox, C. C. 45.

⁸ Steph. Dig. Cr. L. 18.

⁹ *Reg. v. Cruse*, 2 Moo. C. C. R. 53.

¹⁰ 1 Hawk. c. 1, s. 12.

¹¹ *Rex v. Dicks*, cited 1 Russ. Cr. 141.

¹² See *Reg. v. M^cClarens*, 3 Cox, C. C. 425.

¹³ Steph. Dig. Cr. L. 27.

person in law, and have but one will;¹ but it is doubtful now whether that proposition would be held to be good law if it were shown that the agency of the wife was as active as that of the husband.

This protection is based upon presumption only, and may be rebutted by evidence to show that she has been acting voluntarily, and even taking the more active share in the offence,² or by proving that the husband was a cripple and in bed at the time of the offence.³ The mere fact of his commanding her to commit the crime would be no excuse for her obeying his voice, and breaking the law.⁴ This defence does not cast upon the woman the burden of strict proof that she was the wife of the male prisoner,⁵ and in one case, where the man and the woman were proved to have lived together for several months, and to have a child with them which was said to be theirs, the woman was acquitted on the ground of coverture.⁶ A wife is not responsible for her husband's breach of duty.⁷

Presumption
of coercion
rebuttable.

A wife can now be found guilty of larceny from her husband, if she take his property when leaving or about to leave him.⁸

The legal settlement of a wife under the Poor Law is the last legal settlement of her husband, for his settlement is her settlement;⁹ but if he has no settlement, then upon his death her settlement before marriage revives. Thus, a wife who is made a widow by the death of her husband who has acquired a settlement during his life, retains her husband's settlement until she acquires one for herself, and is not disqualified from so retaining it by the effect of section 35 of the Divided Parishes Act, 1876,¹⁰ for the status acquired by the woman in marriage does not terminate at the death of the husband.¹¹ She takes the settlement for the time being of her husband, though she is living apart from him and cohabiting with another man.¹² In cases where a husband has deserted his wife, or gone abroad and the place of his settlement is unknown, she will be removable to the place of her own settlement; unless she has acquired a status of irremovability for herself. Widows are not removable for twelve months after the death of their husbands if they remain unmarried;¹³ and where a wife is deserted by her husband, and then lives for three

Legal settle-
ment of wife
under the poor
laws.

Status of irre-
movability.

¹ 1 Hawk. P. C. c. 72, s. 8; 1 Russ. Cr. 145.

² *Reg. v. Smith*, 1 D. & B. 553.

³ Per Tindal, C.J., in *Reg. v. Cruise*, 8 C. & P. 541.

⁴ *Ibid.*

⁵ *Reg. v. McGinness*, 11 Cox, C. C. 391.

⁶ *Reg. v. Torpey* (*ubi sup.*).

⁷ *Reg. v. Squire*, cited 1 Russ. Cr. 144.

⁸ 45 & 46 Vict. c. 75, s. 12. For further details, see *post*, chap. xii.

⁹ See *Reg. v. Bridgnorth*, 9 Q. B. D. 765, 771.

¹⁰ 39 & 40 Vict. c. 61.

¹¹ *Guardians of the Reigate Union v. Guardians of the Croydon Union*, and *Guardians of the Medway Union v. Guardians of the Westminster Union*, 14 App. Cas. 465.

¹² See *Guardians of Woolwich Union v. Guardians of Fulham*, [1905] 2 K. B. 203.

¹³ 9 & 10 Vict. c. 66, s. 2.

years in such a manner as would, if she were a widow, render her exempt from removal, she shall be so exempt unless her husband return.¹ Gross misconduct which would entitle the husband to live apart from her does not confer this right upon her.² A married woman, for the purposes of obtaining a status of irremovability for herself, can add to the portion of the statutory period of twelve months in which her husband (having no settlement of his own) has resided in a parish, and who has left her with an intention of returning, the remainder of the statutory period that she has resided by herself in the said parish.³

For many years a single woman has been able to exercise the privilege of voting at a municipal or county council election, also at an election for the lately abolished school board; but whether single or married a woman cannot exercise the parliamentary franchise either in a borough,⁴ or in a county.⁵ Up to quite recently, when a woman married her right of voting at a municipal election was taken away, at any rate during the period of coverture; for marriage at common law was a total disqualification, and a married woman, therefore, could not vote, her existence for that purpose being merged in that of her husband.⁶ But by the Local Government Act, 1894,⁷ which extended (*inter alia*) the principles of municipal government to the rural districts, a woman for the purposes of that Act is not disqualified by marriage for being on any local government register of electors, or for being an elector of any local authority, provided that she and her husband shall not be qualified in respect of the same property.⁸ She is now entitled to vote for the election of both county, parish and district councillors, and the case of *Reg. v. Harrald* is no longer law. She is entitled to vote as occupier only and not as owner of property.⁹ She is not only entitled to vote, but may herself be elected to the post of parish or district councillor, and may even be chairman of a district council. If she is rated as owner of property, she may be sent to prison for non-payment of rates.¹⁰

The word "wife" in a testamentary gift to the "wife" of a particular person *prima facie* means the wife of the person who is alive at the time of the will and death of the testator.¹¹

To conclude the chapter, it is enough to say that in earlier

Relation of married woman to the franchise.

Summary. Former state of the law compared with the modern.

¹ 24 & 25 Vict. c. 55, s. 3. Barrett-Lennard, *The Position in Law of Women*, pp. 22, 23.

² *Reg. v. Cookham Union*, 9 Q. B. D. 522. But see *Reg. v. Maidstone Union*, 5 Q. B. D. 31.

³ *Guardians of Tewkesbury Union v. Guardians of Birmingham*, [1904] 2 K. B. 395.

⁴ *Chorlton v. Lings*, L. R. 4 C. P. 374.

⁵ *Chorlton v. Kistler*, L. R. 4 C. P. 397.

⁶ *Reg. v. Harrald*, L. R. 7 Q. B. 361.

⁷ Sect. 43.

⁸ *Re Allen*, [1894] 2 Q. B. 924.

⁹ *Re Coley, Hollinshead v. Coley*, [1903] 2 Ch. 102.

¹⁰ 56 & 57 Vict. c. 73.

¹¹ *Draze v. Fooks*, [1896] 1 Q. B. 238.

times the identity of husband and wife was more complete, and the wife's separate existence less fully recognized than at the present day. The husband had more power over the person of his wife, as well as over her property, in which, if pure personalty, he acquired an absolute interest; as a compensation, he was under more and she under fewer liabilities than now. Their unity of person was recognized in a mutual inability to give evidence for or against each other, and to make contracts and gifts between themselves. Equity in time stepped in, and by degrees made serious inroads into the doctrines which once prevailed, as will be seen in the succeeding pages; and legislation, marching with modern ideas, has lately (whether for her good or ill) put the wife, in respect of the acquisition and disposition of her property, almost on a level with her unmarried sisters or her husband, thus severing the present from the past. The present state of the spouses is not one of partnership, for partners hold the firm property in common, but that of two persons whose legal status is one and the same, but whose property is held independently of each other. The law that was once peculiar to the relation of husband and wife as regards each other's property now no longer exists, at least during the coverture; and the ordinary principles of law that govern property and the incidents of property apply with scarcely an exception to that held by the married couple. Husband can contract with wife, and wife with husband, and both with strangers, unaffected by any legal theories, or by more substantial disabilities. The husband has no particular interest based on coverture in the property of his wife. He holds his own property as in former times, and she now holds hers unaffected by any rights on his part. But for all that, it cannot be said that the incidence of the matrimonial burdens falls equally. There is nothing that renders a husband less liable to the support of his wife and children than formerly; and she has practically no less authority to pledge his credit for necessities than before. It is true that she is liable for the support of her husband and children, and grandchildren, if she have the means, but only when he is disabled from doing so, or has deserted her. If a man of slender means marries a rich woman, she is in no way bound (unless by the provisions of a settlement) to furnish of her riches anything towards the expenses of the household, but he must support her and their children. The answer to this may be that he need not have married her, but there are more considerations in a marriage than the pecuniary prospects of the parties.

No law peculiar to property-relations of husband and wife.

Incidence of matrimonial burdens still unequal.

CHAPTER X.

PROPRIETARY RIGHTS OF THE SPOUSES CREATED BY COVERTURE.

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THE scope of this chapter is the interest of the spouses in their own and each other's property as affected by coverture. The chapter will be broadly divided into two sections: the first dealing with real property, including chattels real; and the second with personal property. Introductory.

Marriage at Common Law operated as an absolute conveyance of the wife's personal property to the husband, and to give him an interest in her realty for his and her joint lives, or if entitled as tenant by the curtesy, an interest for his life. Now when the condition of life in earlier times is closely considered socially and economically, this conveyance of the wife's property to the husband will not seem such an injustice or hardship as it may appear on a superficial observation. In those days personal property scarcely existed, and if it scarcely existed among men, still less did it exist among women. It may be taken as true that a woman on her marriage very seldom brought any personal property to her husband except her raiment, a few jewels, and such presents as her relatives and friends might have made her. Upon her husband fell the duty of supporting her and the family he had by her; to the matrimonial expenses she contributed nothing. He was liable for her debts, and in damages for any torts or wrongs committed by her. If, therefore, the wife brought to the marriage, or during coverture acquired a small portion of personal property, it seemed almost natural that the husband should in return for his liability take it as a sort of indemnity. In other matters, too, she was thoroughly subordinated to the husband; but "the disabilities thus entailed upon her doubtless protected the wife from many difficulties and hardships which in Marriage a Common Law conveyance of wife's personal property to husband.

Husband did not take absolute interest in wife's realty.

the rough days of civil commotion might otherwise have befallen her.”¹ The real property of the married woman was put upon a different footing, and the husband never took a greater interest in it than for his life. This fact may be thus explained: Land, in former days the most valuable commodity, was often owned to a large extent by females, the interest of whose heirs was jealously guarded. Again, the principles of the tenure of land must be taken into consideration. The incidents and services of tenure in feudal times were most profitable, and jealously guarded by those entitled to exact them. The husband took a joint interest, or a full life interest, because he had to perform the requisite services in lieu of his wife; but he did not acquire the fee, not only because it would have broken the line of descent marked out by the original grant, but might have caused a serious infraction of the rights of the superior lord, who would have had a strange and possibly hostile family thrust upon him, and his services imperilled. To place husband and wife on an equal footing in respect of each other's property has been the modern tendency of the law. Under the Married Women's Property Act, 1882, all the property of a married woman is, and remains, her own; but the unity of the spouses is still to a certain extent recognized; thus, though a wife is not liable for her husband's debts, contracted at an inn where she lives with him, yet her goods brought there are liable to the innkeeper's lien to the amount of the unpaid account of her husband.²

SECTION I.

Real Property.

Real property.

Interest of husband in his own freehold estates of inheritance.

(1) *Interest of Husband in his own Realty.*—Marriage in no way affected the interest of the husband in his own freehold estates of inheritance, and he possessed equal rights of ownership over it after as before marriage, subject, however, to his wife's Common Law right to dower.

Interest of husband in wife's freehold estates of inheritance.

(2) *Interest of Husband in his Wife's Freehold Estates of Inheritance.*—The husband's interest must be viewed in regard to the Common Law; the Common Law as modified by the Married Women's Property Act, 1870;³ and the present state of the law as brought about by the Married Women's Property Act, 1882,⁴ which affects the lands of those married after it came into force, and the lands which are acquired by wives (married before the Act) subsequently to its coming into operation.

Wife's freehold estates of inheritance.

At Common Law the husband took a freehold interest in his

¹ Con. & And. M. W. P. Acts (2nd ed.), p. 3.

² *Gordon v. Silber*, 25 Q. B. D. 491.

³ 33 & 34 Vict. c. 93.

⁴ 45 & 46 Vict. c. 75.

wife's estates of inheritance which she possessed at the time of marriage, or of which she became seised during coverture; his largest interest in them did not exceed an estate for life. Before the birth of issue capable of inheriting the wife's lands, the freehold interest of the husband was commensurate with the joint lives of himself and his wife. After the birth of issue the husband's interest was enlarged by the inchoate right which accrued of enjoying her lands for his life on surviving his wife; he then became tenant by the curtesy. As long as the coverture lasted, his interest was styled tenancy by the curtesy initiate; after the death of his wife, tenancy by the curtesy consummate.¹ Both husband and wife were seised together in her right by entirety: the "effect of which is to put the ownership for the coverture entirely in the husband's power. Hence he can alienate this ownership at pleasure; and his conveyance will pass the freehold without the wife's co-operation."² He could sue in his own name for injuries to the actual profits of the estate, such as damage to the growing crops, and the like, though for injuries done to the inheritance, whether in the nature of trespass or waste, his wife must have been joined in the suit.³ He could charge and aliene her lands for their joint lives; he was entitled to all the rents and profits of her freeholds;⁴ and if he survived her, he was entitled to the arrears of such rents and profits accrued due up to the time of her death, and might have brought an action after the determination of the coverture to recover them.⁵ Without the husband's consent the wife had no power to aliene the lands either by levying a fine, or suffering a recovery, before the Act for the Abolition of Fines and Recoveries;⁶ or after that Act by a deed acknowledged after a separate examination;⁷ nor could she dispose of them by will, unless acting in the exercise of a valid power in that behalf. The husband could mortgage his wife's lands, and the security would last as long as he had any interest in them, but no longer, and his wife or her heirs on taking the property would enjoy it freed from any charges he may have created. If the joint interest of the husband ceased on the termination of the coverture, and he held over, he was deemed a trespasser; and the full value of the profits received by him during such wrongful possession

Tenancy by the curtesy.

Power of the husband over the wife's realty.

Mortgages by husband.

¹ "As soon . . . as any child was born the father began to have a permanent interest in the lands, he became one of the *pares curtis*, did homage to the lord, and was called tenant by the curtesy initiate; and this estate being once vested in him by the birth of the child, was not suffered to determine by the subsequent death or coming of age of the infant." ² Bl. Com. 126.

² Macq. H. & W. 28; *Robertson v. Norris*, 17 L. J. Q. B. 201.

³ 1 Rop. H. & W. 215.

⁴ Bac. Abr. Bar. and Feme, c. 1; *Kingham v. Lee*, 16 L. J. Ch. 491.

⁵ 32 Hen. VIII. c. 37, s. 3. His statutory right did not apply to the rents reserved under a lease. *Prescott v. Boucher*, 3 B. & Ad. 849.

⁶ 3 & 4 Wm. IV. c. 74.

⁷ See *post*, p. 194.

could be recovered as damages against him or his executors or administrators.¹

The trustee of a bankrupt husband whose wife is legal tenant for life of land (not settled to her separate use) has no absolute right to the custody of the title-deeds of the land during the coverture; and it is doubtful whether, under ordinary circumstances, an assignee of a husband of his right to receive during the coverture the rents of such land, is entitled as a matter of course to the custody of the deeds.²

As regards leases for years granted by deed by the husband alone, it seems an open question whether they were void, or voidable only so as to be capable of confirmation by the wife after her husband's death.³ By 32 Hen. VIII. c. 37, a husband seised of a freehold (not copyhold) estate of inheritance in possession in right of his wife may jointly with his wife make a lease of her lands not exceeding twenty-one years or three lives, with a rent reserved to himself and his wife and her heirs; and though this rent was thus reserved to the wife as well, yet during coverture the husband was entitled to take it; and he or his personal representatives could sue for arrears of it.⁴ Now the Settled Estates Act, 1877,⁵ empowers any person entitled to the possession or to the receipt of the rents and profits of any unsettled estate in right of a wife who is seised in fee to demise the same (except the principal mansion-house and the demesnes thereof and other lands usually occupied therewith) for twenty-one years in England and thirty-five years in Ireland,⁶ and the demise will be valid against the wife or any person claiming through or under her.⁷ The husband has also similar powers with regard to settled estates held by him in right of his wife, unless the settlement excludes them.⁸

A husband's lease of his wife's lands, whether alone or jointly with her, under 32 Hen. VIII. c. 37, may be good at common law, though not made in compliance with the statute; but on the termination of coverture the wife has an option of affirming or disaffirming the lease.⁹ Her affirmance of such informal lease must be evinced by such acts as the acceptance of rent,¹⁰ unless the lease was within the Statute of Frauds, in which case it will be held altogether void.

Where the wife was entitled to an estate for life, the husband at Common Law acquired a freehold interest in it during the joint lives of himself and his wife; and he could charge it and

¹ 6 Anne, c. 18, s. 5.

³ See 1 Br. H. & W. 196, 197.

⁴ For the law on this subject see 1 Br. H. & W. 193-220.

⁵ 40 & 41 Vict. c. 18.

⁷ Sect. 47.

⁹ Bell, H. & W. 175; and see *Toler v. Sluter*, L. R. 3 Q. B. 42.

¹⁰ *Doe v. Weller*, 7 T. R. 478.

² *Ex parte Rogers, Re Pyatt*, 26 Ch. D. 31.

⁶ Sect. 46.

⁸ *Ibid.*

Custody of
wife's title
deeds.

Leases by
husband.

Power of
husband under
Settled Estates
Act, 1877.

Estates for
life.

deal with it so long as his interest lasted.¹ If the wife were impeachable for waste, and the husband committed waste during the coverture, he personally, and not the wife or her estate, was liable.²

The Settled Land Act, 1882,³ provides that where a married woman (who if she had not been a married woman would have been a tenant for life, or would have had the powers of a tenant for life under the Act) is not entitled for her separate use, she and her husband together shall have the powers of a tenant for life under the Act.⁴

Powers of a tenant for life under Settled Land Act, 1882.

The husband became seised in right of his wife of her copyhold as well as her freehold land, and one of the homage, and bound to perform the services customary in the manor; his formal admission was, however, not necessary. If he did an act entailing the forfeiture of the estate, as by granting a lease not warranted by the custom, the forfeiture did not last beyond his interest; and on his death the wife was entitled to the land.⁵ Many acts or omissions of services on the part of the husband which would legally entail forfeiture will now be relieved against by the Court of Chancery.

Wife's copyholds.

A husband had no interest in his wife's lands settled to her separate use during coverture; they were free from his control and liabilities; but if the wife did not dispose of them during coverture, he was entitled as tenant by the curtesy to her equitable estate. He also had no interest in the rents and profits of realty settled to her separate use.⁶ So if he deserted his wife, and she obtained an order protecting her property against him, his rights over her real estates ceased and were discharged so long as the order or protection lasted;⁷ and it was the same where she had obtained a decree of judicial separation.⁸

Wife's separate real estate.

Unless disposed of, husband tenant by the curtesy.

Effect of protection order.

The interest of a husband married after the passing of the Married Women's Property Act, 1870,⁹ and before the 1st of January, 1883, in his wife's real property, was somewhat modified by section 8 of that Act, which provided that "where any freehold, copyhold, or customary-hold property shall descend upon any woman married after the passing of this Act as heiress or co-heiress of an intestate, the rents and profits of such property shall . . . belong to such woman for her separate use, and her receipts alone shall be a good discharge for the same." The wife must take as heiress or co-heiress of her predecessor in title.

Husband's interest modified under M.W.P. Act, 1870.

Wife must take as heiress or co-heiress.

¹ 1 Br. H. & W. 112, 113.

² *Kingham v. Lee*, 16 L. J. Ch. 491.

³ 45 & 46 Vict. c. 38.

⁴ Sect. 61. For what are the powers of a tenant for life, see Part III., Guardian and Ward, chap. vi.

⁵ *Saverne v. Smith*, Cro. Car. 7; 1 Rop. H. & W. 83 n.

⁶ See chap. xv.

⁷ 20 & 21 Vict. c. 85, s. 25.

⁸ *Ibid.*, and 21 & 22 Vict. c. 108, ss. 6-10. See chap. xv.

⁹ 33 & 34 Vict. c. 93.

This section only specifically provides that the rents and profits of the realty shall be to her separate use. If the *corpus* is not to her separate use (and it is an open point), on the birth of issue capable of inheriting, the husband's curtesy rights cannot be affected by any disposition on her part.

Husband has no interest except by settlement or gift of wife under M.W.P. Act, 1882.

Husbands married after the Married Women's Property Act, 1882, came into force¹ have no longer any interest during coverture in their wives' real estate, except so far as is secured them by settlement, or is validly given them by their wives *inter vivos*; for married women now hold their real property unaffected by any marital rights, as though they were single women.² Husbands also, who were married before the Act came into force, but whose wives have subsequently to its coming into operation acquired in any manner real estate, no longer enjoy their former common law rights over such property; but by force of the statute it is rendered separate estate, free from marital interest and control.³ But it seems unquestionable that husbands who would be entitled to curtesy rights in the property acquired by their wives under this Act, and undisposed of by them, will be allowed to retain them.⁴

Interest of husband in his chattels real.

(3) *Interest of Husband in his own Chattels Real*.—The interest of the husband in his leaseholds belonging to him at the time of his marriage, and subsequently acquired, was and yet remains unaffected by any right of his wife arising out of marriage.

Interest of husband in wife's leaseholds.

(4) *Interest of Husband in his Wife's Chattels Real*.—At Common Law marriage operated as a qualified conveyance of the wife's chattels real, and enabled the husband to alienate and dispose of them at his pleasure, provided that the transaction took effect in his lifetime by some act *inter vivos*. The husband's marital right does not, however, render him a purchaser of his wife's leaseholds by the marriage, and will not prevail against her prior voluntary settlement;⁵ but a valid agreement to assign or dispose of the wife's leaseholds, though not carried out in the husband's lifetime, would be enforced in equity as against the surviving wife.⁶ He may dispose of his wife's leaseholds, whether vested or contingent or reversionary, unless they are of such a nature that they cannot possibly vest in the wife during coverture.⁷ During coverture he may dispose of them altogether as his own—he may assign or sublet them; but he cannot by will dispose of them so as to bar her right by survivorship. If he survive her, he will take them *jure mariti*, and need not take out administration to her estate in order to reduce them into possession.⁸ He

¹ 45 & 46 Vict. c. 6, 75, January 1, 1883.

² Sect. 1, sub-s. 1, and sect. 2.

³ See next chapter: Curtesy.

⁴ Sect. 5.

⁵ *Richards v. Lewis*, 11 C. B. 1035.

⁶ *Bates v. Dandy*, 2 Atk. 207; and see *Clarke v. Burgh*, 2 Coll. 221.

⁷ *Duberley v. Day*, 16 Beav. 33.

⁸ 1 Roll. Abr. 345; 2 Bl. Com. 435.

may assign both the legal and equitable interest of his wife,¹ and may dispose by way of absolute assignment of the whole of his interest in them;² or by way of sub-lease, in which case the undisposed-of residue of the term would survive to the wife, though the rent reserved on the sub-lease, in the event of the husband dying before the time was at an end would go to his representatives;³ or by way of mortgage. Where the assignment is by way of mortgage, the modern tendency of the courts is to regard (where the contrary does not appear from the deed creating the mortgage) the conveyance by way of mortgage as a mere security in equity and not an absolute assignment at law, operating as a reduction of the chattel into possession by the husband, so that the equity of redemption survives to the wife.⁴ He may also assign it by other means than alienation, as by his taking a second lease of the premises on a different holding, *e.g.*, a lease for their joint lives in the place of a lease for years vested in the wife, because by the acceptance of the second lease the term would be considered as surrendered by operation of law.⁵ Her non-separate leasehold interests were subject to his debts,⁶ and on his bankruptcy vested in his assignee or trustee.⁷

Husband's
assignment
absolute;
by way of
sub-lease;

by way of
mortgage.

A husband married at a date which would bring him within the provisions of the Married Women's Property Act, 1870, would take no interest *jure mariti* in the leaseholds coming to his wife as next of kin of an intestate, as they now form part of her separate property;⁸ his interest in them would depend upon her dying without having disposed of them.

M.W.P. Act,
1870.

So, too, if married since the Married Women's Property Act, 1882, came into force, a husband takes no marital interest, at any rate during the coverture, in his wife's leaseholds, possessed by her at the time of marriage or subsequently acquired; any interest he might take on surviving would depend upon her not having disposed of them during coverture by gift *inter vivos*, or by will.⁹ The like consequences will follow in the case of those who were married before January 1, 1883, but whose wives after that date have become entitled to leasehold property.¹⁰

M.W.P. Act,
1882.
No marital
interest in
wife's lease-
holds.

(5) *Interest of Wife in her Husband's Realty.*—The wife during coverture has no interest in her husband's realty by virtue of the marriage, unless it has been secured to her by agreement between the parties. Her interest in his freeholds of inheritance does not arise till after the death of her husband without having disposed of them.¹¹

Interest of
wife in hus-
band's realty.

¹ Macq. H. & W. 24.

³ Co. Litt. 46 a.

⁵ 2 Roll. Abr. 495, pl. 50.

⁷ *Doe dem. Shaw v. Stewart*, 1 A. & E. 300.

⁹ Sect. 1, sub-s. 1; sect. 2.

² *Steed v. Cragh*, 9 Mod. 43.

⁴ *Clark v. Burgh*, 2 Coll. 221.

⁶ Co. Litt. 357.

⁸ Sect. 8.

¹⁰ Sect. 5.

¹¹ See next chapter.

Interest of
wife in her
own realty.

(6) *Interest of Wife in her own Realty.*—The husband, it has been seen, acquired no greater interest in his wife's real estate, freehold or copyhold, than a life interest; but the fee-simple, or fee-tail, remained in her, and if she died during coverture, her undisposed-of realty (subject to a life interest (if any) of her husband) descended to her heirs. This right of the husband to a joint or a life interest in his wife's freeholds was in time affected by the equitable doctrine of the separate use, and she held her realty settled to her separate use discharged and free from her husband's rights over it, and if not restrained from dealing with it, could dispose of it as though she were a *feme sole*. The Married Women's Property Act, 1870, gave her rights over real property which was not settled to her separate use by declaring that the rents and profits of freehold, copyhold, or customary freehold property descending upon any woman married after the passing of that Act, as heiress or co-heiress, should belong to her for her separate use;¹ but the fee-simple in the property is not to her separate use, and she cannot convey it without a deed acknowledged.² By the Married Women's Property Act, 1882, the real estate of married women has been rendered completely free from any marital rights in it, for all those affected by the Act hold their property as if they were single women, and with all the incidents and attributes of complete ownership, unless they are specifically restrained from dealing with it.³ A married woman who is lady of a manor is to be deemed a *feme sole* with respect to her copyhold land for the purposes of the Copyhold Act, 1894.⁴

M.W.P. Act,
1870.

M.W.P. Act,
1882. Estate
of married
women free
from marital
control.

Gift to husband
and wife in
joint tenancy.

The theory of the unity of the persons of the spouses formerly had considerable influence, and husband and wife took by entireties real property or chattels real, or personal property conveyed or devised, or given jointly to them during coverture; each was deemed to be seised of the whole estate, and neither of a part; the husband alone could not convey the property so as to affect the interest of the wife surviving;⁵ but the fund was subject to the husband's debts, and the wife had no equity to a settlement in respect of it.⁶

Where husband and wife were tenants by entireties, the effect of a decree for dissolution of their marriage was to make them joint tenants, and each party would have the right of account against the other of rents and profits from the date of the decree.⁷ And where property has been so given to husband and wife before

¹ 33 & 34 Vict. c. 93, s. 8. See *King v. Voss*, 13 Ch. D. 504.

² *Johnson v. Johnson*, 35 Ch. D. 345. Dictum of Jessel, M.R., in *King v. Voss* (*ubi sup.*), observed upon.

⁴ 57 & 58 Vict. c. 46, s. 45.

³ 45 & 46 Vict. c. 75, s. 1, sub-s. 1; ss. 2 and 5.

⁵ 1 Br. H. & W. 25.

⁶ *Ward v. Ward*, 14 Ch. Div. 506; *Re Bryan, Godfrey v. Bryan*, 14 Ch. Div. 516; these cases can be considered no longer law.

⁷ *Therley v. Thornley*, [1893] 2 Ch. 229.

the Married Women's Property Act, 1882, came into force, and the husband dies after August 1, 1894, the Finance Act of that year¹ will apply, and the duty will be payable on the whole property as passing on his death.²

But the alteration in the relations of a married woman to her property effected by the Married Women's Property Act, 1882, which enables a married woman to hold her property separate and apart from her husband, now operates to prevent a husband having an estate by entireties in any real or personal property which has been conveyed, devised, or bequeathed to him and his wife during the marriage; but now husband and wife will hold either as joint tenants or tenants in common, as the terms of the instrument of donation may provide,³ and the wife will take her interest for her separate use.⁴ The general effect of a gift of property, whether by will or *inter vivos*, and whether limited in joint tenancy or tenancy in common⁵ to a husband and his wife and a stranger, was formerly that the husband and wife took one moiety and the stranger the other moiety of the property. This rule, applicable both to real property⁶ and to personal property,⁷ was no doubt founded on the doctrine of law that husband and wife were for most purposes one person. But this was a rule of construction only that was applied to the instruments of donation, and any slight indication of intention that each donee mentioned should take an equal part was effectual.⁸ The Married Women's Property Act, 1882, which was not intended to alter any rights except those of husband and wife *inter se*, has not effected any change in this branch of the law;⁹ accordingly, where it is intended that a stranger shall take one moiety and the husband and wife the other moiety, the property will be so apportioned; but the wife will take her share of the joint moiety as her separate property.¹⁰ But it is not unlikely that the future tendency will be to hold that the husband and wife will take separate and not joint interests, the effect of which will be distinctly in favour of husband and wife, whose respective shares will be largely increased.¹¹

Since M.W.P. Act, 1882, husband and wife no longer hold by entireties.

Joint gift to husband and wife and a stranger.

Rule as to joint interest one of construction only.

No change effected by M.W.P. Act, 1882.

Marriage *per se* not a severance of joint tenancy.

¹ 57 & 58 Vict. c. 30, s. 2 (1 b).

² *Re Jupp, Jupp v. Buckwell* 39 Ch. D. 148.

³ *Re Wylde*, 2 De G. M. & G. 724.

⁴ *Brieker v. Whatley*, 1 Vern. 233; *Re March, Mander v. Harris*, 27 Ch. D. 166.

⁵ *Warrington v. Warrington*, 2 Ha. 54; and see *Dias v. De Livera*, 5 App. Cas. 123.

⁶ See *Re March, Mander v. Harris* (*ubi sup.*). In this case the Court of Appeal reversed *Chitty, J.* (26 Ch. D. 222), who held that the property was divisible into thirds and not into moieties, when it accrued after the Act to a stranger and a husband and wife married before the Act.

⁷ *Re March, Mander v. Harris* (*ubi sup.*).

⁸ *Re Dixon, Byram v. Tull*, 42 Ch. D. 306. In this case a testator gave his residue to "W. B.," "E. B., his wife," "S. R.," "J. D.," "G. D. B.," "C. C.," and "C. C., his wife," to be equally divided between them, share and share alike. It was held that the residue was divisible into sevenths, "W. B." and "E. B., his wife," and "C. C." and "C. C., his wife," taking separately.

⁹ *Hanson's Death Duties*, p. 103.

¹⁰ *Thorndley v. Thorndley* (*ubi sup.*).

¹¹ Co. Litt. 187 a.

where a woman marries who is joint tenant of real estate whether of freehold or chattel interest ;¹ or of choses in action not reduced into possession by the husband ;² but does so operate in respect of personal chattels in possession.³ The principle underlying this distinction is that the effect of marriage on particular property in which a woman has an interest as joint tenant depends on whether the marriage divests the property from the wife and vests it in the husband. If it does, then the joint tenancy is severed ; if it does not, there is no severance. Where some *novus actus interveniens* on the part of the husband is required—*e.g.*, an assignment of the wife's chattels real, or reduction into possession of her choses in action, in neither of these cases does marriage operate as a severance.⁴ A settlement or a covenant to settle by a joint tenant on her marriage is effectual to sever the joint tenancy ;⁵ and this is so even where the settlor is an infant, and the property settled is reversionary.⁶ But where a man has married a woman who is joint tenant with another, a mere lease by her husband and her joint tenant did not in former days operate to sever the joint tenancy,⁷ and it is difficult to see how any act of the husband since the Married Women's Property Act, 1882, after marriage can have any operative effect to sever the joint tenancy of his wife and the joint tenant. Where husband and wife are tenants by entireties, a decree absolute for dissolution of marriage makes them joint tenants, and the wife is entitled to an account of rents and profits as from the date of the decree.⁸ As another consequence of this complete power which a married woman possesses over her property, it will follow that if she enter into a contract for the conveyance of her property as a single woman, and afterwards marry, specific performance will be decreed against her, and she will be compelled to convey.⁹

At Common Law and under the Married Women's Property Act, 1870,¹⁰ the wife was unable to dispose of her interest in the legal estate of her realty except by deed or will under a power, or by virtue of an agreement with her husband before marriage, without his concurrence, unless dispensed with, and by going through the proper forms prescribed from time to time ;¹¹ but now she will be

Specific performance decreed against married woman.

Wife's power of disposition. Legal estate ;

husband's concurrence.

¹ Co. Litt. 185 b. *Palmer v. Rich*, [1897] 1 Ch. 134.

² Co. Litt. 351 b ; *Armstrong v. Armstrong*, L. R. 7 Eq. 518 ; *Re Butler's Trusts*, *Hughes v. Anderson*, 38 Ch. D. 286, disapproving of *Baillie v. Treharne*, 17 Ch. D. 388.

³ *Re Butler's Trusts*, *Hughes v. Anderson* (*ubi sup.*).

⁴ Per Bowen, L.J., in *Re Butler's Trusts*, *Hughes v. Anderson* (*ubi sup.*).

⁵ *Caldwell v. Fellowes*, L. R. 9 Eq. 410.

⁶ *Burnaby v. Equitable Reversionary Interest Society*, 28 Ch. D. 416.

⁷ See *Rich v. Palmer* (*ubi sup.*).

⁸ *Thornley v. Thornley*, [1893] 2 Ch. 229.

⁹ The decision of Lord Cottenham in *Jordan v. Jones*, 2 Ph. 170, reversing that of Wigram, V.C., is no longer law.

¹⁰ *Johnson v. Johnson*, 35 Ch. D. 345.

¹¹ This was otherwise in equity ; and if the married woman had trustees who were seised of the legal estate, on her assignment, they became trustees of her assignee, and she could compel them to execute a conveyance of the legal estate to him. *Taylor v. Meads*, 34 L. J. Ch. 203.

able to sell it, charge it, mortgage it, and make leases of it free from any control on the part of her husband. Though all the formalities are no longer required in the case of married women desirous of disposing of their property who come under the provisions of 45 & 46 Viet. c. 75,¹ yet as the old law still holds good in the case of large numbers, it has been thought fit to set out shortly its requirements. Her husband's concurrence is still necessary where a married woman as trustee has an active duty to perform.²

Before the Act for the Abolition of Fines and Recoveries,³ a wife could only dispose of her legal estate by going through the fictitious and expensive process of levying a fine or suffering a recovery. By section 77 of the last-mentioned Act, it is enacted that

Acknowledgments to bar wife's interest under Fines and Recoveries Act, 1834.

"It shall be lawful for every married woman in every case, except that of being tenant in tail, for which provision is already made by this Act,⁴ by deed to dispose of lands of any tenure, and money subject to be invested in the purchase of lands, and also to dispose of, release, surrender, or extinguish any estate⁵ which she alone, or she and her husband in her right, may have in any lands of any tenure, or in any such money as aforesaid, and also to release or extinguish any power which may be vested in or limited or reserved to her in regard to any lands of any tenure, &c., as fully and effectually as she could do if she were a *feme sole*—save and except that no such disposition, release, surrender, or extinguishment shall be valid and effectual unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as hereinafter directed."

Deed acknowledged.

These provisions do not apply to copyhold lands, which by custom might have been conveyed by the married woman surrendering them, with her husband's concurrence, into the hands of the lord of the manor⁶; nor, among other things, where she executes a deed only as protector of a settlement, giving her consent to the disposition of the tenant in tail;⁷ but a declaration

Not applicable to certain copyhold lands.

¹ See *Riddell v. Errington*, 26 Ch. D. 220.

² See *Re Harkness and Allsopp's Contract*, [1896] 2 Ch. 358. For the circumstances under which she may dispose of the legal estate as though a *feme sole*, see chaps. xiv. and xv.

³ 3 & 4 Wm. IV. c. 74.

⁴ See section 40.

⁵ The equitable reversionary interest of a married woman in a sum of money secured by mortgage is an "estate" within the meaning of section 1 of the Act, so as to entitle her to dispose of it by deed acknowledged with her husband's concurrence. *Miller v. Collins*, [1896] 1 Ch. 573. In this case, *Re Newton's Trusts* (23 Ch. D. 181) was overruled. A mere expectancy that a parent will die intestate and leave real property is not an "estate" within this section. *Alleard v. Walker*, [1896] 2 Ch. 369.

⁶ Proviso of section 77.

⁷ Sect. 79. The following is the practice as to the acknowledgment of deeds by married women: The acknowledgment of the deed must be taken before a judge of the High Court (36 & 37 Viet. c. 66, s. 76), or a county court judge (51 & 52 Viet. c. 43, s. 184), or a perpetual commissioner or a special commissioner appointed for that purpose (45 & 46 Viet. c. 39, s. 7). The commissioner is to examine the married woman as to her voluntary consent apart from her husband, for one of the essential purposes of the separate examination is to ascertain what is the bargain between her

of trust of copyholds by an acknowledged deed is an effectual disposition by her within section 77 of the Act.¹ Though there may be irregularities in the deeds executed by the wife, or in the certificates of their acknowledgment, or in the affidavits verifying them, yet if it can be satisfactorily proved that the deeds,² or the acknowledgments, were duly taken, such irregularities will not be fatal.³ The acknowledgment must be after the separate examination of the married woman. Where on separate examination the married woman does not insist upon any provision for herself out of the purchase-money or otherwise, she will be treated as giving up all claim to such purchase-money, and as having no further interest in it either in law or in equity; even if the purchase-money is left outstanding in the hands of trustees, and if she should survive her husband and the fund still remains outstanding, she cannot, as against his estate, claim the fund as her chose in action not reduced into possession by the husband, for in such a case the doctrine of possession does not apply.⁴

Separate
examination.

When hus-
band's con-
currence dis-
pensd with;

The husband's concurrence, though usually necessary, might under certain circumstances be dispensed with; thus, it was provided

and her husband, that is, whether the purchase-money is to belong to him or not (per Kay, L.J., in *Tennant v. Welch*, 37 Ch. D. 635). The following are some of the more important rules under the Act for the Abolition of Fines and Recoveries, and section 7 of the Conveyancing Act, 1882:—

1. No person authorized or appointed under the Act 3 & 4 Will. IV., c. 74 (in these rules referred to as the Fines and the Recoveries Act), to take the acknowledgments of deeds by married women, shall take any such acknowledgment if he is interested or concerned either as a party or as solicitor or clerk to the solicitor for one of the parties or otherwise in the transaction giving occasion for the acknowledgment.

2. Before a Commissioner shall receive an acknowledgment he shall inquire of the married woman separately and apart from her husband and from the solicitor concerned in the transaction, whether she intends to give up her interest in the estate to be passed by the deed without having any provision made for her; and where the married woman answers in the affirmative, and the Commissioner shall have no reason to doubt the truth of the answer, he shall proceed to receive the acknowledgment, but if it shall appear to him that it is intended that provision is to be made for the married woman, then the Commissioner shall not take her acknowledgment until he is satisfied that such provision has been actually made by some deed or writing produced to him; or if such provision shall not have been actually made before, then the Commissioner shall require the terms of the intended provision to be shortly reduced into writing, and shall verify the same by his signature in the margin, at the foot, or at the back thereof.

3. The memorandum to be endorsed on or written at the foot or in the margin of a deed acknowledged by a married woman shall be in the following form in lieu of the form set forth in section 84 of the Fines and Recoveries Act:—

"This deed was this day produced before me and acknowledged by
therein named to be her act and deed (or their several acts and
deeds), previous to which acknowledgment (or acknowledgments), the said
was (or were) examined by me separately and apart from her
husband (or their respective husbands) touching her (or their) knowledge of the
contents of the said deed and her (or their) consent thereto and (each of them) declared
the same to be freely and voluntarily executed by her."

4. When an acknowledgment is taken by any person other than a judge, the following declaration shall be added to the memorandum of acknowledgment:—

"And I declare that I am not interested or concerned either as a party or as a solicitor or clerk to the solicitor for one of the parties or otherwise in the transaction giving occasion for the said acknowledgment."

10. These Rules shall take effect from and after the 31st December, 1882.

¹ *Carter v. Carter*, [1896] 1 Ch. 62.

² *Re Mayer*, 40 L. J. C. P. 201; S. C. *Re Sandilands*, L. R. 6 C. P. 411.

³ *Re Packer*, L. R. 5 C. P. 424.

⁴ *Tennant v. Welch* (*ubi sup.*).

that if a husband, in consequence of being a lunatic, idiot, or of unsound mind, and whether he shall have been found such by inquisition or not, or from any cause, is incapable¹ of executing a deed, or of making a surrender of copyhold lands, or if his residence is unknown, or he is in prison, or is living apart from his wife, either by mutual consent or by sentence of divorce, or from any other cause, the court² may make an order in a summary way upon the application of the wife, and upon such evidence as the court may deem sufficient, dispensing with the concurrence of the husband.³ Where application has been made to the husband, the court must be satisfied that a proper application has been made to him, and he has refused his concurrence.⁴ The wife must apply to the court (now the King's Bench Division) for the order, supported by affidavits, one of which must be made by herself,⁵ setting forth the grounds of her application; if the court is satisfied of the sufficiency of the grounds alleged, it will make the order, dispensing with the husband's concurrence; but without the order the husband's concurrence is necessary.⁶ The affidavits must disclose clearly and to the satisfaction of the court some such cause as the following: The husband's protracted absence,⁷ or disappearance,⁸ or desertion,⁹ coupled in each case with a refusal to support his wife; but mere temporary absence is insufficient,¹⁰ or his imbecility.¹¹ The affidavit must also contain a statement that the husband does not contribute to the wife's support,¹² but mere occasional contribution towards her support does not disentitle the wife to dispense with her husband's concurrence.¹³ Refusal to convey,¹⁴ or refusal except on improper terms,¹⁵ is another ground for dispensing with the husband's concurrence. The husband should be living apart from his wife, but if he occasionally visit her, and is actuated by improper motives in withholding his consent, the court will dispense with his concurrence, notwithstanding such visits.¹⁶ The dispensing by order with the husband's concurrence renders the separate examination and acknowledgment by the wife unnecessary.¹⁷

by order of the court.

How the order is to be obtained.

Contents of affidavits.

¹ As from infancy, *Re Haigh*, 26 L. J. C. P. 209; or lunacy, see *Re Reeves*, 24 W. R. 848.

² The Court of Common Pleas was the court in which this business was assigned; it is now merged in the King's Bench Division. *Re Giles*, 70 L. T. 757.

³ Sect. 91.

⁴ *Re Williams*, 2 Scott N. R. 120.

⁵ *Re Mirfin*, 4 Man. & Gr. 635.

⁶ *Goodchild v. Dougal*, 3 Ch. D. 650.

⁷ *Ex parte Gill*, 1 Bing. N. C. 168; *Re Shirley*, 5 Bing. N. C. 226.

⁸ *Ex parte Shuttleworth*, 4 Man. & Gr. 332 n.

⁹ *Ex parte Robinson*, L. R. 4 C. P. 205.

¹⁰ *Re Squires*, 25 L. J. C. P. 55; *Ex parte Gilmour*, 3 C. B. 967.

¹¹ *Re Woodall*, 3 C. B. 639.

¹² *Re Carburton*, 16 W. R. 84; *Ex parte Robinson (ubi sup.)*.

¹³ *Re Caine*, 10 Q. B. D. 284. But if the husband correspond with the wife, and remit money for her support, she will not be entitled to an order. *Re Squires (ubi sup.)*.

¹⁴ *Re Mirfin (ubi sup.)*.

¹⁵ *Re Woodcock*, 1 C. B. 347; *Re Caine (ubi sup.)*.

¹⁶ *Re Alice Rogers*, L. R. 1 C. P. 47.

¹⁷ *Goodchild v. Dougal*, 3 Ch. D. 650.

But the interests of the husband existing independently of the Act are not affected by the dispensing with his concurrence and the alienation on the part of his wife, and his common law rights in his wife's property acquired through coverture are not taken away from him.¹ Married women affected by the old law must comply with these formalities, as has been already stated. Those who are under the present law will clearly be able to deal with their legal as well as equitable estate without their husband's concurrence; indeed, to require it would be contrary to the spirit of recent changes. If the husband's concurrence is dispensed with, the necessity for her separate examination is gone. Where women have been married, and their title to the property has accrued after January 1, 1883, they will not require separate examination, or the concurrence of their husbands.² It is, however, possible that under certain circumstances the separate examination and acknowledgment of the woman may be retained when she proposes to alienate her property;³ it is almost certain that the Court of Chancery would not permit one of its wards within a short period of attaining majority to dispose of her realty without ascertaining that she had acted freely and voluntarily in so doing.⁴ Under the Settled Estates Act, 1877,⁵ a married woman applying to the court, or consenting to an application, is required to be examined apart from her husband; and if she was married, and her interest in the property was acquired, before the Married Women's Property Act, 1882, came into force, she will still require to be separately examined;⁶ and this is so where the money resulting from the sale of settled estates is in court, notwithstanding the effect of the provisions of section 32 of the Settled Land Act, 1882.⁷ But if she has married since the Married Women's Property Act, she is not so required to be separately examined;⁸ nor need she be separately examined where she submits her interests to the court in an application under the Settled Estates Act, 1877;⁹ nor where her interest in her property has been acquired subsequently to the commencement of the Act.¹⁰ If she is an infant, the concurrence of her guardian is not enough, but she must be separately examined;¹¹

¹ *Fowke v. Draycott*, 29 Ch. D. 996.

² *Re Drummond and Davie's Contract*, [1891] 1 Ch. 524.

³ On the principle that as the separate examination was devised as a means of protection against the influence of the husband, and as Acts of Parliament do not change human nature, the protection devised of old ought to be continued.

⁴ There would seem to be yet a case in which the acknowledgment of the wife and the concurrence of the husband would be necessary, viz., where they were jointly seised of the property which they desired to convey. The wife's interest would have to be protected, and certainly the husband's concurrence would be requisite.

⁵ 40 & 41 Vict. c. 18, s. 50.

⁶ *Re Harris' Settled Estates*, 28 Ch. D. 171.

⁷ *Re Arabin's Trusts*, 52 L. T. 728.

⁸ *Re Shirley's Settled Estates*, 59 L. J. Ch. 82.

⁹ *Riddell v. Errington*, 26 Ch. D. 220.

¹⁰ See *Re Batt's Settled Estates*, [1897] 2 Ch. 65.

¹¹ See *Re Broadwood's Settled Estates*, L. R. 7 Ch. App. 323.

though the court under certain circumstances beneficial to all parties will dispense with her separate examination.¹ A married woman was able to aliene her copyhold lands, where possible, according to the usual custom of the manor, by surrendering them into the hands of the lord of the manor, with her husband's concurrence; or by acknowledged deed declaring a trust.² But now, under the effect of the above-mentioned Act, such surrender may be effected by her without the concurrence of her husband.³

Alienation
copyholds

As incidental to her interest in her real estate, a married woman could mortgage it, but, as in the case of a sale, her husband had to concur; she was required to be separately examined, and her deed acknowledged before she could make a valid conveyance by way of mortgage.⁴ Compliance with the forms of the Fines and Recoveries Act, 1834, will be needed in the case of those mortgaging their real property who were married before January 1, 1883, and whose title to their property vested in them before that date, but not in the case of those who were married on or after that date, or whose title to their property accrued after that date, though their marriage was anterior to it.⁵

Mortgages
by married
women.

When mortgages of the wife's property were executed by husband and wife, questions often arose as to whether the equity of redemption was in the wife and her heirs, or in the husband and his heirs. As a general rule, it was held that the equity of redemption remained in the wife and her heirs.⁶ To defeat this equity on the wife's part, a change of property in the realty must have been intended, and she must have clearly and expressly contracted that such change should be effected;⁷ and if the intention was that the husband should have the equity of redemption he was entitled to it;⁸ thus, where an estate belonging to the wife was mortgaged, and the equity of redemption was in words reserved to the husband and his heirs, the court held that there was a resulting trust for the wife and her heirs.⁹ But her contract, or desire that the property should change, and the equity be in her husband, may be proved by her assenting to limitations in the mortgage deed inconsistent with her right to the equity of redemption;¹⁰ in other words, the mortgage deed operates as a new settlement, diverting the property of the estate from one channel to another.¹¹ Where a married woman's property

Wife's equity
of redemption.

To defeat
wife's equity a
change of pro-
perty clearly
must have been
intended.

¹ See *Re Halliday's Settled Estates*, L. R. 12 Eq. 199.

² *Carter v. Carter*, [1896] 1 Ch. 62.

³ If by the custom of the manor her separate examination was required, probably she would still have to conform to that custom.

⁴ 3 & 4 Wm. IV. c. 74, s. 77; *Price v. Copner*, 1 Sim. & St. 347.

⁵ 45 & 46 Vict. c. 75, s. 5.

⁶ Macq. H. & W. 183.

⁷ *Re Belton's Trust Estates*, L. R. 12 Eq. 553.

⁸ *Jackson v. Innes*, 1 Bli. 104.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ See *Reeves v. Hicks*, 2 Sim. & St. 403.

affected by the new law is conveyed by way of mortgage, there can be no doubt of the wife's equity being in herself and her heirs, for she alone and apart from her husband will convey the property.

Where a wife mortgaged her lands for the purpose of paying off her husband's debts, she was entitled in equity to have her estate exonerated out of his assets. This equity was put on the principle that her property was merely a surety for his debts, and had all the remedies of a surety.¹ "It is a common case for a wife to join in a mortgage of her inheritance for a debt of her husband. After his death she is entitled to have her real estate exonerated out of his personal and real assets; the court considering her estate only as a surety for his debt."² The principle is the same where the wife mortgages her property in the exercise of a power, if she has a beneficial interest in such property.³ This equity still exists even if part of the mortgaged property belongs to the husband.⁴ So, where a wife pays off her husband's mortgage by a loan of money out of her separate estate, she is entitled to stand in the place of the mortgagee; and even where she joins with him in charging her estate she is entitled to be exonerated out of his estate.⁵ The consequence of this doctrine was that the other creditors of her husband had no preference over her in the administration of his assets. Under certain circumstances a wife is postponed to her husband's creditors in his bankruptcy in respect of loans made by her to him for the purpose of any trade or business carried on by him;⁶ yet this provision does not apply where she merely secures by her own separate property advances made to him in his business, which she afterwards herself pays off.⁷ The presumption that the married woman's property was a surety only for her husband's debts may be rebutted, and if the money raised was really advanced to her, or expended in paying her debts, or she obtained the benefit of it, her equity of exoneration does not arise.⁸ Parol evidence may be admitted to show for whose benefit the money was really advanced.⁹

Again, the doctrine that a married woman who charges her property for the purpose of paying her husband's debts, and the money raised is devoted to that purpose, is *prima facie* entitled to exoneration by him, is equitable only, and based on the facts

¹ *Earl of Huntingdon v. Countess of Huntingdon*, 2 Bro. P. C. 1.

² Per Lord Hardwicke in *Robinson v. Gee*, 1 Ves. Sen. 252; see *Hudson v. Carmichael*, Kay, 613.

³ *Ferguson v. Gibson*, L. R. 14 Eq. 379.

⁴ *Aguilar v. Aguilar*, 5 Madd. 414.

⁵ *Parteriche v. Powlett*, 2 Atk. 384.

⁶ 45 & 46 Vict. c. 75, s. 3.

⁷ *Re Cronmire, Ex parte Cronmire*, [1901] 1 K. B. 480. See *post*, chap. xiv.

⁸ *Hudson v. Carmichael* (*ubi sup.*); *Gee v. Smart*, 26 L. J. Q. B. 305.

⁹ *Gray v. Downman*, 27 L. J. Ch. 702.

Equity of
exoneration.

Wife's pro-
perty presumed
to be surety
only for hus-
band's debts;

rebuttal of
presumption.

of each particular case. If the advance was intended as a loan, she is entitled to exoneration; but if as a gift, or the circumstances show that it was not intended as a loan, her equity does not arise.¹ Therefore, where a wife applied to the court to remove the restraint against anticipation of her settled property for the purpose of raising money to pay her husband's debts for a reason in which she was equally interested with him, and money was raised and paid over to the husband, she was afterwards held not entitled to any equity of exoneration.² Though the wife may waive this equity of exoneration, such waiver will not affect the rights of her representatives or creditors to stand in her place and enforce the rights to which she was entitled.³

At Common Law a married woman was incapacitated from making leases of lands belonging to her; and her husband alone could not make leases of them to last beyond the coverture. Under 32 Hen. VIII. c. 28, husband and wife together were empowered to make leases of lands to which the wife was entitled in fee or in tail for a period not exceeding twenty-one years, in accordance with the conditions prescribed by that Act. In equity she was entitled to execute leases of the property settled to her separate use; and the extent of the term created depended upon the amount of her interest in the property demised. Under the Settled Estates Act, 1877,⁴ a married woman, whether adult or an infant, may consent to a lease by her husband of her settled or unsettled property in pursuance of the prescribed conditions;⁵ her consent must be ascertained by her separate examination.⁶ But examination is not requisite in the case of those married after January 1, 1883;⁷ and of those married before that date whose interest in their property has been acquired since that date.⁸

Leases by married women.

Under the Settled Land Act, 1882,⁹ a married woman who, if she had not been a married woman, would have been a tenant for life, or would have had the powers of a tenant for life,¹⁰ under the foregoing provisions of this Act, is entitled for her separate use, or is entitled under any statute, passed or to be passed, for her separate property, or as a *feme sole*, then she, without her husband, shall have the powers of a tenant for life under this Act. Where she is constituted a *feme sole* by a decree of judicial separation, the property over which she obtains the sole power

Settled Land Act, 1882.

¹ *Clinton v. Hooper*, 1 Ves. 173; 3 Bro. C. C. 201; *Paget v. Paget*, [1898] 1 Ch. 470.

² *Paget v. Paget* (*ubi sup.*).

³ *Lancaster v. Ewors*, 10 Beav. 154, 266.

⁴ 40 & 41 Vict. c. 18, s. 52.

⁵ For what leases can be made under this Act, see Part III., Guardian and Ward, chap. vi.

⁶ Sect. 50.

⁷ *Riddell v. Errington*, 26 Ch. D. 220.

⁸ *Re Batt's Settled Estates*, [1897] 2 Ch. 65.

⁹ 45 & 46 Vict. c. 38, s. 61.

¹⁰ For what are the powers of a tenant for life under this Act, see *post*, Part III., Guardian and Ward, chap. vi.

under this Act must have been acquired whether in possession or reversion after the date of the decree.¹ Where she is entitled otherwise than as aforesaid, then she and her husband together shall have the powers of a tenant for life under this Act. The provisions of this Act referring to a tenant for life, and a settlement and settled land, shall extend to the married woman without her husband, or to her and her husband together, as the case may require, and to the instrument under which her estate or interest arises, and to the land therein comprised. The married woman may execute, make, and do all deeds, instruments, and things necessary or proper for giving effect to the provisions of this section. A restraint on anticipation in the settlement shall not prevent the exercise by her of any power under this Act; but it does not constitute her a tenant for life with the powers of such tenant under the Act.² This section does not enable an infant married woman to exercise the powers of the Act (unless they are conferred upon her expressly), for the disability of infancy remains notwithstanding coverture, and her trustees would have to exercise the powers under the Act.³ Since the passing of the Married Women's Property Act, 1882, the provisions of the Settled Estates Act, 1877, as to her leasing powers would only apply to lands vested in a married woman before January 1, 1883; so, too, the powers to be exercised by her under the Settled Land Act, 1882, would require to be exercised by her jointly with her husband as to lands vesting in her before that date, though she can exercise them solely with regard to lands vesting in her after that date, or if she has married subsequently to it.

Under the Agricultural Holdings Act, 1883,⁴ a woman married before January 1, 1883, who possessed separate property without restraint upon anticipation, may exercise the powers under that Act without the concurrence of her husband.

The interest of the wife in her chattels real at law was altogether at the disposal of her husband, and if he chose by act during his lifetime to dispose of them, he barred her right to them; but his testamentary disposition unaccompanied by any act *inter vivos* charging the property in them did not exclude her claim by survivorship.⁵ In equity she had full right and control over her leaseholds settled to her separate use; and her interest in them under the new law will be quite unaffected by any marital rights.

¹ *Waite v. Morland*, 38 Ch. D. 135.

² See Wolst. (9th Edit.) 425.

³ Macq. H. & W. 23.

⁴ *Bates v. Kesterton*, [1896] 1 Ch. 159.

⁵ 46 & 47 Vict. c. 61, s. 26.

SECTION 2.

Personal Property.

(1) *Interest of Husband in his own Personalty.*—The fact of marriage in no way altered the relations of a man to his personal property. All his personal goods and chattels, whether existing at the time of marriage or subsequently brought into existence, remain his absolutely, without any right to or claim over them on the part of his wife. “Those chattels, personal in possession, and specific chattels in the hands of third parties, which before the marriage belonged to the husband, continue to belong to him exclusively after the marriage, the *communio bonorum* being unknown to the marriage law of England.”¹

Interest of husband in his own person-
alty.

(2) *Interest of Husband in his Wife's Personalty.*—Marriage, as has been stated already, operated at Common Law as a conveyance of all the wife's specific personal chattels to her husband, *i.e.*, he took *jure mariti* an absolute interest in all such property which she possessed at the time of marriage or subsequently became possessed of. This operated at times very harshly against the wife, and prevented her from holding any personal property except on the sufferance of her husband. This doctrine was tempered and modified by the equity invention of the separate estate, by which an interest in her own property was secured to a married woman unaffected by any rights of her husband.² Her husband's power over her equitable estate in pure personal chattels (except chattels real) was regulated by his power over the legal estate; and his right over a specific chattel held in trust for his wife was absolute, but it was not complete in her choses in action until he had taken steps to reduce them into possession.³

Interest of husband in wife's person-
alty.
Specific
chattels.

Now by the Married Women's Property Act, 1882, the Common Law rights of a husband married after that Act came into force as to his wife's personal property are completely taken away.⁴ His rights to her property on intestacy will be considered in a following chapter.⁵

Alteration of
the law.

(3) *Interest of Husband in his Wife's Choses in Reversion.*—A husband under the former state of the law was entitled to the choses in reversion of his wife, whether vested or contingent, which fell into possession during coverture, but not otherwise.

Husband's
interest in
wife's choses
in reversion.

¹ Macq. H. & W. 18, 19.

² See chap. xv., Separate Estate.

³ Lewin, 929.

⁴ It is true that section 14 says that a husband shall be liable for his wife's antenuptial debts, &c., “to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife.” The expression “become entitled to” does not seem a very happy one, for it might be inferred that he was entitled to property of his wife *jure mariti*, which he is not; and his right and title can only depend upon the terms of the bargain made by way of settlement, or arise on her intestacy.

⁵ See next chapter.

If they did not fall into possession during coverture he could not validly assign them, so as to defeat his wife's title by survivorship.¹ If the reversionary property did not vest in possession during the coverture, but the husband survived the wife, by taking out letters of administration to her estate, he became entitled to it on its vesting in possession. If he died before it vested in possession his personal representatives on taking out letters of administration to his wife's estate became entitled to it.²

Under the Married Women's Property Act, 1870, the husband is deprived of his interest in his wife's reversionary property not exceeding £200 coming to her during coverture under any deed or will.³ Under the Married Women's Property Act, 1882, the interest of a husband married after the Act came into force in his wife's reversionary property of every description, and to any amount, is expressly taken away;⁴ so is the interest of husbands who were married before that date, but the reversionary property of whose wives vests in possession after that date.⁵ But the principle of the case of *Re The Goods of Harding* will apply if the wife die intestate as to her property, and the husband will be entitled to her reversionary choses on administration.

(4) *Interest of Husband in his Wife's Choses in Action*.—The right of the husband to the wife's specific chattels and to her choses in action was not identical at law. To the former, whether belonging to his wife at the time of marriage or devolving upon her during marriage, he was absolutely entitled, and might have brought an action for them in his own name, and if he survived her was entitled to them without administering to her estate; and if he died in her lifetime, they did not survive to the wife, but to his executors or administrators.⁶ But this was not so in the case of what was known as her choses in action; and marriage was only a qualified gift to the husband of his wife's choses in action, viz., upon condition that he reduced them into possession during its continuance; for if he happened to die before his wife without having reduced them into possession, she and not his personal representatives was entitled to them, for a wife was capable of having a chose in action conferred upon her, which survived to her on her husband's death, unless he had interfered by doing some act to reduce it into possession;⁷ or if they were

¹ *Ashby v. Ashby*, 1 Coll. 553.

² *Re The Goods of Harding*, L. R. 2 P. & D. 394.

³ 33 & 34 Vict. c. 93, s. 7. If under the same instrument but by different titles she derives several sums of money, each of them less than £200, though in the aggregate exceeding that amount, as between herself and her husband she will be deemed to have acquired the separate use in each of such sums. *Re Davies, Harrison v. Davies*, [1897] 2 Ch. 204.

⁴ 45 & 46 Vict. c. 75, s. 2.

⁵ Sect. 5.

⁶ Bac. Abr. Bar. and Feme (C.); 1 Rep. H. & W. 169; and see *Bird v. Peagram*, 22 L. J. C. P. 166.

⁷ *Dalton v. Midland Counties Railway Company*, 22 L. J. C. P. 177; 1 Wms. Exors. (10th edit.) 641; *Osbourn v. Morgan*, 21 L. J. Ch. 318.

M.W.P. Act,
1870.

M.W.P. Act,
1882.

Interest of
husband in
wife's choses in
action.

reduced into possession after the marriage had been dissolved,¹ unless he had become a purchaser of them, as by ante-nuptial settlement.²

The Married Women's Property Act, 1882, affects the husband's interests in his wife's choses in action as in other classes of property, for the term "property" in the Act includes "a thing in action."³ Thus his interest in them depends upon whether he was married before or after the Act came into force. If he has married since the Act came into force, unless he has by agreement acquired a right to them, he has no interest in them.⁴ Neither has he any where he was married before the Act came into force, but his wife's title to them has accrued since that date.⁵ The Act, it is submitted, does not affect rights already accrued; and husbands who have acquired a right to their wives' choses in action, but have not proceeded to enforce them, will be permitted to do so. This then will necessitate a short statement of the law on the subject, and the method of enforcing claims to them.

A chose in action is a right to be asserted, or property to be reduced into possession by action at law or in equity. A wife's choses in action would be such things as debts owing to her on bond or otherwise,⁶ bills of exchange and promissory-notes payable to her,⁷ arrears of rent,⁸ legacies,⁹ trust funds,¹⁰ residuary personal estate,¹¹ money in the funds, wages, earnings, and other property, the recovery of which necessitates a recourse to legal process. Debentures are also choses in action,¹² and so are shares in a partnership;¹³ but shares in companies governed by modern statutes are not, for the legal as well as the equitable title to them can be transferred by delivery.¹⁴

Although the property in the wife's choses in action is not changed by the marriage, yet by the marriage the husband acquires a power of suing for and recovering them, and so making them his own, by converting them in fact into chattels personal in possession; and payment ought, during the marriage, to be made to the husband, not to the wife, except as his agent.¹⁵ The husband's interests were put an end to by death; also by divorce,¹⁶

¹ *Gaters v. Madeley*, 6 M. & W. 496; *Sherrington v. Yates*, 13 L. J. Ex. 249.

² *Norbone's Case*, Freem. Ch. 282.

³ 45 & 46 Vict. c. 75, s. 24.

⁴ Sect. 1 (sub-sect. 2), sect. 24.

⁵ Sect. 5.

⁶ *Coppin v. —*, 2 P. Wms. 496.

⁷ *Gaters v. Madeley* (*ubi sup.*). A married woman will now be the proper person to endorse negotiable instruments given to her either before or during marriage; and her husband will no longer be entitled to do so, and act upon them. See *Barlow v. Bishop*, 1 East, 432.

⁸ *Salvey v. Salvey*, Amb. 693.

⁹ *Fleet v. Perrins*, L. R. 3 Q. B. 500.

¹⁰ *Ex parte Rensbury*, 4 Ch. D. 685.

¹¹ Lind. Comp. 454.

¹² *Prole v. Sady*, L. R. 3 Ch. App. 220.

⁹ *Blount v. Bestland*, 5 Ves. 515.

¹¹ *Baker v. Hall*, 12 Ves. 497.

¹³ *Re Bainbridge*, 8 Ch. D. 218.

¹⁵ Macq. H. & W. 48.

judicial separation,¹ or the obtaining of a protection order. In the case of judicial separation the chose in action must have vested after the date of the decree;² and in that of a protection order after the desertion and during the continuance of the order.³ In order to reduce his wife's chose in action into possession the husband must not only have intended so to reduce it, but must have done some act to give effect to his intention; that is, he must have done something to divest his wife's right and to make his absolute, such as bringing an action for its recovery, or actually receiving or dealing with it. For the interest of a husband in a chose in action of his wife which he has not reduced into possession is not a mere possibility, but property subject to the condition that he must reduce it into possession.⁴ His act must at some moment or other have given him absolute dominion over the chose in action without the concurrence of his wife.⁵

Reduction into possession;

what is.

What is sufficient reduction into possession.

The following acts have been held a sufficient reduction into possession by the husband: Receipt by the husband of the fund owing to his wife, or a joint authorization by husband and wife of a person to receive it who actually does receive it;⁶ also a receipt by an agent appointed by the husband of money forming part of the estate of an intestate of which the wife is administratrix;⁷ transferring stock of wife by husband into his own name, or into the names of trustees appointed by him;⁸ a loan of his wife's money by her trustee on mortgage of husband's own property;⁹ so, too, a payment into court to the credit of the lunacy account, the husband being a lunatic.¹⁰ Where the husband assigns his wife's choses in action before reducing them into possession his assignee must reduce them before the husband dies.

What is not sufficient reduction into possession.

Where the husband during coverture has failed to make his title to his wife's choses in action complete at any one time, he will not be deemed to have reduced them into possession. The following have been held insufficient reduction: Mere appropriation of a fund by a third party to satisfy a legacy to the wife on which the husband receives interest,¹¹ or the mere receipt of interest on a debt due to the wife,¹² or a set-off of the wife's fund against a debt owed by the husband,¹³ or proof on his part of his

¹ *Re Insole*, L. R. 1 Eq. 470.

² See *Waite v. Morland*, 38 Ch. D. 155.

³ *Re Coward and Adams' Purchase*, L. R. 20 Eq. 179. See *Cooke v. Fuller*, 26 Beav. 99.

⁴ Per Fry, J., in *Re Biaggi*, W. N. [1882], 65.

⁵ *Nicholson v. Drury Buildings Estate Company*, 7 Ch. D. 48.

⁶ Roll. Abr. 342, 350.

⁷ *Re Barber*, 11 Ch. D. 442.

⁸ *Burnham v. Bennett*, 2 Coll. 254.

⁹ *Rawlins v. Birkett*, 4 W. R. 795; *Widgery v. Tepper*, 7 Ch. D. 423; affirming 5 Ch. D. 516.

¹⁰ *Re Jenkins*, 5 Russ. 183.

¹¹ *Blount v. Bestland*, 5 Ves. 515.

¹² *Hart v. Stephens*, 14 L. J. Q. B. 148.

¹³ *Harrison v. Andrews*, 13 L. J. Ch. 243.

wife's debt in bankruptcy;¹ neither does the mere receipt of part of the wife's chose in action constitute a reduction into possession.² Thus, where a wife was entitled to a sum of money in the hands of a third person, and on her marriage the holder transferred the sum into the joint names of the husband and wife, the husband directing him to keep it separate from his (the husband's) other moneys, this was held no reduction;³ an investment not inconsistent with the wife's equities is not a reduction.⁴ It is the same where the husband is not at any time during the coverture capable of asserting his rights,⁵ or where he obtains possession of the chose in action in a non-marital but representative capacity as executor⁶ or trustee,⁷ or where the chose cannot be reduced to a certainty in his lifetime,⁸ or he agree that stock belonging to the wife shall be settled on himself and wife, and he die before the settlement is completed,⁹ or where by agreement he has precluded the reduction into possession.¹⁰ Where there is a decree in a joint suit by husband and wife in respect of money claimed in her right, and the husband die before any further proceedings are taken, the benefit of the decree will survive to the wife;¹¹ so, where judgment is recovered in an action, but the husband dies before execution, there is no reduction into possession.¹²

If the husband does not reduce his wife's choses in action into possession during coverture, and he survive her, he must take out letters of administration before he can become possessed of them;¹³ but if he dies before he administers, his representatives will have the right to administer.¹⁴ Since the husband in order to reduce his wife's choses in action or reversionary interests into possession frequently had need of recourse to the Court of Chancery, it was the practice of the court to put him upon terms favourable to his wife before it would part with the fund or property sought to be reduced by him into possession, on the principle that he who seeks equity must do it. This right of the wife to have a provision made for her out of her own property is called her Equity to a Settlement.¹⁵ Before the passing of Malins Act,¹⁶ the husband could not dispose of his wife's reversionary

When letters of administration necessary.

Assignment of choses in action. Malins' Act, 1857.

¹ *Hall v. Hill*, 1 Con. & Law, 135; *Anon*, 2 Vern, 706.

² *Nash v. Nash*, 2 Madd. 133.

³ *Scrutton v. Patillo*, L. R. 19 Eq. 369.

⁴ *Ryland v. Smith*, 1 Myl. and Cr. 53.

⁵ *Aitchison v. Dixon*, L. R. 10 Eq. 589.

⁶ *Baker v. Hall*, 12 Ves. 497.

⁷ *Wall v. Tomlinson*, 16 Ves. 413.

⁸ *Amhurst v. Selby*, 11 Vin. Abr. 377, pl. 8.

⁹ *Fort v. Fort*, Forr. 171.

¹⁰ *Nicholson v. Drury Buildings Estate Company*, 7 Ch. D. 48.

¹¹ *Nanney v. Martin*, 1 Eq. Cas. Abr. 68.

¹² *Bond v. Simmonds*, 3 Atk. 20.

¹³ *Bourne v. Crofton*, 2 Moll. 318.

¹⁴ *Elliot v. Collier*, 3 Atk. 576.

¹⁵ For the discussion of this subject, see *post*, p. 211 *et seq.*

¹⁶ 20 & 21 Vict. c. 57.

choses in action so as to bar her right of survivorship; but after its passing he and his wife could join in disposing of such (unless she was restrained from anticipating), by conforming with the provisions of the Fines and Recoveries Act, 1834.¹

If the wife's title to her choses in action accrued before the Married Women's Property Act, 1882, came into force, her husband would be entitled to reduce them into possession, though he commence proceedings after the Act has come into force to effect that purpose, and on reduction they would become his absolutely.

Marriage gave wife no interest in husband's personalty during coverture.

Interest of wife in her personalty. Specific chattels in possession.

(5) *Interest of Wife in her Husband's Personal Property.*—The mere fact of marriage gave the wife no claim to participate in her husband's personal estate during coverture, nor any indefeasible right to share in it after his death.

(6) *Interest of Wife in her own Personal Property.*—At this point a comparatively short exposition of the law will suffice, because some of the same ground will be traversed in the later chapter on Separate Estate. On marriage a woman at common law ceased to have any ownership or interest in her specific chattels which she might possess at the time of marrying or might subsequently acquire. A married woman could not acquire any legal right to personal property during her coverture; and if she had money or goods in her possession, and she lent the one or sold the other, the right to recover the debt or the value of the property thus parted with vested in the husband. If she survived her husband, who died intestate, his personal representative and not herself took his property, though all that he died possessed of might have been derived from her, and she could only claim to share in it by force of the Statute of Distributions;² but when she died intestate possessed of separate estate, her husband took it *jure mariti*. A married woman's interest in her personal property was increased under the Divorce and Matrimonial Causes Acts;³ for if, during a judicial separation, or the currency of a protection order, she acquired property, she acquired it in all respects as if she were a *feme sole*, and on her decease intestate it was to go as though her husband were dead. The Married Women's Property Act, 1870, increased her interest in certain classes of specific chattels enumerated below. The Married Women's Property Act, 1882, has brought about a complete alteration in the relations of a married woman to her personal property. All chattels personal in possession which belong to her at the date of the marriage or are afterwards acquired by her remain and become her own separate property, which she can dispose of in any

¹ 3 & 4 Wm. IV. c. 74; see *ante*, p. 193.

² 22 & 23 Car. II. c. 10.

³ 20 & 21 Vict. c. 85; 21 & 22 Vict. c. 108.

manner she pleases; wages, earnings, money, and property gained or acquired by her separate exertions are included.

A married woman under the Act of 1870 acquired a sole interest in the wages or earnings gained by her in any employment, occupation, or trade which she carried on separately from her husband, and in any money or property gained by her through the exercise of any literary, artistic, or scientific skill, and in all investments of such wages, &c.; and her receipts alone were a good discharge for them.¹ Her interest was the same whether she carried on the trade at the time of marriage, or afterwards entered into it.² Before this Act her husband could recover and retain as his own property wages due to her; and her receipt, unless as agent for him, was no discharge of the debt.³ Her interest in these classes of property has been confirmed by the Act of 1882, both as regards women married before and after the Act came into force.⁴

Interest of wife in her earnings.
M.W.P. Act, 1870.

M.W.P. Act, 1882.

The sole interest of a married woman in the savings effected by her out of her separate property,⁵ and in the investments of such savings, has always been recognized in equity. Her savings out of her statutory separate property were secured to her by the Married Women's Property Act, 1870; and by the like Act of 1882 she will be entitled to all savings effected by her out of her property, both that which has been rendered her separate property by the Act, and that which before the Act was strictly not her separate property, but out of which she was entitled to put up savings which became her separate property; thus, she will be entitled to accumulations or savings out of the pin-money allowed her, at any rate in such cases as she would formerly have been entitled to the accumulations as her separate property.⁶ But where the wife is living with her husband, and is supported by him, and is allowed a sum for household expenses, and she saves out of it, the recent Act does not confer any interest in these savings upon her, and she will not be entitled to claim them as her own property.⁷ Any damages that a married woman may recover in an action founded on contract or in tort belong to her as her separate property;⁸ and if she bring her action in tort jointly with her husband, any damages recovered in it by her will belong to her as her separate property.⁹

Savings.
M.W.P. Acts, 1870 & 1882.

Damages :
M.W.P. Act, 1882.

The interest of a married woman in her choses in reversion depends upon the date of her marriage and of the accrual of her

Wife's interest in her choses in reversion.

¹ Sect. 1.

² See *Ashworth v. Outram*, 5 Ch. D. 923; *Lovell v. Newton*, 4 C. P. D. 7; *Re Dearmer, James v. Dearmer*, 53 L. T. 905.

³ *Offley v. Clay*, 3 Scott, N. R. 372.

⁴ 45 & 46 Vict. c. 75, s. 5.

⁵ *Maddison v. Chapman*, 1 J. & H. 470; *Steward v. Blakeway*, L. R. 4 Ch. App. 603.

⁶ See *M'Lean v. Longlands*, 5 Ves. 79; *Dixon v. Dixon*, 9 Ch. D. 587.

⁷ See *Slanning v. Style*, 3 P. Wms. 338.

⁸ 45 & 46 Vict. c. 75, s. 1. sub-s. 2.

⁹ *Beasley v. Roney*, [1891] 1 Q. B. 509.

Husband's interest depends upon reduction into possession.

title to them. If she was married, and her title to them accrued before the Married Women's Property Act, 1882, came into force, and they fall into possession during coverture, they become the husband's absolutely unless settled to her separate use. If they do not fall into possession during coverture, they survive to her, unaffected by any disposition the husband alone may have made of them, or the claims of his personal representatives. The coverture may be determined not only by death, but by the dissolution or even suspension of the marriage tie; and where a chose in reversion belonging to the wife is not reduced into possession before the marriage is terminated by a decree of dissolution, the interest of the wife in it remains unaffected by any rights of her late husband.¹ But where she has married, or her title has accrued since the Act has come into force, her interest in it remains unaffected by any marital right, and she can dispose of it by act *inter vivos*, or by will, just as she can dispose of her specific chattels in possession.²

Assignment of wife's choses in reversion.

Joint.

Sole, by husband.

A married woman at one time could not make solely, or jointly with her husband, a valid assignment of her reversionary choses. A joint assignment by the wife and her husband of a chose in reversion, unless it fell into possession during coverture, had no further period of operation than that of the coverture. And because the husband could give no greater interest in the property than he possessed, it followed that his sole assignment put his assignee in the same position as that of himself; so that if the husband survived the wife, the assignee was entitled to the property on the husband taking out administration to her estate, but not otherwise.³ If the reversionary interest became vested in possession during coverture, the husband's assignee took it, subject, in the case of equitable choses, to the wife's equity to a settlement. If the wife survived the husband, she would be entitled to the reversionary fund both as against her husband's sole and their joint assignee.⁴ A married woman having a reversionary interest in personalty, though she obtained an assignment of the interest of every other person in the fund, did not convert her reversionary interest into an interest in possession, nor enable her husband to do indirectly what he could not do directly, viz., assign her original interest so as to bar her right by survivorship;⁵ and if the reversionary fund was in court, it was not paid out, though the consent of all other persons interested in it was obtained.⁶

Power of disposition under Malins' Act, 1857.

In equity she had a full and complete interest in her rever-

¹ *Wilkinson v. Gibson*, L., R. 4 Eq. 162.

² Sects. 1, 2, and 5.

³ *Hornsby v. Lee*, 2 Madd. 16.
⁴ *Le Vasseur v. Scrutton*, 14 Sim. 116; *Purdew v. Jackson*, 1 Russ. 1; see also *Horner v. Morton*, 3 Russ. 65, and *Stiffe v. Everitt*, 5 L. J. Ch. 138.

⁵ *Whittle v. Henning*, 2 Ph. 731.

⁶ *Ibid.*

sionary personal property to her separate use, and could dispose of it by deed, if she pleased.¹ Where the property was reversionary in its nature and not settled to her separate use, she did not possess this disposing power over it; but under Malins' Act,² if she or her husband in her right became entitled by virtue of any instrument made after December 31, 1857,³ to reversionary personal property of any description, she might, unless restrained from anticipating, or bound by her covenant to bring such property into settlement, dispose of her interest in it (with the concurrence of her husband) by deed acknowledged in the manner required by the Fines and Recoveries Act, 1834.⁴ The concurrence of the husband might be dispensed with for certain reasons, such as living apart from his wife and the like.⁵ A due execution of an assignment under this Act was a complete discharge of all marital rights over it.⁶ The disposition under this Act is really that of the wife, therefore the husband is not precluded from validly joining in the conveyance by reason of his bankruptcy.⁷ The disposing power under this Act extends to a chose in action, *e.g.*, a policy of insurance.⁸ Where a husband executed a document in which it was recited that both he and his wife agreed to settle certain reversionary property which was not within the application of Malins' Act, and which contract was by reason of the Statute of Frauds not binding on the wife, but she recognized it and elected to have the benefit of it, she was held bound by the settlement.⁹

The effect of the Married Women's Property Act, 1882, is to render her reversionary property, equally with her realty and her personal chattels, her separate property. As before remarked, she need not now dispose of it with the formalities of a deed acknowledged, nor obtain the concurrence of her husband; for it would be idle to give him a power of vetoing his wife's disposition of property in which he has no interest. At any rate his potential interest as administrator of his wife in the event of her dying intestate is too remote to be taken into consideration. But whether the court will under all circumstances dispense with the woman's acknowledgment remains to be seen.¹⁰ Of course women married before January 1, 1883, whose title to their reversionary property

Effect of
M.W.P. Act,
1882.

¹ *Sturgis v. Corp*, 13, Ves. 190.

² 20 & 21 Vict. c. 57.

³ See *Re Eleom, Layborn v. Groves-Wright*, [1894] 1 Ch. 303.

⁴ See *ante*, p. 193. The expectation of taking under the will of a person who is alive at the date of the married woman's disposition is not a future interest within the meaning of the Act. *Allcard v. Walker*, [1896] 2 Ch. 369.

⁵ *Re Rogers*, L. R. 1 C. P. 47; but see *Ex parte Cockerell*, 4 C. P. D. 39.

⁶ *Re Batchelor*, L. R. 16 Eq. 481.

⁷ *Cooper v. Macdonald*, 7 Ch. Div. 288; *Re Jakeman's Trusts*, 23 Ch. Div. 344.

⁸ *Witherby v. Rackham*, 60 L. J. Ch. 511.

⁹ *Greenhill v. North British and Mercantile Insurance Company*, [1893] 3 Ch. 474; but see *Harle v. Jarman*, [1895] 2 Ch. 419.

¹⁰ See *ante*, p. 196.

accrued before that date, are under the old law and must fulfil its requirements.

The interest of a married woman in her chose in action¹ is not divested by reason of the coverture; but it continues to be her property till her husband succeeds in reducing it into possession.² Her interest in her choses in action under the present state of the law depends, as in other matters, upon the date of her marriage.

Interest of wife in her choses in action.

Effect of reduction into possession before and after the M.W.P. Act, 1882, came into force.

If a woman has been married, or her title to the chose in action not settled to her separate use has accrued before the Married Women's Property Act, 1882, came into force, her interest in it would depend upon whether or not it was reduced into possession by her husband during coverture; if he does reduce it into possession, and no doubt he is entitled to take steps to do so since the Act has come into force, her interest in it is gone. If he fails to reduce it during coverture into his possession, her right to it by survivorship remains good and unaffected. If she has married, or her title to the chose in action has accrued since the date of the Act coming in force, her interest in it is complete, and in no way subject to marital rights. But if she die intestate, and without having disposed of her choses in action during her lifetime, it is submitted that her husband's right to administer to them will be fully recognized. If, then, a chose in action accruing to a married woman before January 1, 1883, is to be reduced into possession, and an action is necessary for the purpose, it must be brought in the names both of husband and wife;³ and on judgment being given for them in the action, the title of the husband to it will be complete. But under the present state of the law, the interest of a married woman in her choses in action of every kind is the same as that in her specific chattels. Marriage does not operate to divest her of her interest in them, or give her husband a power to reduce them into possession, and acquire ownership in them. If she has recourse to legal proceedings to reduce them into possession, she alone may bring the action, and the husband need not be joined.⁴

The Married Women's Property Acts, 1870 and 1882, have effected an important alteration of the law in favour of married women in respect of certain choses in action; and the latter Act still more extends their privileges. In the future "all deposits in any post-office or other savings-bank, or in any other bank, all annuities granted by the Commissioners for the Reduction of the

Deposit of stock, &c., in wife's name *primâ facie* separate property.

¹ For a definition of a chose in action, see *ante*, p. 203.

² *Purdew v. Jackson*, 1 Russ. 1; *Prole v. Soady*, L. R. 3 Ch. App. 220. For what constitutes reduction into possession by him, see *ante*, p. 204.

³ See *Milnes v. Milnes*, 3 T. R. 631.

⁴ Sect. 1 (sub-sect. 2), and sect. 24.

National Debt, or by any other person, and all sums forming part of the public stocks or funds . . . which at the commencement of this Act are standing in the *sole* name of a married woman, and all shares, stocks, debentures, debenture-stock, or other interests of or in any corporation, company, or public body, municipal, commercial, or otherwise, or of or in any industrial, provident, friendly, benefit, building, or loan society, which at the commencement of this Act are standing in her name,"¹ or which after its commencement "shall be allotted to or placed, registered, or transferred in or into or made to stand in the sole name of any married woman, shall be deemed, unless and until the contrary be shown, to be her separate property."² It is the same with investments standing in the name of a married woman jointly with any person or persons other than her husband;³ and the latter need not be made a party to join in the transfer of any such sums, deposits, or securities.⁴ A deposit by a husband of money in his wife's name will *prima facie* be deemed to be her separate property,⁵ though whether she is or is not entitled to the deposit may remain a question to be determined;⁶ the onus of disproof of her title is shifted upon her husband, or those claiming under him. If the married woman has fraudulently taken her husband's money and invested or deposited it in her own name, he may reclaim it, and have it transferred and paid to himself.⁷

The interest of a married woman in the property which she holds in a representative capacity as executrix or administratrix, has been set out and dealt with elsewhere.⁸

Choses in
autre droit.

In order to complete the subject-matter of this chapter, reference is necessary to that interest which a wife has in her property which springs up under certain circumstances. This interest is called the Wife's Equity to a Settlement.

The Wife's Equity to a Settlement.—In the preceding sections of the present chapter the common law operation of marriage in favour of the husband has been fully set out and discussed. Now equity, while recognizing this right of the husband to the personal property of his wife not settled to her separate use, and the whole interest in which vested in him, modified it in her favour in order to prevent him from alienating and disposing of all the property to which he might become entitled *jure mariti*, whether to satisfy his own caprice, or on insolvency, to satisfy the claims

Wife's equity
to a settlement.

A modification
of the common
law right of
husband to
wife's equitable
choses in
action reduced
into possession.

¹ Sect. 6.

² Sect. 7.

³ Sect. 8.

⁴ Sect. 9. This renders the case of *Howard v. Bank of England* (L. R. 19 Eq. 295) no longer law.

⁵ *Mews v. Mews*, 15 Beav. 529; *Parker v. Lechmere*, 12 Ch. D. 256.

⁶ See *Lloyd v. Pughe*, L. R. 8 Ch. App. 88.

⁷ Sects. 10 and 17. As to disputes between husband and wife in respect of their property, see *post*, chap. xv.

⁸ See *post*, chap. xiv., Contracts of Married Women.

of his creditors. It accordingly gave to the wife, under certain circumstances, the right to be suitably provided out of her own equitable choses in action. This right is called the wife's Equity to a Settlement.¹ It has been held that this equity was only recognized and enforced in those cases in which the husband as plaintiff was bound to have recourse to the Courts of Equity in order to obtain possession of the property; and the courts enforced their favourite maxim that "he who seeks equity must do equity"; and compelled the husband and those claiming under him to make a settlement of part of the fund on the wife and children.² Specific chattels which the husband himself could reduce into possession were not affected by the equity. The equity attaches when a decree for a settlement or a contract for a settlement is made;³ but an action brought by a third party,⁴ or a decree for administration⁵ is insufficient.

Under M.W.P. Act, 1882, wife need not enforce her equitable right.

The Married Women's Property Act, 1882, has altogether done away with the necessity for enforcing this equitable right of the wife to share and participate in her own equitable choses in action, by abrogating the marital right over all and every species of property which may belong to her at the time of marriage, or devolve upon her after marriage; yet as this change is but comparatively recent, and existing rights are left untouched, a knowledge of the principles applied by the courts in considering the subject is not unnecessary.

Equity attaches to the right to receive the wife's property.

This right to a settlement was an obligation which the court fastened, not upon the property of the wife, but upon the right to receive it, or, in other words, rested on the control which a court of equity, standing *in loco parentis*, ever exercises over property falling under its dominion. Strictly speaking, an equity to a settlement arises when a husband makes a claim to the wife's property in a court of equity; upon his making such claim he is bound to do equity; and if the wife be not properly provided for, the court, at the instance of the wife, will direct a settlement of the whole or a part of her property, according to the circumstances, upon her and her children. But the wife herself, as a plaintiff, may take proceedings in a court of equity to assert that equity, whether before or after a claim has been made by her husband.⁶ The consequence of this is that the wife's equity prevails over any right of retainer of a legacy left to her on the part of an executor for a debt due to his testator from her

¹ *Murray v. Elibank*, 10 Ves. 84; 1 W. & T. L. C. 493.

² *Bosvil v. Brander*, 1 P. Wms. 459. The Court of Bankruptcy seemingly has an equitable jurisdiction to insist upon a settlement on behalf of the wife. *Ex parte Coysegame*, 1 Atk. 192; *Ex parte Norton*, 8 De G. M. & G. 258.

³ See *Wallace v. Auldjo*, 2 Dr. & S. 216.

⁴ *Baker v. Bayldon*, 8 Ha. 210.

⁵ *De la Garde v. Lempriere*, 6 Beav. 344.

⁶ *Wortham v. Pemberton*, 1 De G. & S. 644; and see *Re Briant*, *Poulter v. Shackel*, 37 Ch. D. 471.

husband.¹ Equity did not interfere where the husband had the legal title by which he could obtain possession of his wife's personal estate,² and the husband is entitled, where he can, to lay hold of his wife's property, and the court will not interfere.³ The court exercises its unfettered discretion as to amount; and not for the benefit of the wife only, but for her children; limitations which are wholly inconsistent with a right of property in her.⁴ This equity will be enforced not only against the husband, but against his trustee in bankruptcy, or a general assignee for the payment of his debts, who will be compelled to make a settlement,⁵ and against an assignee for valuable consideration,⁶ though the position of the latter is more favourable than that of the husband, or his general assignee.⁷

In whose
favour
enforced.

Rights of the Children.—This equity to a settlement, though strictly personal to the wife, was always extended on behalf of her children,⁸ whether they were the issue of a former or the existing marriage, and of full age, and already provided for.⁹ Though a wife might have waived her right altogether, she could not have availed herself of it for herself and have given it up for them;¹⁰ but if she died before asserting her right, her children could not insist upon a settlement.¹¹ She might have waived her right before the settlement was actually completed, and so defeated the claims of her children who took no interest independently of her contract, or a decree of the court in her favour. But if she either entered into such a contract or had had a decree made in her favour, and died without waiving her right (and she could have waived it before it was actually made),¹² their interests were preserved, though they were not named in the decree.¹³ Their rights, however, did not exist where their mother, after action brought, died before the decree was made,¹⁴ and were lost where they had acquiesced for a long time in the fact of their omission from the settlement.¹⁵

Children take
in right of
mother.

¹ *Re Briant, Poulter v. Shackle* (*ubi sup.*).

² *Jewson v. Moulson*, 2 Atk. 420.

³ *Per Eldon, L.C., in Murray v. Elibank*, 10 Ves. 84–90.

⁴ *Peach. Sett.* 158.

⁵ *Sturgis v. Champneys*, 5 Myl. & Cr. 97. See also *Carr v. Taylor*, 10 Ves. 574, in which it was decided that the wife's equity was paramount to a right of set-off in respect of a debt due from her husband; but it is otherwise where the wife is joint legatee of a residue, and her husband as executor wastes assets, and is unable to pay his debts to the estate. *Knight v. Knight*, 18 L. R. Eq. 487.

⁶ *Macaulay v. Phillips*, 4 Ves. 19.

⁷ *Elliott v. Cordell*, 5 Madd. 149.

⁸ *Lady Elibank v. Montolieu*, 5 Ves. 737; *Johnson v. Johnson*, 1 J. & W. 472; see *Roberts v. Cooper*, [1891] 2 Ch. 348, per Kay, L.J.

⁹ *Conington v. Gilliatt*, 46 L. J. Ch. 61.

¹⁰ *Briggs v. Chamberlain*, 11 Ha. 69.

¹¹ *Scriven v. Tapley*, 2 Ed. 337.

¹² *Fraser v. Taylor*, 2 Russ. & Myl. 190.

¹³ *Lady Elibank v. Montolieu* (*ubi sup.*).

¹⁴ *Wallace v. Auldjo*, 1 Dr. & Sm. 216; see also *De la Garde v. Lempiere*, 6 Beav. 344; *Baker v. Bayldon*, 8 Ha. 210, overruling *Steinmetz v. Halthin*, 1 G. & J. 64.

¹⁵ *Johnson v. Johnson*, 1 J. & W. 472.

To what Property the Equity Attaches.—The equity of the wife attached to real and personal property of an equitable nature to which she became entitled before as well as after marriage,¹ but not such as vested without more in her husband *jure mariti*; though if a purely legal estate became from collateral circumstances the subject of a suit in equity the wife's right at once attached.² Since the Judicature Act, 1873,³ it would seem that the claim by a wife to her equity in a purely legal estate would have effect given to it; in other words, it is immaterial whether her claim arises in respect of a legal or equitable estate.⁴ This right had been long insisted upon in respect of every species of unsettled personalty of the wife of which a settlement could be made;⁵ accordingly, where the property of the wife was equitable, and so not recoverable at law, the husband or his assignees could only have obtained it upon the terms of making a settlement upon the wife and her children, if she required one to be made.⁶ But the right did not attach when the wife's interest in pure personal estate was reversionary in its nature.⁷ Where she takes a joint interest with the husband the equity does not arise.⁸ This right was extended to realty by Lord Cottenham in the important case of *Sturgis v. Champneys*,⁹ in which he reviewed the authorities, and admitted the claim of the wife to have a settlement out of her real estate. The following are a few instances of different kinds of property to which this right was attached: A legacy charged on land with a power of entry and receipt of the rents and profits,¹⁰ a trust term for years,¹¹ an equitable estate tail,¹² and an estate in fee, but not so as to affect the husband's possible estate by the curtesy.¹³

A distinction has been made between those cases in which the wife takes an *absolute interest* and those in which she takes a *life-interest* only. It has been seen that where her interest is absolute, her right against her husband and his assignees, whether general or particular, and for valuable consideration, has been fully established, not only on her own behalf, but on that of her children.¹⁴ Where the wife takes an absolute interest her right to a provision for herself and children is independent of the

Distinction where wife takes an estate absolutely, and where for life only.

Where wife's interest for life only.

¹ *Barrow v. Barrow*, 18 Beav. 529.

² See remarks of Malins, V.C., in *Ruffles v. Alston*, 19 L. R. Eq. 539, 546.

³ Sect. 25.

⁴ Per North, J., in *Fowke v. Draycott*, 29 Ch. D. 1013.

⁵ *Barrow v. Barrow*, 25 L. J. Ch. 267.

⁶ *Milner v. Colmer*, 2 P. Wms. 639.

⁷ *Oshorn v. Morgan*, 21 L. J. Ch. 318.

⁸ *Ward v. Ward*, 14 Ch. D. 506.

⁹ 5 Myl. & Cr. 97; see also *Freeman v. Fairlie*, 11 Jur. 447.

¹⁰ *Duncombe v. Greenacre*, 28 Beav. 482.

¹¹ *Hanson v. Keating*, 4 Ha. 1. In this case not only as against the husband, but as against his assignee for valuable consideration. This overrules the supposed decision in *Sir Edward Turner's Case*, 1 Vern. 7. For the manner in which the judgment in this latter case was delivered, see Macq. H. & W. 92 et seq.

¹² *Life Assurance of Scotland v. Siddal*, 4 L. T. 311.

¹³ *Smith v. Matthews*, 30 L. J. Ch. 445.

¹⁴ *Tidd v. Lister*, 23 L. J. Ch. 249, on appeal; *Scott v. Spashett*, 3 Mac. & G. 599.

acts and conduct of her husband; but when she takes a life-interest only, this right arises from the non-fulfilment by him of his obligations, and so is dependent on his acts and conduct. Thus her right in the latter case was not always maintained. At first it was doubted whether she was entitled at all to any settlement out of an annuity or a life-interest, but that she may be so entitled is now settled.¹

The question of her equity may arise either between the wife and her husband or between her and her husband's general or particular assignees or creditors. Where the wife is living with her husband, who maintains her, and is neither bankrupt nor insolvent, she is not entitled to this equity, though he is in embarrassed circumstances, and has nothing to support her except her income;² but she is entitled when deserted by him.³

Where the person against whom the wife could enforce her right is a particular assignee for value of the husband, she will not be permitted to have a settlement out of her life-interest decreed in her favour.⁴ This assignment of the life-interest of a married woman, unless within the provisions of 20 & 21 Vict. c. 57, cannot operate for any longer period than the joint lives of husband and wife; and if the interest accrues to the wife after coverture, it is reversionary in its nature, and unaffected by the assignment.⁵ But when the husband assigns his wife's interest generally for the benefit of his creditors, her equity will be recognized and enforced.⁶

To sum up—the wife has an equity when the interest becomes vested in the husband's general assignees, or trustee in bankruptcy, but not where it is vested in a particular assignee for value, though the assignment in the latter case, unless the woman acknowledge her consent, will operate only during the coverture. The wife also will not be entitled where there has been no assignment, and the husband is maintaining her.

The Amount to be Settled.—The amount to be settled is absolutely in the discretion of the court, and depends upon the circumstances of each case that is brought before its notice;⁷ and equally so where the wife's interest is absolute, or for life.⁸ As between the husband and wife, the court will take into consideration the amount of the wife's fortune already received by the husband, or any previous settlement which may have been

¹ *Lumb v. Milnes*, 5 Ves. 517; *Jacobs v. Amyatt*, 1 Madd. 376 n; *Sturgis v. Champneys*, 5 Myl. & Cr. 97; *Squires v. Ashford*, 23 Beav. 132; *Taunton v. Morris*, 11 Ch. D. 779.

² *Vaughan v. Buck*, 13 Sim. 404.

³ *Gilchrist v. Cator*, 1 De G. & Sm. 188. See *Boxall v. Boxall*, 27 Ch. D. 220.

⁴ *Wright v. Morley*, 11 Ves. 11; *Elliott v. Cordell*, 5 Madd. 149; *Tidd v. Lister* (*ubi sup.*); *Re Duffy's Trusts*, 28 Beav. 386.

⁵ *Stiffe v. Everitt*, 5 L. J. Ch. 138.

⁶ *Spirett v. Willows*, L. R. 1 Ch. App. 520.

⁷ *Ibid.*

⁸ *Taunton v. Morris* (*ubi sup.*).

made,¹ and where the husband has received half the fund he has been deemed disentitled to receive any more.² Generally speaking, where the husband has been guilty of misconduct,³ such as adultery, cruelty, or what may be termed aggravated misconduct,⁴ or is insolvent,⁵ or the fund is small,⁶ the whole will be settled on the wife.

Waiver and
release of
equity by wife.

Waiver and Release of Equity to the Settlement.—The wife may, if she please, waive her equity to a settlement as well as any agreement made in respect of it, but only on proof of her free consent by separate examination by the court itself.⁷ She will not be permitted to do so as long as she is under age,⁸ or a ward of court, and has eloped or married without consent.⁹ Where the wife is willing to forego this right, and the fund exceeds £200,¹⁰ her consent must be formally taken upon her examination in court,¹¹ or under a commission issuing from the court, which generally happens when she is abroad.¹² When the examination is proceeding, neither the husband nor any one connected with him should be present.¹³ The wife may revoke her consent at any time before the actual transfer;¹⁴ even though an order of the court has been made for payment in accordance with it.¹⁵ Before the property of the wife will be paid over or assigned to the husband, the court must be satisfied by affidavits that there is no settlement on the marriage affecting the property in question; or if there be a settlement, it must be produced so that the court may form its own judgment on the point.¹⁶ The amount of the fund must be ascertained.¹⁷

Power of married woman under 20 & 21 Vict. c. 57, to dispose of reversionary personal estate.

Before the beginning of the year 1858, a married woman was not permitted to part with her reversionary interest in personal property not settled to her separate use; but by 20 & 21 Vict. c. 57 (known as Malins' Act), she may with the concurrence of her husband (except where under 3 & 4 Wm IV. c. 74, s. 91, his concurrence may be dispensed with),¹⁸ and under a deed or instrument duly acknowledged (not being a settlement or agreement for a settlement on her marriage),¹⁹ dispose of her personal

¹ *Re Suggitt's Trusts*, L. R. 3 Ch. 215; *Borall v. Borall*, 27 Ch. D. 220.

² *Scott v. Spashett*, 3 Mac. & G. 599; *Ward v. Yates*, 1 Dr. & S. 80.

³ *Dunkley v. Dunkley*, 2 De G. M. & G. 390.

⁴ *Reid v. Reid*, 33 Ch. D. 220.

⁵ *Scott v. Spashett* (*ubi sup.*).

⁶ *Re Kincaid's Trusts*, 16 Jur. 106.

⁷ *Wright v. Rutter*, 2 Ves. 673.

⁸ *Stubbs v. Sargon*, 2 Beav. 496; *Abraham v. Newcome*, 12 Sim. 566; *Shipway v. Ball*, 16 Ch. D. 376.

⁹ *Stackpoole v. Beaumont*, 3 Ves. 89.

¹⁰ *Elworthy v. Wickstead*, 1 J. & W. 69; *Veal v. Veal*, L. R. 4 Eq. 115.

¹¹ *Beaumont v. Carter*, 8 L. T. 685.

¹² *Tasburgh's Case*, 1 V. & B. 507; but see the course pursued in *Minet v. Hyde*, 2 Bro. C. C. 663.

¹³ *Re Bendyshe*, 3 Jur. (N. S.) 727.

¹⁴ *Penfold v. Mould*, L. R. 4 Eq. 562.

¹⁵ *Watson v. Marshall*, 17 Beav. 363.

¹⁶ *Britten v. Britten*, 9 Beav. 143.

¹⁷ *Sperling v. Rochfort*, 8 Ves. 180; see also *Packer v. Packer*, 1 Coll. 92. The usual form of settlement adopted by the court is set out in the case of *Spirett v. Willows*, L. R. 1 Ch. App. 520.

¹⁸ See *ante*, p. 194.

¹⁹ *Clarke v. Green*, 13 L. T. 38.

estate, to which she is entitled in reversion, and also release her equity to a settlement, so as to give the assignee for value an absolute title without any deduction in respect of claims upon the husband's interest in the wife's right.

When the Equity may be defeated.—There are many circumstances under which this right of the wife does not arise; some by what may be termed the operation of law, and others the acts of the wife herself, or her husband. Thus she has no equity where the fund has been made the subject of a settlement, or is affected by a provision in it,¹ or where an adequate settlement has been made upon her,² or where the disposal of the fund is governed by a foreign law which does not recognize this equity.³ The equity may be barred by a disposition by the wife under the Fines and Recoveries Act or Malins' Act. It may also be barred by the receipt by the husband or his assignees of the fund, or by a transfer of it by trustees before action brought; ⁴ but if an action has been commenced her rights will be preserved.⁵ The wife's conduct in assisting her husband to obtain possession of a fund which has been assigned by him will disentitle her to the equity as against the assignee.⁶ Again, it will not be recognized where she is amply provided for,⁷ or where at the time of her marriage she owed more than the whole amount of her property, and her husband subsequently becomes bankrupt, and the claim to the fund is disputed between herself and his assignees.⁸ In *Barnard v. Ford* and *Carriek v. Ford*,⁹ it was held that the wife's equity could not be sustained against her own ante-nuptial creditors in proceedings in bankruptcy against her husband. It was further decided that under such circumstances her equity can only arise when an amount equal to the amount of her debts has been provided out of her estate, and therefore the creditors of the bankrupt against whose estate the wife's debts had been proved can set aside a post-nuptial settlement of such property. Lastly, it does not arise in such instances as where the wife has made false and fraudulent representations respecting the fund over which she claims her equity,¹⁰ or is living in adultery apart from her husband.¹¹

When the equity defeated.

¹ *Brett v. Forcer*, 3 Atk. 405.

² If the settlement is inadequate, such inadequacy must be result of express stipulation. *Salwey v. Salwey*, Amb. 692; *Spirett v. Willows* (*ubi sup.*).

³ *Sawer v. Shute*, 1 Anst. 63 (Prussia); *Anstruther v. Adair*, 2 Myl. & K. 513 (Scotland); *Re Marsland* (Isle of Man), 55 L. J. Ch. 581.

⁴ *Murray v. Lord Elibank*, 10 Ves. 84. ⁵ *De la Garde v. Lempriere*, 6 Beav. 344.

⁶ *Roberts v. Cooper*, [1891] 2 Ch. 335.

⁷ *Giacometti v. Prodgers*, L. R. 8 Ch. 338.

⁸ *Bonner v. Bonner*, 17 Beav. 76.

⁹ L. R. 4 Ch. 247.

¹⁰ *Re Lush's Trusts*, L. R. 4 Ch. 591.

¹¹ *Carr v. Eastbrooke*, 4 Ves. 146; but see *Re Lewin's Trusts*, 20 Beav. 378, and *Ball v. Coutts*, 1 V. & B. 302, in which the wife was a ward of court. This rule seems to be otherwise when both husband and wife are living in adultery. *Greed v. Lavender*, 13 Beav. 62.

CHAPTER XI.

PROPRIETARY RIGHTS OF THE SPOUSES CREATED BY THE TERMINATION OF COVERTURE.

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IN this chapter the rights of the spouses in each other's property which come into existence at the moment of the termination of the coverture by death will be discussed. As in the earlier chapter dealing with their mutual rights created by coverture, there will be two main sections; the first dealing with Real Property, and the second with Personal Property.

SECTION I.

(1) *Interest of Husband in his Wife's Realty.*

The husband has an inchoate right which is given to him by the general law of the land to a life-interest in his wife's freehold¹ estates of inheritance on the birth of a child capable of inheriting them; and the death of the child before the determination of the coverture, or before the seisin of the wife, does not affect his right. This *inchoate* right may be turned into a *consummate* or perfect right by the death of the wife, in cases where the property has not been disposed of during the coverture. There were four requisites for an estate by the curtesy, namely, a valid marriage; birth of a child capable of inheriting the lands; sole seisin of the wife during coverture;² and death of the wife. The marriage must be one recognized by the law of the land. The child must be born alive, though it would be sufficient if it only survived its birth a few moments:³ it must also at the time of its birth be capable of inheriting; thus, if the estate was limited in tail male the birth of a daughter would not cause the right to spring into existence; and where the estate is so limited that the issue of the wife would take as purchasers and not by descent, the husband's curtesy right does not attach.⁴

Real property.
Interest of
husband in
wife's realty.
Curtesy
inchoate.

Consummate.

There is in law a twofold seisin, a seisin in deed, and a seisin in law; and the seisin for curtesy is that "in deed," "if it may be attained unto."⁵ Thus, there must be some sort of entry into possession by the wife, if possible; and there is no inchoate right to curtesy until the wife becomes entitled to an estate of inheritance in possession.⁶ In some cases the seisin must necessarily be "in law," as where the estate consists of an incorporeal hereditament, such as an advowson in fee, or a rent-charge, of both of which a husband may have his curtesy.⁷

Seisin.

Entry is not always required where a seisin "in deed" is impracticable, and the husband was held entitled by the curtesy to lands on which there were leases for years existing, and a rent which had accrued descended on the wife, who survived after the rent day accrued, though she made no entry, nor received any rent at all.⁸ Momentary seisin, too, is enough;⁹

¹ The husband may have curtesy out of her copyholds if it is the custom of the manor that he may have it; but the custom must be strictly observed.

² The husband has no right of curtesy in respect of his wife's freehold estate held by her in joint tenancy; though his right does exist where her tenancy is only in common. 1 Rep. H. & W. 11; Burt. Comp. pl. 353.

³ Co. Litt. 29 b.

⁴ *Barker v. Barker*, 2 Sim. 249.

⁵ *Gibbins v. Eyden*, L. R. 7 Eq. 371.

⁶ Co. Litt. 29 a; *Delhick v. Bradburne*, 2 Sid. 110.

⁷ *De Grey v. Richardson*, 3 Atk. 469.

⁸ *Parker v. Carter*, 4 Ha. 400.

⁹ *Ibid.*

and where, through no fault of the husband, actual seisin has not taken place, as, for instance, where a devise to a daughter who dies leaving issue in the lifetime of the testator, takes effect by force of section 33 of 1 Vict. c. 26 (The Wills Act, 1837); in such a case the husband, who by no possibility could have obtained seisin during the lifetime of the testator or of his wife, shall yet have his curtesy.¹ The tenant by the curtesy may exercise the powers conferred by the Settled Estates Act, 1877,² and the still wider powers of the Settled Land Act, 1882;³ in the latter case by means of the fiction that his estate arises under a settlement made by his wife.⁴

Curtesy attaches to equitable estates.

The husband's curtesy right attaches not only to her legal but also to her equitable estates.⁵ Where the wife's estate was settled to her separate use, legally or by way of trust, it has been a contested point whether the husband's right attached to such estate in the event of the wife not having disposed of it during the lifetime or by will, as she might have done. It is, however, now settled law that where a married woman has an estate of inheritance limited to her separate use, and does not dispose of it by deed or will, her husband, unless his right is expressly excluded, is entitled to curtesy in respect of it.⁶ But where an estate has been limited by will in trust to her for life with a general power of appointment (which she does not exercise) with remainder to her heirs, and she dies intestate, her husband's curtesy rights do not attach, for the rule in *Shelley's Case* does not apply so as to cause a merger of the two estates, thereby creating the fee-simple in her.⁷ The husband's curtesy rights are not taken away by the Married Women's Property Act, 1882, for though the Act contains an indication to interfere with the husband's rights as regards the acquiring, holding, and disposing of the wife's property, it does not contain any indication of an intention to exclude his rights as regards the devolution of her property on the wife's intestacy.⁸ The statutory separate use is just as much exhausted by the termination of the coverture as the purely equitable separate use was before the Act passed. It is just as much in the power of the wife by act *inter vivos* or by will to defeat her husband's curtesy rights, as it is in the power

Curtesy under M.W.P. Act, 1882.

¹ *Eager v. Furnivall*, 17 Ch. D. 115.

² 40 & 41 Vict. c. 18.

³ 45 & 46 Vict. c. 38. For the powers conferred by these two Acts, see *post*, Part III., Guardian and Ward, chap. vi.

⁴ 47 & 48 Vict. c. 18, s. 8 (The Settled Land Act, 1884).

⁵ *Follett v. Tyrer*, 14 Sim. 125.

⁶ *Cooper v. Macdonald*, 7 Ch. D. 288; *Appleton v. Rowley*, L. R. 8 Eq. 139; *Morgan v. Morgan*, 5 Madd. 408; *Follett v. Tyrer* (*ubi sup.*); *Roberts v. Dixwell*, 1 Atk. 607; *Lewin*, 829. The case of *Cooper v. Macdonald* (*ubi sup.*) decisively overrules *Hearle v. Greenbank*, 3 Atk. 695; and *Moore v. Webster*, L. R. 3 Eq. 267, which were decided to the contrary.

⁷ *Re Hart's Estate*, *Orford v. Hart*, W. N. [1883], 164.

⁸ *Hope v. Hope*, [1892] 2 Ch. 336.

of her husband to defeat her right to dower; and there is nothing in the Act to take away the wife's right to dower in the event of her husband dying without having disposed of his real estate. The fee-simple interest of a married woman and her husband's curtesy right in her real property do not constitute a limitation for more than one person so as to create a settlement within section 2, sub-section 1, of the Settled Land Act, 1882, and confer upon the married woman the powers of a tenant for life under that Act.¹ Whether the husband will lose his right by being divorced, is a point which has not yet been settled; but, by analogy, as the wife forfeits her right to dower by being divorced,² he should lose his right for the like reason, Curtesy on divorce, *quere*.

(2) *Interest of Wife in her Husband's Realty*.—When a man possessed any estates of inheritance, and married, or if after marriage he acquired any such estates, and died leaving a widow, she was entitled to a provision, amounting to one-third, out of these estates; and her right was called her Dower. This dower-right, as will be seen, has not nowadays much resemblance to that which existed in earlier times, but still remains in a modified shape. It certainly remains in the case of women married before the recent Married Women's Property Act came into force; and there does not seem to be anything in that piece of legislation which deprives them of their undoubted common law right. Interest of wife in husband's realty.
Dower.
Not affected by M.W.P. Act, 1882.

Dower has been thus variously defined: "Tenant in dower is where a man is seised of certain lands and tenements in fee-simple, fee-tail general, and as heir in special tail, and taketh a wife and dieth; *the wife*, after the decease of her husband, *shall be endowed of the third part of such lands and tenements as were her husband's at any time during the coverture*, to have and to hold to the same wife in severalty by metes and bounds for term of her life." ³ Definitions: Littleton.

"Dower, in the common law, is taken for that portion of lands or tenements which the wife hath for term of her life of the lands or tenements of her husband after his decease, for the sustenance of herself and the nurture and education of her children." ⁴ Coke.

"Dower is that freehold estate which is carved to the widow out of the real property whereof the husband was seised at any time during the coverture, of a nature to be inherited by any issue which she might have had, being usually made to cover one-third of the same for her life, as her right in law growing out of the marriage, his seisin, and his death." ⁵ Bishop (American).

"The reason why the law gave the widow dower will appear, Reasons for dower.

¹ *Bates v. Kesterton*, [1896] 1 Ch. 159.

² *Frampton v. Stephens*, 21 Ch. D. 164.

⁴ Co. Litt. 30 b.

³ Litt. s. 36.

⁵ *Bish. Laws. of Marr. Wom.* s. 243.

if we consider how the law stood anciently, for by the old law, if this provision had not been made, and the party at the marriage had made no assignment of dower, the wife would have been without any provision, for the personal estates, even of the richest, were then very inconsiderable; and before trusts were invented, which is but lately, the husband could give his wife nothing, during his own life, nor could he provide for her by will, because lands could not be devised, unless it was in some particular places by the custom, till the statute of Henry VIII."¹ Strictly speaking, the right to dower has nothing whatsoever to do with the nurture and education of children, for the widow is entitled to it whether she be childless or the mother of a numerous family; it was intended solely as a provision for herself.

There were originally five kinds of dower: (1) At common law; (2) by custom; (3) *ad ostium ecclesiæ*, or at the church porch; (4) *ex assensu patris*; (5) *de la plus belle*. This last was a conveyance of tenure by knight service, and was abolished by the Act of Charles II., which did away with tenure in chivalry.² The dower at the church porch (though surviving in the marriage service), and that *ex assensu patris* had long become obsolete, and were finally done away with by the Dower Act, 1834.³ This same Act has much modified dower at common law and by custom.

There were three requisites for dower: There must have been a marriage between the man and woman; a voidable marriage, however, not disaffirmed during the lifetime of both parties, is enough to support the widow's claim; but the marriage must not be void.⁴

Seisin, or possession, on the part of the husband, was formerly a requisite. It was not necessary in all cases that the husband should have entered actually on the corporeal property, or enjoyed the profits of the incorporeal, in order to entitle his widow to dower. But the husband must be *solely* and not *jointly* entitled to the property over which dower is claimed. Since the Dower Act, seisin is no longer a requisite.

Death of the husband.

Dower attached to all property of which the husband was at any time seised during the coverture. "Dower may be claimed out of all corporeal hereditaments, and out of all incorporeal hereditaments that savour of the realty; that is, which issue out of corporeal ones, or which concern or are annexed to, or may be exercised within the same";⁵ thus, the widow is entitled to be dowered out of rents, estovers, commons, advowsons, fairs, tithes,

¹ Note by editor of the 11th edition of Co. Litt., preserved in subsequent editions. Co. Litt. 30 b.

² 12 Car. II. c. 24.

³ 3 & 4 Wm. IV. c. 105, s. 13.

⁴ For what are void and voidable marriages, see *ante*, chap. v.

⁵ 1 Rep. H. & W. 342.

Different
kinds of
dower.

Requisites :
Marriage.

Seisin.

Death.

To what pro-
perty it
attaches.

woods,¹ mills, piscaries, tolls arising from public navigable rivers. She is also dowable of mines and minerals worked in the husband's lifetime, but not of mines unopened.² She is dowable of shares in a company when they are in the nature of real estate, such as those of the New River.³ Where she is dowable of lands which have been purchased under the Lands Clauses Act, and the purchase-money (a specific portion of which is agreed to be an equivalent for her right of dower; has been paid into court, she is entitled to be paid the value of her right of dower out of the *corpus* of the fund.⁴ The widow takes the crops growing from the seeds sown by her husband on the lands assigned to her as dower; she is also entitled to and may dispose of emblements.⁵ The estate or interest of the husband must be a freehold, whether an estate in fee or in tail, but not a mere life or chattel interest, on the broad principle, that when the interest of the husband had ceased during his lifetime, or ceases on his death, the wife cannot stretch such an estate to continue for her life. An estate for years might possibly last for long after the husband's death, but as it is not a freehold estate, to which alone at common law dower attached, the widow's right does not attach to such an interest.

Until the passing of the Dower Act,⁶ the wife was not dowable of property in which her husband had only an equitable interest, for the theory that dower existed solely by force of the common law was all powerful; and as the latter did not recognize trust estates, so it could not recognize dower out of them, and equity did not assist the wife.⁷ She now can claim it out of estates in which her husband had only a beneficial interest;⁸ but now dower has become of little practical moment and advantage to her.

Dower formerly not claimable out of trust estates.

Now claimable.

Dower by Various Customs.—Lands held in gavelkind tenure are subject to dower, which amounts to one half of the husband's estate so held; but the widow's right lasts only so long as she continues chaste and unmarried.⁹ The Dower Act extends to gavelkind lands.¹⁰

Dower by various customs. Gavelkind.

By the custom of Borough English, the widow takes the whole of her husband's lands holden by that tenure for dower.¹¹

Borough English.

¹ If timber is cut down before dower is assigned, she is entitled to a third of the interest upon the proceeds of the sale during her life. *Bishop v. Bishop*, 10 L. J. Ch. 302.

² *Dicken v. Hamer*, 29 L. J. Ch. 778.

³ See *Drybutter v. Bartholomew*, 2 P. Wms. 127; but see the Metropolis Water Act, 1902 (2 Edw. VII. c. 41), section 9, the effect of which is to substitute "water stock" of the Board created by the Act for the former shares of the New River Company.

⁴ *Re Hall's Estate*, L. R. 9 Eq. 179.

⁵ 20 Hen. III. c. 2, Statute of Merton.

⁶ 3 & 4 Wm. IV. c. 105.

⁷ *Lady Radnor v. Vandebendy*, Show. Parl. Cas. 69. This case arose on a question of setting aside a trust term for years, which prevented Lady Radnor's dower from attaching, and the House of Lords refused a decree setting it aside as against a purchaser, though with notice.

⁸ Sect. 2.

⁹ Bac. Abr. Gavel. A.

¹⁰ *Farley v. Bonham*, 30 L. J. Ch. 239.

¹¹ 1 Br. H. & W. 328.

Freebench.

Copyhold.—Where the lands are copyhold in their nature, the widow's right is called freebench. Before freebench can attach, the husband must have been admitted as copyholder.¹ This right depends wholly on the special custom of the manor within which the lands lie,² and the custom regulates the amount which she is to take—whether a third, or a half, or even the whole.³ Her rights also vary in different manors as to what lands they shall attach. In some freebench attaches only to those lands of which her husband shall *die seised*, rendering her rights generally subject to his disposition;⁴ and a mere devise without a surrender to the use of the will is, under section 3 of the Wills Act, a bar to freebench.⁵ In others it attaches to lands of which he shall be at any time seised. Freebench is not affected by the Dower Act,⁶ consequently she is not dowable of his equitable copyhold estates, nor is it liable to satisfy her husband's debts.⁷

Rights and liabilities of dowager.

Widow's quarantine.

Rights and Liabilities of Dowager.—The widow is entitled to be endowed immediately after her husband's death; and dower ought to be assigned to her within forty days after the happening of that event. In the meantime, she is entitled at the common law, confirmed by *Magna Charta*, to remain in her husband's capital messuage, or other dwelling-house, of which she is dowable, for the space of forty days, and to be supported *de bonis viri*. This right of residence is called the widow's "quarantine." But if she marry during these days, or depart from her husband's house (to which she will not be permitted to return for the remainder of the term), her right to quarantine determines.⁸ The widow is entitled to emblements,⁹ but the widow of a copyholder who forfeits her freebench by a second marriage is not entitled to the emblements.¹⁰ Under the Settled Estates Act, 1877,¹¹ a tenant in dower may demise any part of her dower lands (except the principal mansion-house, &c.) for any term not exceeding twenty-one years in England and thirty-five in Ireland, to take effect in possession at or within one year next after the making. Such demise must be by deed, must reserve the best obtainable rent, without any fine or benefit in the nature of a fine, must not be made without impeachment of waste, and, among other things, must contain a condition of re-entry on non-payment of rent.

Power of tenant in dower under Settled Estates Act, 1877.

The dowager is liable for waste committed by herself or

¹ *Smith v. Adams*, 24 L. J. Ch. 258.³ *Ibid.* 87.⁵ *Lacey v. Hill*, *Leney v. Hill*, L. R. 19 Eq. 346.⁶ *Smith v. Adams* (*ubi sup.*); *Powdrell v. Jones*, 21 L. J. Ch. 123.⁷ *Spyer v. Hyatt*, 20 Beav. 621.⁹ 20 Hen. III. c. 2, Statute of Merton.¹⁰ *Oland's Case*, 5 Rep. 116.² 2 Watk. Copy. 72.⁴ *Ibid.* 73.⁸ 1 Br. H. & W. 363.¹¹ 40 & 41 Vict. c. 18.

strangers,¹ and to contribute a proportional share to keep down the interest of charges on the property.² Where there is a mortgage over the property which has been assigned to her in dower, she is liable to be called upon for the payment of the whole debt, or to be foreclosed.³ If she discharge the demand she will be at liberty to hold the estate until she be reimbursed what she paid beyond her proportion as tenant for life of a third part of the lands.⁴

The widow is entitled to have a proper quantity of lands assigned to her to satisfy her dower right; it sometimes happens that an excessive quantity is assigned to her; when an excessive assignment was made by the heir, when of full age, it bound him and he could not be relieved against it at law,⁵ but now in equity he can be relieved. But both formerly and at the present time if he is under age when he assigns dower, he is protected against the consequences of an excessive assignment, and he is entitled to a readjustment of the lands.⁶

Assignment of dower.

The widow may enforce her right to dower or freebench by proceedings at law; and these are now assimilated to those ordinarily taken for the prosecution of rights to land;⁷ or in equity.⁸ She may claim arrears of dower, but not for more than six years.⁹ The jurisdiction of equity has been increased by the operation of the Dower Act, 1834,¹⁰ which renders the widow dowable out of her husband's trust estates.

Enforcement of dower.

When the right of dower had once attached to the lands of the husband, it adhered to them, notwithstanding any sale or devise which the husband might make. It consequently became necessary for the husband, whenever he wished to make a valid conveyance of his lands, to obtain the concurrence of his wife for the purpose of releasing her right to dower. This release could be effected only by means of a fine, in which the wife was separately examined. And when, as often happened, the wife's concurrence was not obtained on account of the expense involved in levying a fine, a defect in the title obviously existed so long as the wife lived.¹¹

How dower may be barred.

"In order to prevent the inconvenient right of the wife attaching to newly purchased lands, and to enable the purchaser to make a title at a future time without his wife's concurrence, various devices were resorted to in the framing of purchase deeds and other instruments, which are here briefly set out:—

"The old-fashioned method of barring dower was to take the conveyance to the purchaser and his heirs, to the use of the

Conveyance to husband and a trustee in joint-tenancy.

¹ Co. Litt. 53, 54; ² Inst. 303; Fitz. N. B. 55 E. 56 F.

² Rop. H. & W. 371, 376.

³ See *Jones v. Griffiths*, 2 Coll. N. C. 207.

⁴ 1 Rop. H. & W. 372; *Palmer v. Danby*, Prec. Ch. 137.

⁵ 1 Br. H. & W. 381.

⁶ *Ibid.* 382.

⁷ By the Common Law Procedure Act, 1860, 23 & 24 Vict. c. 126, s. 26.

⁸ *Mundy v. Mundy*, 4 Bro. C. C. 294.

⁹ 3 & 4 Wm. IV. c. 27, s. 41.

¹⁰ *Ibid.* c. 106.

¹¹ *Williams*, Real Property, 315.

purchaser and a trustee and the heirs of the purchaser. . . . By this means the purchaser and the trustee became joint-tenants for life of the legal estate and the remainder of the inheritance belonged to the purchaser. If, therefore, the purchaser died during the life of his trustee the latter acquired in law an estate for life by survivorship; and as the husband had never been solely seised, the wife's dower never arose. The defect of this plan was, that if the trustee happened to die during the husband's lifetime, the latter became at once seised of an estate in fee-simple in possession, and the wife's right to dower accordingly attached."¹

To obviate this and other drawbacks which attended the latter mode of conveyance, a new form of disposition was invented, which enabled the husband to dispose of his property without the concurrence of any other person, or the possibility of his wife's dower attaching; this was effected in the following manner, and was founded on the legal proposition that there is no right to dower where the husband has merely a reversion or remainder after a life estate. A general power of appointment by deed is in the first place given to the purchaser, by means of which he is enabled to dispose of the lands for any estate at any time during his life. In default of and until appointment, the land is then given to the purchaser for his life, and after the determination of his life-interest by any means in his lifetime, a remainder (which is vested) is limited to a trustee and his heirs during the purchaser's life. This remainder is then followed by an ultimate remainder to the heirs and assigns of the purchaser for ever, or which is the same thing, to the purchaser, his heirs and assigns for ever.² By this means the union of the purchaser's life-estate and remainder never took place; but by the operation of the rule in *Shelley's Case*,³ he had the full rights and incidents of ownership over his property.

Another method of barring the widow's right was as follows: Where lands were being sold to which the right of the vendor's widow to dower attached, and a term of years had been created for some purpose or other, which was precedent to her right of dower, it became the practice to hold that, where the purchaser could get the term, though satisfied, to a trustee for himself, the widow's right to dower was barred as against the purchaser even with notice.⁴ But by the Satisfied Terms Act, 1845,⁵ when such terms are satisfied they shall absolutely cease and determine. Where, however, such terms are not satisfied, but are assigned for the benefit of the purchaser, such assignment will operate as

Conveyance to
uses to bar
dower.

Assignment of
satisfied term
to purchaser.

¹ Williams, Real Property, 316.

² Fearne, Cont. Rem. 347 n.

³ 1 Rep. 93 a; *Duncomb v. Duncomb*, 3 Lev. 437.

⁴ *Lady Radnor v. Vandebendy*, Show. Parl. Cas. 69.

⁵ 8 & 9 Vict. c. 112.

a bar to the right of dower in case of women married before January 1, 1834.¹

There is another method of barring the wife's dower, that is, Jointure. by a provision made for her in lieu of dower called Jointure. Of jointures there are two kinds, legal and equitable. Legal jointures are the direct outcome of the Statute of Uses.² Previously to that enactment it was customary to convey estates to trustees to the use of the husband. As the trustees took the legal estate, the wife, not being dowable of a trust, would have been without a provision but for the husband taking a conveyance from his trustees of some part of his property to himself and wife in joint tenancy. When, however, the Statute of Uses turned the use into possession, the wife would have been dowable of all her husband's estates, had it not been for the provisions in the Act that she should not be entitled to dower where she had a jointure settled upon her;³ for at common law a provision for the wife made by the husband before or after marriage did not bar her right to dower.

Jointure has been defined to be "a competent livelihood⁴ of freehold⁵ for the wife, of lands or tenements, to take effect presently in possession or profit after the death of her husband, for the life of the wife at least, if she herself be not the cause of determination or forfeiture of it."⁶

"A jointure, strictly speaking, signifies a joint estate limited to both husband and wife, but in common acceptation extends also to a sole estate limited to the wife only."⁷

The following are the chief requisites of a good legal jointure:⁸

(1) The jointure must commence immediately after the husband's death; *primâ facie* it is a provision that is to take effect on the husband's death,⁹ though a provision by way of jointure may be limited to take effect in the husband's lifetime.¹⁰ (2) It must be limited to the wife solely, or to her and her husband jointly. (3) It must be for her life or greater estate, or be determinable by her own act.¹¹ An estate limited to the wife *pur autre vie* is not a good jointure within the statute.¹² (4) It must be made before marriage; if after, it is voidable at her election on her husband's death.¹³ (5) The jointure must be expressed to be in satisfaction of dower, that is, of her whole dower, and not of part

Definitions:
Coke.

Blackstone.

Requisites of
a legal
jointure.

¹ *Anderson v. Pignet*, 8 L. R. Ch. App. 180; reversing L. R. 11 Eq. 329.

² 27 Hen. VIII. c. 10.

³ Sects. 6-10.

⁴ The adequacy is not defined by the Statute of Uses. *Drury v. Drury*, 2 Ed. 57.

⁵ A jointure of a copyhold estate is no bar at law of dower, but otherwise in equity. *Warde v. Warde*, Amb. 299.

⁶ Co. Litt. 36 b.

⁷ 2 Bl. Com. 137.

⁸ Rep. H. & W. 464, *et seq.*

⁹ See *Re De Hoghton v. De Hoghton*, [1896] 2 Ch. 385.

¹⁰ See *Jamieson v. Trevelyan*, 10 Exch. 269.

¹¹ *Vernon's Case*, 4 Rep. 3 a. In this case it was *durante viduitate*.

¹² Co. Litt. 36 b.

¹³ *Frank v. Frank*, 3 Myl. & Cr. 17.

of her dower.¹ (6) At law the jointure cannot be out of a trust estate, but otherwise in equity,² where she will have like remedies as at law.

A power given to a man to appoint to a wife is in the nature of a power to grant a jointure,³ but is not so wide in its operation, and may be exhausted by him by an act inconsistent with its exercise.⁴

An infant wife is bound to a jointure which operates as a proper and adequate provision, on the principle that the jointure takes effect, not as a matter of contract, but as a provision made by the husband, and by force of the Statute of Uses making it effectual.⁵

The wife's elopement or adultery does not *per se* bar her right to her jointure.⁶

It has already been mentioned⁷ that where the husband makes a provision for the wife after the marriage, she will not be barred by such provision, even though it be expressly stated as in lieu of dower. At the same time, the wife will not be permitted to take both provisions, but will be compelled to elect between them. For the rule of election, that is, that a person cannot accept and reject the same instrument, has been said to apply both to deeds and wills, in short, to every species of instrument, as also to every species of right, and the right of dower is no more protected than any other.⁸ To put the wife to an election, however, there must be a clear intention to exclude her from dower, either expressed or implied.⁹ If there be anything ambiguous or doubtful, then the averment that the gift was made in lieu of dower cannot be supported, which is necessary to make a case of election, for a gift is to be taken as pure, until a condition appear. This has been said by Lord Redesdale to be the ground of all the decisions.¹⁰ The only question made in all the cases is, whether an intention not expressed by apt words could be collected from the terms of the instrument; and the result of the cases of implied intention seems to be that the instrument must contain some provision inconsistent with the assertion of a right to demand a third of the lands to be set out by metes and bounds.¹¹ This intention should be extended to copyhold as well as freehold lands, for though the former are not within the Statute of Uses, yet by so doing freebench will be

Infant wife
barred by
proper
jointure.

Wife must
elect between
jointure and
dower.

To put wife to
her election,
there must be
a clear inten-
tion, express
or implied,
to exclude her
from dower.

¹ Co. Litt. 36 b. *Tinney v. Tinney*, 3 Atk. 8.

² *Corbet v. Corbet*, 1 Sim. & S. 620.

³ *Re Lindo, Askin v. Ferguson*, 59 L. T. 462.

⁴ *Re Hancock, Malcom v. Burford Hancock*, [1896] 2 Ch. 173.

⁵ *Simson v. Jones*, 9 L. J. Ch. 106.

⁶ *Seagrave v. Seagrave*, 13 Ves. 443.

⁷ *Ante*, p. 227.

⁸ *Birmingham v. Kirwan*, 2 Sch. & Lef. 450.

⁹ *Miall v. Brain*, 4 Madd. 125.

¹⁰ *Birmingham v. Kirwan* (*ubi sup.*).

¹¹ *Peach. Sett.* 367, 368.

barred in equity.¹ The question whether a widow must elect between the provision made for her by way of jointure and the lands as to which her husband died intestate, and without having disposed of them *inter vivos*, has, since the passing of the Dower Act, lost much of its importance, for most of the cases in which it would have arisen under the old law fall within some one or other of the sections of that Act. It is possible that it might arise where the woman was married before January 1, 1834, or where her right has not been barred under the Act; as where the jointure has been made *after* marriage, and her right has not been barred under the Act.²

In modern marriage settlements these limitations to bar dower by way of jointure follow in the form of a rent-charge after the husband's life estate in his realty.³ This rent-charge in favour of the wife is accompanied with appropriate ancillary remedies under the fifth section of 27 Hen. VIII. c. 10, such as a power of distress, and a power of entry.⁴ The value of the jointure is the value of the property settled at the date of the settlement; this is important as affecting the covenant of the settlor, by which his general property may be bound to make good any deficiency which may have arisen from depreciation.⁵

Limitations to bar dower in modern marriage settlements.

Where the jointress releases her estate charged with her jointure, and accepts income arising from the investment of the proceeds of the sale, such income being at the time equal to the jointure, any deficiency that may subsequently occur through the subsequent insufficiency of the substituted security must be made good to her.⁶ The release of her jointure to be efficacious must be by deed acknowledged in accordance with the provisions of the Fines and Recoveries Act, 1834, as amended by the Conveyancing Act, 1882.⁷ Where she releases her jointure lands to enable her husband to mortgage, her right will subsist as against the equity of redemption,⁸ and she may now release a part of such lands, and the release will not operate as a release of the whole.⁹ A husband who is a tenant for life and has a power of charging his real estate with a jointure can make a post-nuptial bargain with his wife to exercise that power provided that she alone is benefited by it, though he himself receives consideration from her for its exercise, which exercise will not be regarded as a fraud on the power.¹⁰ A bargain which entitled persons other than the wife to

Wife's equities after release of her jointure rights.

¹ *Willis v. Willis*, 34 L. J. Ch. 313.

² 1 Rep. H. & W. 468; 1 Br. H. & W. 441, *et seq.*

³ These limitations to bar dower have now practically usurped the functions of the legal jointure. ⁴ For details, see Dav. Prec. vol. iii. pt. 1, p. 310 *et seq.*

⁵ *Eustace v. Keightley*, 4 Bro. P. C. 588; *Speake v. Speake*, 1 Vern. 217.

⁶ *Arundell v. Arundell*, 1 Myl. & K. 316.

⁷ *Noyes v. Pollock*, 33 Ch. D. 53.

⁸ *Wood v. Wood*, 7 Beav. 183.

⁹ 22 & 23 Vict. c. 35, s. 10; see *Noyes v. Pollock* (*ubi sup.*).

¹⁰ *Baldwin v. Roche*, 5 Ir. Eq. Rep. 110; *Saunders v. Shafte*, [1905] 1 Ch. 126, which latter case overruled *Whelan v. Palmer*, 39 Ch. D. 648.

share in the jointure would be held bad; and the exercise of a power of jointuring under such circumstances by a tenant for life would be invalid against the remainderman.¹

Dower Act,
1833.

*The Dower Act, 1833.*²—This Act has rendered the law of dower and jointures of little moment and importance, for it has put complete power into the hands of the husband to regulate the interests of his wife in his lands. The sections of the Act are here set out:—

Definition of
"land."

Section 1. "The word 'land' shall extend to manors, advowsons, messuages, and all other hereditaments, whether corporeal or incorporeal (except such as are not liable to dower), and to any share thereof."

Widows entitled to dower out of equitable estates.

Section 2. "When a husband shall die beneficially entitled to any land for an interest, which shall not entitle his widow out of the same at law, and such interest, whether wholly equitable, or partly legal and partly equitable, shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession (other than an estate in joint tenancy³), then his widow shall be entitled in equity to dower out of the same land."

This section seems to give the wife more than it really does, for her interests, which are enlarged by this section, are more than proportionably curtailed by subsequent sections. Under this section it has been held that where the husband has an equitable estate in fee, subject to an executory devise over if he die without having a child living at his death, his wife will be entitled, though on his death the executory devise over takes effect.⁴ But an equitable interest in possession severed from the estate of inheritance by the interposition of an estate tail (which may or may not arise) is not equal to an estate of inheritance in possession.⁵

Seisin not necessary to give title to dower.

Section 3. "When a husband shall have been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same if he had recovered possession thereof, she shall be entitled to dower out of the same, although her husband shall not have recovered possession thereof, provided that such dower be sued for or obtained within the period during which such right of entry or action might be enforced."

Dower being an interest in land,⁶ the widow's right must be claimed within twelve years of the time of its accrual.⁷

Alienation by husband.

Section 4. "No widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime, or by his will."

¹ *Saunders v. Shafte*, [1905] 1 Ch. 126.

² 3 & 4 Wm. IV. c. 108.

³ Unless the joint tenancy is severed before his death. *Reynard v. Spence*, 4 Beav. 103.

⁴ *Smith v. Spencer*, 2 Jur. (N.S.) 778.

⁵ *Re Michell, Moore v. Moore*, [1892] 2 Ch. 87.

⁶ *Marshall v. Smith*, 34 L. J. 189.

⁷ 3 & 4 Wm. IV. c. 27, s. 2; 38 & 39 Vict. c. 57, s. 1. *Marshall v. Smith* (*ubi sup.*).

This section gives the husband complete power and control over his wife's right to dower. The question as to what is an absolute disposition not unfrequently arises. A general devise, and a devise in trust for sale and conversion, and to pay annuity to widow, have been held to bar dower,¹ so also a devise of lands to trustees upon certain trusts, being partly for the benefit of the widow.²

But if the realty to which the dower right attaches is sold in an administration action, the widow is entitled to be paid the capitalized value of her dower out of the funds liable to make it good.³

A contract by the husband to sell his lands, though no conveyance be executed, is a bar to dower, on the equitable principle that what is agreed to be done shall be considered as done.

Section 5. "All partial estates and interests, and all charges created by any disposition or will of a husband and all debts, incumbrances, contracts, and engagements to which his land shall be subject or liable shall be valid and effectual as against the right of his widow to dower."

Though the wife's right to dower is not affected by the mere debts of her husband not charged upon his lands,⁴ it is so affected by a mortgage of such lands, and she has no equity against her husband's heir-at-law to be indemnified in respect of such mortgage.⁵

Section 6. "A widow shall not be entitled to dower out of any land of her husband when in the deed by which such land was conveyed to him, or by any deed executed by him, it shall be declared that his widow shall not be entitled to dower out of such land."

Section 7. "A widow shall not be entitled to dower out of any land of which her husband shall die wholly or partially intestate when by the will of her husband, duly executed for the devise of freehold estates, he shall declare his intention that she shall not be entitled to dower out of such land, or out of any of his land."

Section 8. "The right of a widow to dower shall be subject to any conditions, restrictions, or directions which shall be declared by the will of her husband duly executed as aforesaid."

Section 9. "Where a husband shall devise any land out of which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow, such widow

Dower may be barred by a declaration in the deed;

or by a declaration in the husband's will.

Dower subject to restrictions.

Devise of real estate to widow shall bar dower.

¹ *Lacey v. Hill, Leney v. Hill*, L. R. 19 Eq. 346.

² *Rowland v. Cuthbertson*, L. R. 8 Eq. 466.

³ *Gleeson v. Byrne*, 25 L. R. Ir. 361.

⁴ *Spyer v. Hyatt*, 20 Beav. 621. It is, however, very doubtful whether this decision of Lord Romilly that dower has precedence over the "mere debts" of the husband is a correct exposition of the law.

⁵ *Jones v. Jones*, 4 K. & J. 361.

⁶ Such deed need not be executed by the husband. *Fairley v. Tuck*, 27 L. J. Ch. 28.

⁷ *Fry v. Noble*, 25 L. J. Ch. 144; *Clarke v. Franklin*, 4 K. & J. 266. See also *Thompson v. Watts*, 31 L. J. Ch. 445.

shall not be entitled to dower out of or in any land of her said husband, unless a contrary intention shall be declared by his will." ¹

Where a husband leaves by will the income of part of the proceeds of his real estate devised in trust for sale to his widow, the gift of such income is a gift of an "interest in land" within the section, and she is thereby disentitled to dower.²

Bequest of personal estate shall not.

Section 10. "No gift or bequest made by any husband to or for the benefit of his widow or out of his personal estate, or of or out of any of his land not liable to dower, shall defeat or prejudice her right to dower unless a contrary intention shall be declared by his will."

Agreement not to bar may be enforced.

Section 11. "Nothing in this Act contained shall prevent any court of equity from enforcing any covenant or agreement entered into by or on the part of any husband not to bar the right of his widow to dower out of his lands, or any of them."

Where a purchaser has no notice of any such covenant or agreement and obtains the legal estate, equity will not enforce such covenant against him.³

Legacies in bar of dower.

Section 12. "Nothing in this Act contained shall interfere with any rule of equity or of any ecclesiastical court, by which legacies bequeathed to widows in satisfaction of dower are entitled to priority over other legacies."

But the testator must leave real estate, otherwise the widow has no priority.⁴ For this rule to be put in force, her right to dower must exist, in other words, she must be a purchaser of the legacy. But in the case of a wife married after the passing of this Act, to whom her husband bequeaths a legacy declared to be in satisfaction of her dower, and he leaves other legacies, and dies seised of real estate, she is not entitled to priority over the other legacies in the event of the personal estate being insufficient to pay all the legacies in full.⁵

Certain dowers abolished.

Section 13. "No widow shall hereafter be entitled to dower *ad ostium ecclesie*, or dower *ex assensu patris*."

These were two old forms of dower by which the bride was dowered at the church porch and by the father of the bridegroom, who was wont to specify the lands to which the right of dower should attach.

Date of operation of Act, January 1, 1834.

Section 14. "This Act shall not extend to the dower of any widow who shall have been or shall be married on or before the first day of January, 1834, and shall not give to any will, deed, or contract, engagement, or charge executed, entered into, or created before the said first day of January, 1834, the effect of defeating or prejudicing any right to dower."

¹ See *Lacey v. Hill*, *Leney v. Hill*, L. R. 19 Eq. 346; and *Rowland v. Cuthbertson*, L. R. 8 Eq. 466.

² *Re Thomas*, *Thomas v. Howell*, 34 Ch. D. 166.

³ *Jones v. Smith*, 2 Ph. 244.

⁴ *Accey v. Simpson*, 5 Beav. 35.

⁵ *Re Greenwood*, *Greenwood v. Greenwood*, [1892] 2 Ch. 295.

"The effect of the Act," to quote the language of the late ^{Effect of the Act.} Mr. Joshua Williams,¹ "is evidently to deprive the wife of her dower except as against her husband's heir-at-law. If the husband should die intestate and possessed of any lands, the wife's dower out of such lands is still left her for her support, unless, indeed, the husband should have executed a declaration to the contrary. A declaration of this kind has unfortunately found its way as a sort of common form into many purchase deeds. Its insertion seems to have arisen from a remembrance of the troublesome nature of dower under the old law, united possibly with some misapprehension of the effect of the new enactment. But surely if the estate be allowed to descend, the claim of the wife is at least equal to that of the heir, supposing him a descendant of the husband, and far superior if the heir be a lineal ancestor or a remote relation. The proper method seems, therefore, to be to omit any declarations against dower, and so to leave to the widow a prospect of sharing in the lands in case her lord shall not think proper to dispose of them."

A wife forfeits her right to dower where she leaves her husband of her own free will and accord, and subsequently lives in adultery;² so is it where she leaves him and commits adultery, even though he be in fault.³ A sentence of dissolution of marriage operates as a forfeiture, even where the husband was at fault.⁴ ^{Forfeiture of dower.}

The widow's right to dower might also be barred by her waiver ^{Waiver.} of it, during coverture. Under the old law, where the inchoate right of dower had attached to make a valid and complete title, the wife's concurrence had to be obtained, which was usually effected by the fiction of levying a fine. When fines and recoveries were abolished,⁵ her concurrence (tested by a separate examination) in the deed of conveyance was rendered sufficient. If she concurred in executing a mortgage deed by which she released her right to dower, and the equity of redemption was reserved to her husband, her right was extinguished because equity did not recognize dower out of an equitable estate, which the equity of redemption was,⁶ unless there was something in the proviso for redemption which would carry the estate from the person who was owner at the time of executing the mortgage, or some ambiguity in the proviso.⁷ This point cannot arise as regards property affected by the Dower Act, for a wife is now dowable of her husband's equitable estates. But where her right as a widow has attached, and she joins with the heir-at-law in executing a

¹ Principles of the Law of Real Property, p. 319.

² *Hetherington v. Graham*, 6 Bing. 135.

³ *Woodward v. Dowse*, 31 L. J. C. P. 70; *Bostock v. Smith*, 34 Beav. 57.

⁴ *Frampton v. Stephens*, 21 Ch. D. 164.

⁵ 3 & 4 Wm. IV. c. 74.

⁶ *Dawson v. Bank of Whitehaven*, 5 Ch. D. 218.

⁷ *Jackson v. Parker*, Amb. 687.

mortgage deed for the purpose of extinguishing her right to dower, on the reconveyance of the mortgage property her right revives, and she is entitled to have dower assigned to her out of the premises previously mortgaged.¹ The widow must obtain an assignment of dower within twelve years from the date of her husband's death ;² but she can only recover six years' arrears of it.³

The right of the widow on the death of her husband intestate and childless to the whole of his property real and personal where its net value does not exceed £500 will be discussed in the following section.⁴

SECTION 2.

(1) *Right of the Husband to Administer to his Wife's Personal Estate.*

Personal
property.
Right of
husband to
administer to
wife's estate.

Under the former state of the law, on the death of the wife, the husband had no need to take out letters of administration to her specific chattels, such as money, and other like things, of which she died intestate, for these vested in him by marital right ;⁵ but he had to take out letters of administration where there were choses in action belonging to her unrecovered at her death, or chattels real not vested in him in her right in her lifetime. The right of the husband in his wife's separate property was much the same, because the quality of separate estate lasts only during coverture ; "the separate use is exhausted when the woman has died without making a disposition" ;⁶ the wife, of course, may defeat her husband's interest in the property. Thus, if the instrument creating the separate use does not make any disposition of the property to take effect after the wife's death, and she has absolute control over it, and does not make any disposition of it by deed or will, and the husband survive, his position with reference to her property, whether real⁷ or personal,⁸ including vested leaseholds,⁹ and reversionary leaseholds,¹⁰ will be the same as if it had never been settled to her separate use,¹¹ and he will take such property *jure mariti* without taking out administration to her estate. His right to her undisposed-of personalty has long been recognized by the courts administering equity, ecclesiastical, and probate jurisdiction.¹²

¹ *Meek v. Chamberlain*, 8 Q. B. D. 31.

² 37 & 38 Vict. c. 57, s. 1.

³ 3 & 4 Wm. IV. c. 27, s. 42.

⁴ See p. 242.

⁵ *Molony v. Kennedy*, 10 Sim. 254 ; *Tugman v. Hopkins*, 4 M. & G. 389.

⁶ Per Jessel, M.R., in *Cooper v. Macdonald*, 7 Ch. D. 288, 296.

⁷ *Cooper v. Macdonald* (*ubi sup.*).

⁸ *Johnstone v. Lumb*, 15 Sim. 308 ; *Molony v. Kennedy* (*ubi sup.*).

⁹ *Surman v. Wharton*, [1891] 1 Q. B. 491.

¹⁰ *Re Bellamy, Elder v. Pearson*, 25 Ch. D. 620.

¹¹ Macq. H. & W. 318.

¹² See *Re Lambert's Estate*, *Stanton v. Lambert*, 39 Ch. D. 639.

"This right [of administration] belongs to the husband exclusively of all other persons, and the Ordinary¹ has no power or election to grant it to any other. The foundation of this claim has been variously stated: by some it is said to be derived from the statute of 31 Edw. III., on the ground of the husband's being 'the next and most lawful friend' of his wife; while there are other authorities which insist that the husband is entitled at common law *jure mariti*, and independently of the statutes. But the right, however founded, is now unquestionable; and is expressly confirmed by the statute 29 Car. II. c. 3, which enacts that the Statute of Distributions (22 and 23 Car. II. c. 10) 'shall not extend to the estates of *femes covert* that shall die intestate, but that *their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same, as they might have done before the making of the said Act.*' This right of administration to the wife is not an ecclesiastical, but a civil, right of the husband, though it is a right to be administered in the Court of Probate."² But where the wife had been judicially separated, or had obtained a protection order, administration was decreed to her next of kin of the property acquired by her since the judicial separation or desertion, to the exclusion of the husband.³ Where a decree of divorce is made absolute, then the husband should lose his right to administer to his wife's estate.⁴ So, too, where the wife was executrix to another and died intestate, administration as to goods not administered by her in that capacity was not, generally speaking, granted to her husband.⁵ A husband as such is not "next of kin" to his wife under the Statute of Distributions; therefore though his title under ordinary circumstances is paramount, yet he would not take under a bequest to "such persons as would be entitled as next of kin or otherwise under the Statute of Distributions" to the personal estate of his wife.⁶

Origin of husband's right to administer.

Where the husband took his wife's specific chattels *jure mariti*, he was entitled to retain them as his own property; but when he was obliged to take out letters of administration to reduce her choses in action into possession, he was deemed to be a trustee of such property on behalf of her creditors, and he could lay claim only to the surplus after satisfying her liabilities. Apart from any question of liability for the debts of his wife, it was the

Difference between husband taking *jure mariti*, and as administrator of wife as to her specific chattels and choses in action.

¹ Now the Probate Division of the High Court of Justice.

² 1 Wms. Exors. 319, and the cases there cited.

³ *Re The Goods of Worman*, 29 L. J. P. M. & A. 164.

⁴ See *In The Goods of Worman (ubi sup.)*.

⁵ 1 Wms. Exors. 325. This was on the principle that the administration was not of the goods of the wife, but *de bonis non* of her testator, *cum testamento annexo*, and the grant of the administration would naturally follow the interest.

⁶ *Milne v. Gilbert*, 2 De G. M. & G. 715; *Re Norman's Trusts*, 3 De G. M. & G. 965.

intention of the Legislature in passing the Statute of Frauds¹ removing a doubt on the construction of the Statute of Distributions,² that on the death of the wife intestate, the husband and not her next of kin should have the right of administering to her undisposed-of property, including her choses in action.³ If a married woman attempted to dispose by will of property over which she had no testamentary capacity her executor held such as trustee for her husband.⁴ Another difference is to be noticed between the right of the husband over the specific chattels of his wife as to which she died intestate, and that over her choses in action as to which she died intestate. At the moment of her death intestate, in the case of the first kind of property, they passed without more by the mere operation of law into the possession of the husband; but if, in the case of the second class of property, the husband died intestate before reducing them into possession, double administration on the part of his next of kin was necessary; they must have first taken out letters of administration to his estate to constitute themselves his legal personal representatives, and then afterwards taken out letters to administer his wife's estate.⁵ But where the beneficial interest in the property, as under a settlement, is in the next of kin, then administration will be granted to them and not to the husband's representatives.⁶ Where letters of administration have been improperly granted to a wife's next of kin without the knowledge of the husband, he is entitled to have them revoked without proving fraud on the part of those to whom they were granted.⁷ But where a husband deserts his wife, who makes a will without appointing an executor, administration *cum testamento annexo* may be granted without his being cited.⁸

Husband's
right to ad-
minister under
the M.W.P.
Act, 1882.

The above is a short exposition of the law in relation to the husband's right to administer to his wife's estate unaffected by any change that may be wrought by the recent Married Women's Property Act of 1882, and where the property of the spouses does not come under the provisions of that Act, the law, as above laid down, will still hold good. The wife has under the recent Act in many ways no *fuller power* over her property than she had over her equitable separate estate. Its effect is to put in abeyance the marital right over her property of every kind and description by entitling her to hold it as separate property, *and as though she were unmarried*. At this point the Act stops; and a strong

¹ 29 Car. II. c. 3, s. 25.

² 22 & 23 Car. II. c. 10.

³ *Squib v. Wyn*, 1 P. Wm. 378.

⁴ See *Smart v. Tranter*, 43 Ch. D. 587.

⁵ *Re The Goods of Harding*, L. R. 2 P. & D. 394.

⁶ *Re The Goods of Pountney*, 4 Hagg. 289. See *Partington v. Att.-Gen.* L. R. 4 H. L. 100.

⁷ *Copeland v. Simister*, [1893] P. 16.

⁸ *In The Goods of Shoosmith*, [1894] P. 23.

argument that it was intended here to stop may be adduced from the language of section 25 of the Divorce Act, 1857,¹ which provides that property acquired by a married woman during a judicial separation "on her decease . . . shall, in case she shall die intestate, go as the same would have gone *if her husband had been then dead*," and the court has acted upon this provision.² No such words are to be found in the Act of 1882; and even allowing to the fullest that it abolishes his rights, *quâ* marital rights, over his wife's property, it refrains from saying that he is not the proper person to administer to her estate, and does not deprive him of the right to do so. There is an excellent reason for the provision in the Divorce Act, namely, that as the husband has been in fault, and obliged his wife to have recourse to the protection of the court, he ought not on her death to seize upon the property which she may have become entitled to or earned during the separation, and their relations to one another are practically those of strangers. But the Act of 1882 is not directed against the husband's misconduct, but only against his absolute rights, and it has been decided that the Act does not deprive him of his rights to administer to his wife's undisposed-of personal estate.³ Under the Intestates Estates Act, 1890,⁴ the right of an intestate's widow to share not only in a part but to take the whole of her dead husband's property if it does not exceed £500 is fully recognized; now if a married woman were deemed really a *feme sole* for all purposes, she ought not to be regarded as a married woman at all for the purpose of taking his property as against the claims of his next of kin. But the Act, it is suggested, has perhaps introduced a modification of his right to administer; one of the obvious aims of the Act is to assist the wife's creditors, and to prevent the rules of law from defeating their just claims. The effect of this would be that the husband in the future must administer to his wife's estate before he can claim her specific chattels and chattels real, just as he must administer in order to reduce her choses in action into possession, and he will hold her chattels personal in possession as trustee for her creditors, and will be entitled to retain the balance only after paying them what is due and owing.⁵ It has, however, been suggested that the Act does not appear to affect in any way his right to take *jure mariti* his wife's specific chattels and chattels real vested in her before the Act came into force.⁶ This may be the better view. The debts of her creditors will be paid *pari passu*.⁷

Modification introduced by M.W.P. Act, 1882;

husband must administer to all kinds of property belonging to wife.

¹ 20 & 21 Vict. c. 85.

² See *Re The Goods of Worman*, 29, L. J. P. M. & A. 164; *In The Goods of Byrne*, 84 L. T. 570.

³ *Re Lambert's Estate*, *Stanton v. Lambert*, 39 Ch. D. 626.

⁴ 53 & 54 Vict. c. 29.

⁵ See *Askew v. Rooth*, L. R. 17 Eq. 426.

⁶ See *Wms. Exors.* 521 n, 523, 529.

⁷ *Owens v. Dickenson*, Cr. & Ph. 48. See also *London Chartered Bank of Australia*

Death of
husband before
administering.

A question may arise under the new Act whether, in the event of the husband dying before administering to his wife's estate, his or her personal representatives will be entitled to administer to her estate. Formerly the practice in such a case was for the court to grant administration to the husband's representatives.¹ Of course, where her representatives are beneficially interested, on the principle that the grant follows the interest, they will have letters granted to them.² But the doubt will arise when they are not so beneficially interested. It will probably be held that, as under the present state of the law the husband's right to administer is purely personal, it will not descend to his representatives.³ Where husband and wife die by some common death, such as shipwreck or the like, there is no presumption of survivorship between them;⁴ neither is there a presumption that they died at the same time;⁵ but it is a question of fact to be determined on the evidence;⁶ and the *onus* of proof of death or survivorship is on the person affirming the fact.⁷

No presumption
of
survivorship.

If the husband is cited and does not choose to appear he may be passed over and administration granted to the wife's next of kin.⁸ This right to administer to his wife's estate is not one that vests in his trustee in bankruptcy;⁹ though under certain circumstances the court will grant administration to his trustee;¹⁰ as where he is an undischarged bankrupt and his property is vested in an official receiver, and the deceased's estate is small. The court in such an instance will dispense with the citation of the husband and the next of kin.¹¹

Executors of
married
woman no
longer take as
appointees
under a power,
but in a repre-
sentative
capacity.

Formerly, if a *feme covert* made a will, and disposed of only part of her separate property, since her executors did not take *jure representationis*, but as appointees under a power to the extent of the fund appointed, they did not take the undisposed-of part, and the husband took that portion of it which consisted of specific

v. *Lempriere*, L. R. 4 P. C. 572; overruling *Shattock v. Shattock*, L. R. 2 Eq. 182. For the modern practice of granting letters of limited administration to the husband of his wife's undisposed-of property, see chap. xv.

¹ *Partington v. Att.-Gen.* L. R. 4 H. L. 100.

² *In The Goods of Pountney*, 4 Hagg. 289; *In The Goods of Crause*, 1 Sw. & Tr. 146.

³ If the Court so hold, a considerable alteration will have been effected in the rights of the personal representatives of the husband. Formerly, where the husband died before taking out letters of administration, or after having taken them out, before reduction of all his wife's choses in action, administration to the wife was required either generally, or *de bonis non*; but the wife's administrator was in equity held as a trustee for the husband's representatives; but now the wife's administrator will administer for the benefit of her next of kin. If, on the contrary, the former law is still held to govern, disputed questions as to survivorship, where the death of the husband and wife were practically synchronous, will still arise.

⁴ *In The Goods of Alston*, [1892] P. 142; *In The Goods of Beynon*, [1901] P. 141.

⁵ *In The Goods of Selwyn*, 3 Hag. 784.

⁶ *Wing v. Angrave*, 8 H. L. Cas. 183.

⁷ *In The Goods of Shilling*, Deac. & Sw. 183.

⁸ *In The Goods of Moore*, [1891] P. 299.

⁹ *In The Goods of Turner*, 12 P. D. 18.

¹⁰ *In The Goods of Conally*, 74 L. T. 461.

¹¹ *Ibid.*

chattels *jure mariti*, and that which consisted of choses in action after taking out letters of administration.¹ Since the coming into force of the Married Women's Property Act, 1882, her executors will no longer take as appointees of a specific fund, but in a full representative capacity, and would therefore take the undisposed-of portion in their own right, but would hold it, it is submitted, as trustees for the husband, subject to the payment of the wife's debts and liabilities.

To carry out the purposes of the Married Women's Property Act, 1882, "the legal personal representative of any married woman shall in respect of her separate estate have the same rights and liabilities, and be subject to the same jurisdiction, as she would be if she were living."² In most cases where the wife dies intestate, the husband on taking out letters of administration will become her personal legal representative. The effect of this section is, that whoever represents the dead wife will, so far as her separate property is concerned, have the same right to prosecute claims, and be responsible for the same liabilities as she would have had, and been responsible for, if she had lived, or had been a single woman; but it would not keep alive claims by or against her which, by force of the principle expressed in the maxim, *actio personalis moritur cum personâ*, would abate on her death.

Legal personal representative of married woman under M.W.P. Act, 1882.

In former editions the fact that only the legal personal representative of the wife was mentioned, and not her heir-at-law or other real representative was pointed out as a *casus omissus* on the part of the Legislature; but now by the Land Transfer Act, 1897,³ one object of which is to establish "a real representative," the representation of the heir-at-law is altogether abolished; and where real estate is vested in any person without a right in any other person to take by survivorship, it now on his death, notwithstanding any testamentary disposition, devolves upon and becomes vested in his personal representatives or representative from time to time, as if it were a chattel real vesting in them or him; and probate and letters of administration may be granted in respect of real estate only, although there is no personal estate.⁴ These provisions do not apply to *copyhold land* or *customary freehold land* in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant. Under this Act the court may, in its discretion, refuse to grant administration to the husband, but grant letters to the heir-at-law of the deceased wife.⁵

Personal representative created real representative by Land Transfer Act, 1897.

except in case of copyhold land.

¹ Lewin, 972.

² Sect. 23.

³ 60 & 61 Vict. c. 65.

⁴ Sect. 1, and see sects. 2, 3, and 4.

⁵ In *The Goods of Arden*, [1898] P. 147.

If at the time of the wife's death there was any dispute between her and her husband as to what was or was not her separate property, and she left an executor, he could proceed to enforce any claim she might have had against him; and if under such circumstances she died intestate leaving creditors, one of her next of kin, or even a creditor, would be constituted the administrator of her estate in preference to her husband, in order that the claims of the creditors might be safeguarded against the marital rights.¹

Right of widow to administer to husband's estate, and her share in it under Statute of Distributions.

Grant of administration to widow a matter of discretion for the court.

(2) *Right of the Widow to Administer to her Husband's Estate, and her Share in it under the Statute of Distributions.*—It has been assumed that as in the case of dower, so in that of the widow's right to administer to her husband's estate, and in her right to a distributive share of his personal property undisposed of by him at his death, no alteration of the law has been effected by the Married Women's Property Act, 1882, for there is nothing directly or indirectly in that statute to affect it. As to the right of the widow, the statute 21 Hen. VIII. c. 5, s. 3, directs that the Ordinary shall grant administration "to the widow *or* the next of kin, *or* to both," at his discretion. The statute further directs the Ordinary, in his discretion, to grant administration to *both* the widow and the next of kin; and it has been held that the grant may be to them both jointly, or both separately, by committing several administrations of several parts of the goods of the intestate. But the court prefers a sole to a joint administration, and never forces a joint one; and in modern practice the election of the judge is in favour of the widow, under ordinary circumstances. But the court has always held that administration may be granted to the next of kin, and the widow be set aside upon good cause; for instance, if she has barred herself of all interest in her husband's personal estate by her marriage settlement, or where she is a lunatic, or where she has eloped from her husband, or cohabited in his lifetime with another man, or has lived separate from her husband;² but justifying security may be required of the administrator to the extent of the widow's share in the property.³ A strong case, however, must be made out against her;⁴ and the circumstance of the wife having married again is no valid objection.⁵ However, if the deceased left children, one of whom, supported by the

¹ These claims could be enforced under section 17 by the creditors in the same way as the wife could enforce them, in the event of disputes as to her separate property arising between him and herself. If there was a dispute between the husband and wife, and the latter died leaving the former her executor, any claim that she might have had against him would at once cease and be determined.

² *In The Goods of Anderson*, 33 L. J. P. 149; *In The Goods of Stevens*, 67 L. J. P. 60.

³ *In The Goods of Stevens* (*ubi sup.*).

⁴ *In The Goods of Cory*, 84 L. T. 270.

⁵ *Webb v. Needham*, 1 Add. 494.

rest, applies for administration, the second marriage *might* induce the court to prefer the child.¹

On the analogy of the case of *Frampton v. Stephens*,² in which the court held that a woman divorced for adultery lost her right to dower, a woman similarly instanced loses her right to administer to, or share in, the distribution of her late husband's estate;³ so, if she has lived separate up to the time of his death.⁴ But where a mere charge of misconduct is preferred against the widow, she will not be passed over without being cited;⁵ a wife who has had her marriage annulled is disentitled to an annuity which had been bequeathed to her by the testator as "my said wife so long as she shall continue my widow and unmarried."⁶

Under the Statute of Distributions,⁷ where the husband dies intestate, leaving a widow and a child or children, or lineal descendants of such child or children, the widow is entitled to one-third of his personal estate, after satisfying his debts and liabilities;⁸ if there be no child or children, nor any legal representatives of them, then one moiety of the estate is to be allotted to the wife of the intestate.⁹ This disposition is based upon the early practice of the Ordinary. The executorship or distribution of the personal estate (*bona mobilia*) of testators or intestates was originally in the hands of the clergy, who, after the lord of the deceased had taken his heriot, proceeded to deal with his available property on the following lines: First, the payment of his funeral expenses; next, payment of his debts; the residue was then divided into three parts; one-third was apportioned to the widow, and one-third to the children (if any); if there were no children, the half was apportioned to the widow.¹⁰ The *other third part*, when the testator or intestate left children, and the *other half* when he did not leave any, was appointed by the Ordinary *in pios usus*; it was over this share of his property that the deceased was supposed to have full disposing power; but the Church took good care that the disposition should be altogether for the welfare of the soul of the departed; in other words, applied it for its own benefit.¹¹ A widow as such is not next of kin in blood to her husband, so that where, in a settlement of a fund belonging to the husband, the ultimate limitation was for

Widow's share under Statute of Distributions.

A third to be shared with child, or children, &c.

A moiety, if husband leave no child, &c.

¹ 1 Wms. Exors. 327.

² 21 Ch. D. 164. See *Pettifer v. James*, Bunb. 16. But it would be otherwise where she had been judicially separated from him because of his cruelty. *Re The Goods of Ihler*, L. R. 3 P. & D. 50.

³ *In The Goods of Nares*, 13 P. D. 35.

⁴ *Chappell v. Chappell*, 3 Curt. 429.

⁵ *In The Goods of Middleton*, 14 P. D. 23.

⁶ *Re Boddington, Boddington v. Clairat*, 25 Ch. D. 685.

⁷ 22 & 23 Car. II. c. 10.

⁸ Sect. 5. The other moiety goes to the next of kin, or to the Crown, if there be no next of kin.

¹⁰ Bracton, ff. 60, 61.

¹¹ Instead of the Church, the next of kin or the Crown now take the half when the intestate leaves no child or children.

his "next of kin in blood according to the Statute of Distribution of the estates of intestates' effects, and in the manner in which the same would have been distributed if he had died possessed thereof intestate," the words "next of kin in blood" excluded his widow.¹

Right of widow
barred.

This right of the widow may be barred by an ante-nuptial settlement excluding her from her distributive share, even though she were an infant at the date of its execution.² It may also be affected by her husband's covenant to leave her a portion of his personal estate. The rule in such cases is—where the husband covenants to leave, or that his executor shall pay, to his widow a sum of money or part of his personal estate, and he dies intestate, so that she becomes entitled to her portion under the statute, such distributive share shall be a performance of the covenant, and she cannot claim both, unless the distributive share is less than the covenanted; in which case the former is a satisfaction *pro tanto* of the latter.³ But where the husband's covenant is entire, and the provision therein expressed to be secured to the wife is such that the covenant in part might be held to be performed by the widow's distributive share under her husband's intestacy (according to the authorities cited in the footnote below), and the remaining part could not be so considered, then, since the covenant is entire, the court will not split it, and hold a performance and a non-performance at the same time.⁴

It may not be amiss to point out that the expression "thirds of personal estate at common law" is not only inaccurate, but meaningless. A widow has no common law right to a third of her intestate husband's property, for it is purely statutory; and even under the statute her share may amount to a half, and not to a third.⁵

Widow's right
to intestate
and childless
husband's
whole estate
real and per-
sonal where
net value not
exceeding
£500.

In the case of small estates a complete alteration has been made in this branch of the law by the Intestates' Estates Act, 1890;⁶ and where a man dies intestate after September 1, 1890, leaving a widow but no issue, instead of the widow being entitled to her one-third of the realty in the shape of dower, or her half of the personalty (or both), she becomes entitled to the whole.⁷ The effect of this is that where the net value of the estates does not exceed £500, neither the heir-at-law nor the next of kin of

¹ *Re Fitzgerald's Trusts*, 58 L. J. Ch. 662.

² *Earl of Buckinghamshire v. Drury*, 2 Ed. 60.

³ 2 Rep. H. & W. 44; 2 Wms. Exors. 1236; *Blandy v. Widmore*, 1 P. Wms. 324; *Lee v. D'Aranda*, 1 Ves. Sen. 1; *Garthshore v. Chalkie*, 10 Ves. 1.

⁴ 2 Rep. H. & W. 52; *Pouch v. Stratton*, 4 Ves. 391; *Lang v. Lang*, 8 Sim. 451. See also *Young v. Young*, 1 R. 5 Eq. 615.

⁵ The words "common law" must be construed as equivalent to the terms "according to the general law"; the effect of expressing that a settlement on the wife is to be in bar and satisfaction of dower or thirds which she could or might claim at common law, &c., will exclude her from her share under the statute. *Gurly v. Gurly*, 8 Cl. & F. 743; 2 Wms. Exors. 1234.

⁶ 53 & 54 Vict. c. 29.

⁷ Sect. 1.

the intestate need be cited.¹ If the widow die without taking out administration to her husband, letters of administration under the circumstances will be granted to her executor and not to the husband's next of kin;² or, if she die intestate, to her administrator without citing the next of kin.³ Where the net value of the estates shall exceed £500, the widow shall be entitled to £500 absolutely and exclusively, and shall have a charge upon the whole of such real and personal estates for the £500;⁴ and as between the real and personal representatives of the intestate, such charge shall be borne and paid in proportion to the values of the real and personal estates respectively.⁵ A widow's dower is therefore subject to a *pro rata* abatement in respect of the charge in her favour imposed by this Act on her intestate husband's estate.⁶ This provision for the widow is in addition and without prejudice to her interest and share in the residue of the real and personal estates of the intestate remaining after the payment of the said sum of £500 in the same way as if the residue had been the whole of the intestate's real and personal estates and the Act had not been passed.⁷ This Act only applies where there has been a total and not partial intestacy.⁸

To sum up the law on this branch of the question, a husband and wife who as regards each other's property are under the provisions of the law existing previously to the Married Women's Property Act, 1882, are in this position. If the husband die intestate possessed of realty, the widow, unless barred, will be entitled to her dower; if possessed of personal estate, she will be entitled to a third or a half of it, as the case may be. If the wife die intestate, both as regards her real and personal property settled to her separate use, the husband will, in respect of her real estate in possession, whether in fee or in tail, become tenant by the curtesy, and subject to such right the land will descend to her heirs; his interest in her separate chattels real will be the same as, and limited by, her interest. As regards her personal chattels in possession, he will perhaps take them *jure mariti*; and as regards her choses in action, he will become entitled to them only on taking out letters of administration to her estate. Summary.

With regard to those spouses who are affected by the provisions of the Married Women's Property Act, 1882, the widow's interest

¹ *In The Goods of Everley*, [1892] P. 50.

² *In The Goods of Bryant*, [1896] P. 159.

³ *In The Goods of Green*, 84 L. T. 61.

⁴ Sect. 2.

⁵ Sect. 3. Section 5 provides for ascertaining the net value of the realty; and section 6 for ascertaining the net value of the personalty.

⁶ *Re Charriere, Duret v. Charriere*, [1896] 1 Ch. 912.

⁷ Sect. 4.

⁸ *Re Twigg's Estate, Twigg v. Black*, [1892] 1 Ch. 579. In this case, Chitty, J., said the expression "testamentary expenses of the intestate in section 6 is equivalent to expenses of letters of administration and of administration generally, and do not refer to the expenses of one who has died partially testate."

in her husband's realty and personalty will remain unaffected where he dies intestate. It is true under that Act the marital rights during coverture have been practically abrogated, but so they were in equity over the separate estate; and there is no internal evidence that it was the intention of the Legislature to abrogate, or even to modify them on the termination of the coverture, in favour of the wife's heirs or next of kin, or of the Crown. Accordingly, if the wife die intestate as to real and personal property, all of which must by force of the statute be separate property, her husband's interest in it will enable him as before to take her specific chattels and chattels real in possession *jure mariti*, and her choses in action and chattels not so vested after grant of letters of administration, with this important exception, that he will hold such property as a trustee charged with the payment of her debts. He will, then, still take as tenant by the curtesy her real estate, whether in fee or in tail; her chattels real, and her general personal property, whether specific chattels or choses in action, after taking out letters of administration; and, after satisfying the claims of her creditors, will be entitled to retain the surplus, to the exclusion of her next of kin. Where the husband dies without issue and wholly intestate after September 1, 1890, and leaves real and personal property not exceeding £500 in net value, the widow takes the whole absolutely to the exclusion of any heir-at-law and next of kin; and where the estate exceeds in value £500, the first charge on such real and personal property is the widow's right to the £500, in addition to her dower right and right to her thirds under the Statute of Distributions.

CHAPTER XII.

THE GENERAL EFFECT OF COVERTURE.

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MARRIAGE not only modifies the status of those who enter upon it, but also affects certain acts and deeds done by the husband or wife anterior to it, and, further, puts the spouses under certain disabilities both with respect to one another and third persons. Formerly, more than at the present day, marriage operated to alter the position and acts of the wife; but a most marked and sensible change in the law has been gradually worked out to her advantage, and there are but few matters which call for special treatment under such a heading as that of the present chapter, "The General Effect of Coverture."

Marriage operates to extinguish or revoke several acts of the wife done when a *feme sole*. Thus, a will made by a single woman was and is revoked on her marriage,¹ and the consent of the husband did not make it the less invalid;² and though the wife survive the husband, such a will did not until quite recently survive after the husband's death without republication.³ A warrant of attorney executed by her *dum sola* is revoked by her

Ante-nuptial
acts and agree-
ments of hus-
band and wife.

Will of wife.

A warrant of
attorney.

¹ 1 Vict. c. 26, s. 18.

² *Doe dem. Hodsdon v. Staple*, 2 T. R. 684.

³ *Lewis's Case*, 4 Burn's Eccl. Law. 51; *Long v. Aldred*, 3 Add. 48. See 56 & 57 Vict. c. 63. "If a *feme sole* makes her will and afterwards marries, such subsequent

Submission to
arbitration.

marriage;¹ so is her submission to arbitration, if the marriage take place before the award.² This would seem to be still the law, notwithstanding the Married Women's Property Act, 1882.³

Will of hus-
band;

Before the Wills Act, 1837 (1 Vict. c. 26), the marriage of a man did not revoke his will, and it was not until the birth of a child unprovided for that his will, whether of real or personal property, was revoked, and the revocation was by operation of law and not dependent on any question of intention on the part of the testator.⁴ But by section 18 of that Act, it was provided that

revoked by
marriage.

"Every will made by a man or woman after January 1, 1838, shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin, under the Statute of Distributions").

Marriage thus operates as an absolute revocation of a man's will, whether affecting real or personal property. The provisions of this section, while not applying to the wills of foreigners domiciled abroad but marrying in England,⁵ do apply to their wills if domiciled in England at the time of their marriage.⁶ The rule of law embodied in this section is part of the English matrimonial and not testamentary law.⁷ There seems to be good sense at the base of this rule now embodied in section 18, for if an ante-nuptial will were to be valid, and either spouse died shortly after the marriage without revoking his or her antecedent will a serious wrong might be done; for the right of the husband, on the one hand, to take *jure mariti* his wife's personal chattels and choses in action, and, on the other, the right of the wife to her share of her husband's movables under the Statute of Distributions, might be defeated. This rule has had legislative sanction accorded to it in matters of a quasi-testamentary character; for the marriage of a member of a registered friendly society (other than a benevolent or working man's club) operates as a revocation of any previous nomination by him or her of the

marriage is a revocation and entirely vacates the will, and although she should survive the husband, a will made before marriage will not revive upon his death without republication." 1 Wms. Exors. 49.

¹ *Anon.* Salk. 117.

² *Charnley v. Winstanley*, 5 East, 266. "If there be others joined with her as co-plaintiffs or co-defendants in the reference, her marriage avoids the submission as to all of them. But as it is a voluntary act on her part, it is a breach of her agreement to abide by and perform the award, and renders her and her husband liable to an action." Russ. Arbit. 158, and the cases there cited.

³ 45 & 46 Vict. c. 75.

⁴ *Marston v. Roe*, *dem. Fox*, 8 Ad. & El. 14.

⁵ Per Lindley, M.R., in *Re Martin, Loustalan v. Loustalan*, [1900] P. 211.

⁶ *Re Martin, Loustalan v. Loustalan* (*ubi sup.*).

⁷ Per Vaughan Williams, L.J. *ibid.* 240.

person to whom any sum of money payable by the society on the death of the member shall be paid.¹ The payment, however, by the society in ignorance of the subsequent marriage shall be a discharge to the society.²

Marriage, as a general rule, by the common law extinguished all prior obligations and contracts between husband and wife,³ unless made on the occasion and in consideration of the marriage, or where the obligation was of a continuing nature, as a covenant by the husband to pay his wife an annuity during her life; in which case it was suspended and not extinguished during coverture, and might be enforced by the wife for arrears accrued after the death of her husband.⁴ So, again, if the contract has been entered into by the husband with his wife (*dum sola*) in her representative capacity as executrix, &c., it was only suspended during coverture.⁵ Where a woman as such executrix, or administratrix, married one who was debtor to the estate, the debt was not released.⁶ A bond entered into by a woman with her intended husband was not void in equity,⁷ and is now good both at law and in equity. There does not seem to be any doubt that since the passing of the Married Women's Property Act, 1882,⁸ conferring on a married woman full powers of contracting with her husband, and preserving her property to her, ante-nuptial bonds and agreements (other than marriage settlements), between a man and woman who afterwards intermarry will not be affected by the mere marriage.

Effect of marriage on ante-nuptial agreements.

Bond between intended husband and wife good in equity, and now at law.

The effect of marriage is to bring not only the wife but also the husband under certain disabilities and incapacities in reference to each other during the existence of the coverture. Many of these disabilities and incapacities which once flourished at common law have, by the operation of equitable principles or by direct legislative sanction, quite disappeared; those which flowed from the theory of the merged or suspended separate existence of the wife, rendering the married couple incapable of treating each other as a separate person in relation to their contracts and property, have been altogether abrogated by positive enactments. Accordingly, it will be found that most of the incapacities of the spouses, though still incapacities by the common law, are such

Post-nuptial transactions between husband and wife.

¹ 59 & 60 Vict. c. 25, s. 56 (1).

² Sect. 60 (1).

³ Co. Litt. 294 b; *Smith (et uxor) v. Stafford*, Hobart, 216.

⁴ *Clark v. Thompson*, Cro. Jac. 571; *Caye v. Acton*, 1 Ld. Raym. 522; *Fitzgerald v. Fitzgerald*, L. R. 2 P. C. 63. In *Pridgeon v. Pridgeon*, 1 Ch. Cas. 117, it was held that where an agreement is between *baron* and *feme* before marriage that the wife may dispose of part of her estate, or for a thing which is future to the marriage, such an agreement is not dissolved by the marriage; yet where an agreement is to have execution during the coverture, there the marriage extinguisheth the agreement.

⁵ Co. Litt. 351 b; *Richards v. Richards*, 2 B. & Ad. 452.

⁶ *Dorchester v. Webb*, Cro. Car. 372.

⁷ *Cannel v. Buckle*, 2 P. Wms. 243.

⁸ 45 & 46 Vict. c. 75.

but in name. There are, however, a few incapacities to which attention will now be drawn.

Mutual incapacity to give evidence for and against each other in criminal matters.

Mutual Incapacity to give Evidence for and against each other in Criminal Matters.—It may be laid down as a general proposition that at common law husband and wife are mutually incompetent to give evidence either for or against each other in criminal matters;¹ but if one spouse makes a statement in the presence of the other spouse who is charged with an offence, and the latter either authorizes the statement or does not contradict it, evidence of such statement may be given.² Even in collateral matters neither is bound to answer questions which would tend directly to criminate the other;³ but the proof of the one is not to be excluded in such cases, because it may afford the means of procuring evidence against the other.⁴ The exceptions to this rule are for the protection of husband and wife; where the charge is one of personal violence of husband against wife or of wife against husband, the husband or wife can swear the peace against the other. Some are also for the advantage of the public;⁵ thus, the dying declarations of the one are admissible against the other on a charge of murder.⁶ In an abduction case likewise, where the wife has been forcibly married, her evidence has been admitted.⁷ Where the wife is deserted by the husband and becomes chargeable to the parish, she is now an admissible witness against him when he is charged under the Vagrancy Acts.⁸ There has been another special exception created by the Married Women's Property Act, 1882,⁹ and Married Women's Property Act (Amendment Act), 1884,¹⁰ which enables husband and wife to give evidence against each other, on the prosecution of the one by the other for larceny of his or her property committed on desertion.¹¹ In recent statutes creating new offences there is usually a clause enabling the husband or wife of the accused to be called as a witness for the prosecution or the defence; thus, in a prosecution under section 156 of the Army Act, 1881,¹² and section 4 of the Explosive Substances Act, 1883,¹³ the wife or husband of the

Exceptions.

¹ Gilb. Evid. 119; 2 Hawk. P. C. c. 46, s. 70; Bull. N. P. 286; 16 & 17 Vict. c. 83, s. 2.

² Reg. v. *Mallory*, 13 Q. B. D. 33.

³ Reg. v. *Gleed*, cited 3 Russ. Crim. 623.

⁴ *Rex v. All Saints, Worcester*, 6 M. & S. 194. This case seems to be an authority for holding that the one may be called to contradict the other.

⁵ *Lord Audley's Case*, 3 St. Tr. 401; *Reg. v. Jellyman*, 8 C. & P. 604.

⁶ *Woodcock's Case*, 1 Leach, 500.

⁷ 1 East, P. C. c. 11, s. 5, p. 454; *Rex v. Wakefield*, cited 3 Russ. Cr. 625.

⁸ 61 & 62 Vict. c. 36, s. 4 overruling *Reeve v. Wood*, 34 L. J. M. C. 15.

⁹ 45 & 46 Vict. c. 75, ss. 12, 16.

¹⁰ 47 & 48 Vict. c. 14, s. 1. It was found necessary to pass this Act to enable husbands to give evidence against their wives in a prosecution for stealing their property when leaving or deserting them, in consequence of the decision of the Court for Crown Cases Reserved in *Reg. v. Brittleton*, 12 Q. B. D. 266.

¹¹ By section 3 of 16 & 17 Vict. c. 83, mutual communications of husband and wife were privileged; but it is now doubtful whether such communications which would have direct bearing upon what may be called "statutory matrimonial larceny" will be so privileged.

¹² 44 & 45 Vict. c. 58.

¹³ 46 & 47 Vict. c. 3.

accused may, if she or he thinks fit, be called as an ordinary witness in the case; so, under the Criminal Law Amendment Act, 1885,¹ the husband or wife of the person charged shall be a competent but not compellable witness except before a grand jury; and a husband or wife of a person charged under the Prevention of Cruelty to Children Act, 1904,² and the Betting Loans (Infants) Act, 1892,³ is a competent but not compellable witness. On trials of indictments or other proceedings instituted for the purpose of trying or enforcing a civil right only the wife or husband of any defendant is not only an admissible but compellable witness.⁴ Under the Sale of Food and Drugs Act, 1875,⁵ the wife is a competent witness on behalf of her husband; and if she were to carry on a trade separately from her husband and were charged with an offence under this last Act, her husband would now be a competent witness in her favour.

The strong tendency of recent years to treat husband and wife as competent witnesses affecting each other in criminal cases has been developed in the Criminal Evidence Act, 1898,⁶ under the provisions of which, so far as the *defence* is concerned, the husband or wife of every person charged with an offence becomes a competent witness at every stage of the proceedings.⁷ But where a person is charged with an offence under the Acts mentioned below,⁸ then the wife or husband of such person may be called as a witness for the prosecution.⁹ Under this fourth section of the Criminal Evidence Act, 1898, the wife or husband of the person charged may of course be called as a witness for the defence; but where she or he is so called as a witness, it must be on the application of the person charged.¹⁰ This section in terms provides that the wife or husband of the person charged may be called as a witness for the prosecution or *defence* and *without the consent* of the person charged. It is difficult to give a clear meaning to this provision. Why, because under some of the earlier Acts the wife or husband was a competent witness for the defence, should she or he be now a compellable witness for the prosecution? Again, it provides that a wife or a husband may be called as a witness for the defence without the consent of the person charged; but that is unworkable in practice; for no witness for the *defence* can be called against the will of the person charged. One anomalous result of the strict construction of this section is, that if a wife see her husband commit a murder she

Husband or wife competent and compellable witness against each other.

¹ 48 & 49 Vict. c. 69, s. 20.

² 4 Edw. VII. c. 15, s. 12.

³ 55 Vict. c. 4, s. 6.

⁴ 40 Vict. c. 14, s. 1.

⁵ 38 & 39 Vict. c. 63, s. 21.

⁶ 61 & 62 Vict. c. 36.

⁷ Sect. 1.

⁸ The Vagrancy Act, 1824 (5 Geo. IV. c. 83); Offences against the Person Act, 1861 (24 & 25 Vict. c. 100, ss. 48-55, which deal with the ravishment, abduction and defilement of women); The Married Women's Property Act, 1882 (45 & 46 Vict. c. 75, ss. 12, 16); The Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69); and the Prevention of Cruelty to Children Act, 1901 (4 Edw. VII. c. 15).

⁹ Sect. 4.

¹⁰ Sect. 1 (c).

may not be called as a witness against him; but may be so called if she could incriminate him on a charge of rape. If husband or wife be called, he or she is not compellable to disclose any communications made to each other during marriage.¹ The absence of husband or wife from the witness box is not to be commented on by the prosecution.²

In civil matters husband and wife competent witnesses for and against each other.

In civil matters husband and wife are now under no disability in respect of competency to give evidence for or against each other in suits in which one or other or both may be parties. Formerly, but not so very long ago, they were incompetent to give evidence for or against each other in civil causes;³ and the true ground for excluding their evidence was the supposed manifest interest of the parties, and their proneness to commit perjury on each other's behalf. In 1853 an Act, known as "The Evidence Amendment Act,"⁴ rendered husbands and wives of parties admissible witnesses for or against each other in civil suits,⁵ but provided that "no husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage";⁶ and that "nothing herein shall render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband in any criminal proceeding."⁷ There was a further provision as to their mutual incompetency in "any proceeding instituted in consequence of adultery"; but this was repealed by the third section of the Evidence Amendment Act, 1869,⁸ which enacted that: "The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding, provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery";⁹ but this section does not permit discovery to be required from a party to divorce proceedings, when it is sought for no other purpose than to prove such party guilty of adultery.¹⁰ It has been held that this proviso does not render inadmissible the evidence of a witness

Evidence Amendment Act, 1853.

Evidence Amendment Act, 1869.

¹ Sect. 1 (d).

² Sect. 1 (b).

³ 1 Bl. Com. 443. "But in trials of any sort they are not allowed to be evidence for or against each other, partly because it is impossible their testimony should be indifferent, but principally because of the union of person; and therefore if they were admitted to be witness for each other they would contradict one maxim of the law: '*Nemo in propria causa testis esse debet*'; and if against each other, they would contradict another maxim: '*Nemo tenetur seipsum accusare*.'"

⁴ 16 & 17 Vict. c. 83.

⁵ Sect. 1.

⁶ Sect. 3.

⁷ Sect. 2.

⁸ 32 & 33 Vict. c. 68.

⁹ Sect. 3.

¹⁰ *Redfern v. Redfern*, [1891] P. 139.

that he or she has committed adultery, but the witness may claim the protection of the statute.¹

Before the passing of the Act 16 & 17 Vict. c. 83, providing for the privilege of communications made between husband and wife during marriage, the judges had construed the common law rule which excluded the evidence of husband and wife as affecting widowers and widows, so that they were not compelled to disclose communications made to them by their dead spouses,² and also those who had been divorced were included.³ Where a husband has permitted his wife to act for him in any department of business, her admissions or acknowledgments in respect of such business are admissible to charge him; but she cannot bind him by admissions, unless they fall within the scope of the authority which she may reasonably be presumed to have derived from him.⁴

Admissions by wife in matters falling within the scope of her authority bind husband.

Mutual Incapacity to Steal from one another.—By the common law a husband and wife cannot steal from one another, not only because of the supposed unity of their persons, but also because of the terrible scandal which would be provoked by the sight of the husband or wife having recourse to the criminal law to settle their mere property disputes;⁵ and the adultery of the wife does not give her husband the right to prefer a charge of larceny against her.⁶ But the Legislature, in 1882,⁷ has thought fit to alter the common law on the matter in some respects, and to enact that a wife may have redress against her husband, and a husband against his wife, by way of criminal proceedings (as though they were strangers to each other), for the protection and security of each other's property,

Incapacity to steal from one another.

Exception. Alteration of the law by M. W. P. Act, 1882.

“provided always, that no criminal proceeding shall be taken by any wife against her husband by virtue of this Act while they are living together, as to or concerning any property claimed by her, nor while they are living apart, as to or concerning any act done by the husband while they were living together concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife.”

This proviso applies under section 16, *mutatis mutandis*, to the right of the husband to institute criminal proceedings against his wife.⁸ It seems probable that it will be difficult under these

¹ *Hebblethwaite v. Hebblethwaite*, L. R. 2 P. & D. 29.

² *O'Connor v. Marjoribanks*, 4 M. & G. 435.

³ *Munroe v. Twistleton*, Peake, Add. Cas. 221; *Aveson v. Lord Kinnaird*, 6 East, 192.

⁵ Hale P. C. 514; 3 Co. Inst. 110.

⁴ *Meredith v. Footner*, 12 L. J. Ex. 183.

⁶ *Reg. v. Kenny*, 2 Q. B. D. 307.

⁷ 45 & 46 Vict. c. 75, ss. 12, 16. Section 12 gives the wife power to institute criminal proceedings, and section 16 enables the husband to do the same.

⁸ It does not seem necessary to confine criminal proceedings under these sections to simple larceny; but charges involving obtaining money or chattels under false pretences, or larceny by a trick, might well be preferred, for they are all offences concerning property, and seem to be within the mischief of this section.

sections to secure convictions, except in those cases where the husband or the wife has actually left the other, feloniously taking away property belonging to the other, or after the leaving or desertion is complete the deserting spouse returns and unlawfully takes away the goods of the other. As they cannot prosecute each other for acts done during cohabitation, it is difficult to see how an act done when "about to leave¹ or desert," that is, before cohabitation is suspended or interrupted, can be the subject of criminal proceedings.² Runaway wives and their avouterers are more likely under the present law than under the past to be cautious in ascertaining whether the property taken with them in their flight does or does not belong to the deserted husbands. But the avouterers are not liable to be indicted for feloniously receiving the stolen property, as such theft by deserting wives is not a felony at common law or under the Larceny Act, 1861, but is made a special crime by the Married Women's Property Act, 1882;³ thus, for the same reason, an indictment charging as a *misdemeanour* the receipt of chattels stolen by a wife from her husband knowing them to have been stolen is good.⁴ Whether a husband or wife can "steal" from each other while cohabiting is doubtful; if he or she can steal from each other, as neither can proceed criminally against the other, and on the principle of *Reg. v. Streeten*,⁵ a receiver of the property if capable of being "stolen" would not be liable on an indictment for its reception with guilty knowledge. In an indictment under either of these sections it is not necessary to aver that the accused was the spouse of the person, prosecuting, or had taken the goods when leaving or deserting or about to leave or desert the other spouse.⁶

Mutual Incapacity to sue each other for Torts.—It has been shown that a wife may sue the husband on a contract in respect of her separate property;⁷ it now remains to be seen how far husband and wife can sue each other for personal torts. By the common law neither husband nor wife can sue each other for personal torts committed by one against the other—such as libel, slander, assault and battery, or injury arising out of negligence;

Felonious reception of property stolen by one spouse from another not indictable.

Incapacity to sue each other for torts.

Common law incapacity to sue for personal torts.

¹ It is difficult to attribute an exact meaning to the word "leave." Take, for instance, a husband who is known by his wife to be faithless to her, though he cohabits with her, and who by a clear trick obtains money from her. She has a well-founded suspicion from experience on his departure that he will live upon the money with his mistress at some distant town, and will not return to her for at least a week. Can she, under the above section, institute criminal proceedings against him? If so, many an angry wife will be able to lock up her husband who tricks her out of a few shillings wherewith to go and have a drunken bout out of the reach of her reproachful tongue.

² For what is "desertion," see *post.* chap. xvii.

³ *Reg. v. Streeten*, [1900] 2 Q. B. 601.

⁴ *Rex v. Payne*, [1906] 1 K. B. 97.

⁵ *Rex v. James and Johnson*, [1902] 1 Q. B. 540.

⁷ *Woodward v. Woodward*, 11 W. R. 1007.

⁵ *Ubi sup.*

and this was so not only on the ground of the merged existence of the wife, and their incapacity to acquire civil rights against each other,¹ but also on account of the unseemly spectacle presented by husband and wife seeking pecuniary compensation from each other for personal wrongs. This disability to sue each other for personal torts still exists; and neither spouse can take criminal proceedings against the other for defamatory libel.² But by the twelfth section of the Married Women's Property Act, 1882, a married woman is rendered capable of suing her husband for a tort committed by him in respect of her separate property, whether she brings her action during the continuance of the coverture, or after its dissolution by divorce, or suspension by judicial separation. Under this section she may bring an action of detinue of her personal property against her husband; and section 17 of this Act, which provides a summary remedy for the settling disputes as to the title to or possession of property between husband and wife is not a bar to the bringing of such action.³ In the case of *Re Wingfield and Blew (Solicitors)*,⁴ the costs of solicitors who acted for a wife in an action of detinue brought by her against her husband were held properly recoverable by them against him. If such action were not maintainable the Court of Appeal would assuredly have disallowed them. This section does not seem to confer upon the husband a corresponding right to sue his wife for a tort which she may commit in respect of his property.⁵

Exception :
M.W.P. Act,
1882.

So far as the present law is concerned, a married woman cannot be said to labour under many incapacities; indeed, of late years she has become a spoilt child of the Legislature. The favour she has met with in the courts of equity and at the hands of the Legislature has, at all events as regards her relations towards her own property, rendered her practically independent of her husband, and placed her on an almost equal footing with unmarried women and widows. As between the spouses equity principles working out in the doctrine of the separate estate,⁶ and legislation adopting those principles, had removed nearly all their former common law mutual disabilities, and had left very little to distinguish their relations to each other from those of two strangers in like matters where property only is concerned: they now can contract with, and give, and lend to each other.

Former incapacities and present capacities of the wife.

¹ *Phillips v. Barnett*, 1 Q. B. D. 440.

² *Reg. v. Lord Mayor of London*, 16 G. B. D. 772.

³ *Larner v. Larner*, [1905] 2 K. B. 539. Section 17 seems limited to questions of title or possession of property, and probably property of the nature of stocks, funds and shares in public bodies, and was not intended to prevent a married woman from suing her husband in tort and for damages, who had wrongfully injured or detained her personal property.

⁴ [1904] 2 Ch. 665.

⁵ Unless the words "except as aforesaid, no husband or wife shall be entitled to sue the other for a tort," give the husband by implication the right to sue his wife for a like tort as for which she may sue him, namely, in respect of his property.

⁶ See *post*, Separate Estate, chap. xv.

To employ a metaphor, the hard fetters of the common law were dissolved in the crucible of the Separate Use. A superficial observation will discover that a married woman is to all intents and purposes under no disability in respect of her property; and (except where she is expressly restrained from anticipating it) she may deal with it either by act *inter vivos* or by will, as though she were a single woman. Radical changes of the law on this subject have been brought about; and where these have been but recently introduced, it has been thought advisable to state shortly what the old law was, not only because the old may in some cases be still operative, but because some knowledge of the past is at times necessary to explain the present.

At common law a married woman could not acquire, whether by gift or contract, any real or personal property, except with her husband's consent, and without such consent the gift or contract was void.¹ But in equity she in time was enabled to receive and retain control over a gift of real or personal property, if to her separate use, without the consent of her husband. At common law all the real property which she possessed at the time of her marriage, and that which she subsequently acquired, was enjoyed by her husband for his life, even after her death if he became tenant by the curtesy;² and he took the rents and profits of it, and could make leases of it to last at least for his life.³ All her personal property at the time of marriage, and subsequently acquired by her, her husband took *jure mariti*. Equity again interposed on the wife's behalf, and by its operation real property settled to her separate use remained unaffected by any rights of her husband other than those which he might acquire as tenant by the curtesy; and her personal property similarly settled remained her own, and her husband took no interest in it during coverture; but if she made no disposition of it, and he survived her, he took it *jure mariti*. The wife's power of disposition *inter vivos* over her real estate could be exercised with her husband's consent by levying a fine or suffering a recovery, or on the abolition of these assurances in 1834,⁴ by a deed executed by herself and her husband, but separately acknowledged by her as directed by the Act. She could also dispose of her separate personal property vested in her, which she was not restrained from anticipating, as if she were a single woman; her reversionary personal property not settled to her separate use she could not alienate until she was enabled to do so under the provisions of Malins' Act, 1857.⁵ She now possesses complete power of disposition

To hold and dispose of property.

Incapacity at common law.

Capacity in equity.

Complete power of disposition over

¹ Co. Litt. 3 a.

² See *ante*, chap. xi.

³ 1 Br. H. & W. 196, and the authorities there cited for and against this proposition.

⁴ 3 & 4 Wm. IV. c. 74, which is now modified by the Conveyancing Act, 1882 (45 & 46 Vict. c. 39, s. 7).

⁵ 20 & 21 Vict. c. 57. See *post*, chap. xv.

over her real and personal property, unless expressly restrained.¹ real and personal property. As regards her testamentary capacity, it is enough at this point to say that she was incapable of aliening her real property so as to defeat her husband's curtesy rights,² and she could not dispose by will of her personal property, for at law she had nothing to will away, though if her husband had allowed her to retain or acquire any property, she might with his consent will it away, but he might revoke his consent at any time before her will was admitted to probate.³ Equity, however, gave her considerable power of alienation over her separate estate, both real and personal;⁴ and by the Married Women's Property Act, 1882,⁵ she possesses complete testamentary control over all property, of whatsoever nature and whenever acquired.⁶ Section 2 of the M.W.P. Act, 1882, sect. 2. Act enacts:

"Every woman who marries after the commencement of this Act shall be entitled to have and to hold as her separate property, and to dispose of in manner aforesaid, all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill."

Section 5 enacts:

Sect. 5.

"Every woman married before the commencement of this Act shall be entitled to have and to hold, and to dispose of in manner aforesaid as her separate property, all real and separate property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act, including any wages, earnings, money, and property so gained and acquired by her as aforesaid."

Capacity of women married before January 1, 1883.

In *Howard v. Bank of England*,⁷ it was held that the Married Women's Property Act, 1870, did not enable a married woman to dispose of and deal with trust property as a *feme sole*, but the Act of 1882⁸ confers that right and power upon her. A married woman was enabled by 11 Geo. IV. and 1 Wm. IV. c. 65, s. 3, to appoint an attorney for the purpose of being admitted to her copyhold lands. This is of little practical value now, for a married woman can herself come forward and claim to be admitted, for in respect of her copyhold as well as freehold land she is deemed to be a *feme sole*.⁹

¹ 45 & 46 Vict. c. 75, ss. 1 (sub-s. 1), 19.

² *Lewis Bowles' Case*, 11 Co. Rep. 79.

³ See *Willock v. Noble*, L. R. 7 H. L. Cas. 580.

⁴ *Taylor v. Meads*, 34 L. J. Ch. 203.

⁶ *Ibid.* ss. 1 (sub-s. 1), 2, 5.

⁸ Sect. 18.

⁵ 45 & 46 Vict. c. 75.

⁷ L. R. 19 Eq. 295.

⁹ 57 & 58 Vict. c. 46, s. 46.

Formerly coverture acted as a disability in the case of a wife ; but she was protected from the effect of that disability in the case of bringing actions on her contracts by being excepted out of the provisions of the Statute of Limitations, which did not begin to run against her till her coverture had ceased.¹ It is really difficult to see how in former days she could have acquired a right of action founded on her own post-nuptial contract. But since the passing of the Married Women's Property Act, 1882, she is for this purpose discoverable.²

To make a will.
Common law
incapacity to
make will.

To make a Will.—A married woman was, generally speaking, at common law incapable of making a will affecting the legal estate in her freehold or copyhold lands, or disposing of her personal property. As regards her realty, she was disqualified, because excepted out of the testamentary powers conferred by the Statute of Wills,³ which enactment provided that "the will or testament of a married woman made of any manor, lands, tenements, or other hereditaments, by any woman covert, should not be good or effectual in law." The Wills Act of 1837⁴ did not give her any powers which she did not before possess. If a single woman make her will and afterwards marry, the subsequent marriage is a revocation, and entirely vacates the will by force of the eighteenth section of the last-mentioned Act, which declares that "every will made by a . . . woman shall be revoked by . . . her marriage (except a will made in exercise of a power of appointment), when the real or personal estate thereby appointed would not in default of such appointment pass to . . . her heir, customary heir, executor, or administrator, or the person entitled as . . . her next of kin, under the Statute of Distributions." Formerly, such a will, if she survived her husband, did not revive unless republished;⁵ but under the Married Women's Property Act, 1893,⁶ her will, if made during coverture, will not require to be re-executed or republished after the death of her husband, and will speak as from her death. This alteration of the law affects the will of every married woman who dies after the Act has come into operation.⁷

Republication
after husband's
death formerly
necessary, but
not now.

But under certain circumstances here enumerated, she was enabled at common law to make an effectual testament of her personal property, notwithstanding the fact of the coverture. She could make a valid will where she bargained with her husband for the exercise of the right,⁸ or obtained his assent to a particular will, and he survived her and assented to its being

Common law
exceptions as
to personal
property.

Husband's
assent to par-
ticular will.

¹ See 21 Jac. I. c. 16, s. 7.

² See *Lowe v. Fox*, 15 Q. B. D. 667.

³ 34 & 35 Hen. VIII. c. 5.

⁴ See 1 Vict. c. 26, s. 18.

⁵ 1 Wms. Exors. 39.

⁶ 56 & 57 Vict. c. 63, s. 3. This section renders section 24 of the Wills Act, 1837, applicable to the will of a married woman made during coverture.

⁷ *Re Wylie, Wylie v. Moffat*, [1895] 2 Ch. 216.

⁸ 1 Rep. H. & W. 170.

proved.¹ It was not enough to show a general assent, but that he had consented to the particular will made by her;² he could therefore revoke his consent at any time during his wife's life or after her death; though in the latter case, if he acted upon, or agreed to her will, he is not at liberty to retract his assent and oppose probate.³ This bargaining on the part of the wife and the consent of the husband were necessary; for as marriage operated as a conveyance of the wife's personal property to the husband, she had nothing upon which to exercise her disposing power, and the husband's assent amounted to a waiver of his rights as his wife's administrator.⁴

She was permitted with her husband's consent to make a will of property coming to her *en autre droit*, as executrix, because of the absence of any beneficial interest on his part in such property.⁵ The effect of her will was to pass by a pure right of representation to the testator or prior owner such of his personal assets as remained outstanding, but no beneficial interest in them which the wife might have had in them.⁶ She might also have made a will in cases where her husband was *civiliter mortuus*, as where he was banished or undergoing a sentence of transportation or penal servitude.⁷

She might make a will of her real or personal property where she acted under a power of appointment by will;⁸ and her will was a good execution of the power, if the power subsisted at the time of her death, though the will was executed before she acquired the power.⁹ If she made a will during coverture in virtue of powers vested, it was not revoked by her surviving her husband.¹⁰

In equity, however, the right of disposition by will of her separate personal estate (*corpus* and savings) has been long conceded to a *feme covert* as being a necessary incident to the enjoyment of her separate property.¹¹ She could also dispose of her equitable interests in realty, for both the Wills Acts of Henry VIII.¹² and of 1837¹³ were deemed in equity to apply only to lands of a married woman of which her husband stood seised *jure uxoris*, but not to lands settled to her separate use; and she could

Will made in exercise of a power.

Power of disposition in equity.

¹ *Willock v. Noble*, L. R. 7 H. L. 580.

² *Henley v. Phillips*, 2 Atk. 40.

³ 2 Br. H. & W. 65; see *In The Goods of S. A. Cooper*, 6 P. D. 34; *Elliot v. North*, [1901] 1 Ch. 424.

⁴ 2 Br. H. & W. 66 *et seq.*

⁵ *Scammell v. Wilkinson*, 2 East, 552; *S. C. Stephens v. Bagwell*, 15 Ves. 139.

⁶ 2 Br. H. & W. 64.

⁷ *Ibid.* 39.

⁸ Sugd. Pow. 153.

⁹ *Thomas v. Jones*, 32 L. J. Ch. 139.

¹⁰ See *Willock v. Noble*, L. R. 7 H. L. 580.

¹¹ *Fettiplace v. Gorges*, 1 Ves. 46, 3 Bro. C. C. 8; *Sturgis v. Corp*, 13 Ves. 196; *Taylor v. Meads*, 34 L. J. Ch. 203.

¹² 34 & 35 Hen. VIII. c. 5.

¹³ 1 Vict. c. 26.

dispose of the whole of her interest in them.¹ For fuller details as to the testamentary powers of married women in equity and under the Act of 1882, see the chapter on Separate Estate.²

Husband and wife can make a joint will, and if not revoked by either party on the death of one, the court will grant probate of so much of it as becomes operative through the death.³

Where husband and wife perish through one and the same catastrophe, as by shipwreck, and there is no evidence as to who was the survivor, there is no presumption in law of survivorship in favour of either spouse.⁴ The *onus* of proof of death or survivorship is on the person affirming the fact.⁵

¹ *Taylor v. Meads* (*ubi sup.*).

² *Post*, chap. xv

³ *In The Goods of Piazzì Smyth*, [1898] P. 7.

⁴ *Wing v. Angrave*, 8 H. L. Cas. 183; *In The Goods of Alston*, [1892] P. 142.

⁵ *In the Goods of Shilling*, Deac. and Sev. 183. See *ante*, p. 238.

Joint will of
the spouses.

No presumption
of
survivorship.

CHAPTER XIII.

OBLIGATIONS ARISING OUT OF COVERTURE.

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IN this chapter the various liabilities that arise from the fact of Introductory
coverture will be discussed. As may be expected, coverture even
now affects the husband with more liabilities and obligations than
the wife. Only one obligation devolves upon the wife, that of
supporting under certain circumstances her husband and family ;

and this is a creature of statute. In addition to the obligation of supporting his wife and family, the husband on marriage takes over (if the phrase may be used) his wife with certain liabilities. In former days those liabilities contracted by the wife as well before as during the married life were more burdensome upon the husband than at the present time. At the close of a preceding chapter¹ it was shown that the incidence of the matrimonial burdens is still unequal; but apart from these, the interference of the Legislature has equalized the other burdens; and with but an exception here and there, the husband is not responsible for more than his fair share of liability involved in his wife's transactions, and then in return for advantages and profits obtained through her. In the matter of post-nuptial debts and contracts made and entered into by the wife, unless the wife can prove that she was acting as her husband's agent, he is as free and irresponsible as a stranger to her.

For convenience of discussion and reference, under the heading of each of the different liabilities of the husband will be treated the liability of the wife in that respect, though such liability is not one that, strictly speaking, arises out of coverture. These topics are now of greater intricacy than in earlier days.

The chapter will be divided into three sections:—

SECTION 1.—(a) Obligation of Husband to support Wife and Family.

(b) Obligation of Wife to support Husband and Family.

SECTION 2.—(a) Liability of Husband for Wife's Ante-nuptial Debts and Contracts.

(b) Liability of Wife for her Ante-nuptial Debts and Contracts.

SECTION 3.—(a) Liability of Husband for Wife's Ante-nuptial and Post-nuptial Torts.

(b) Liability of Wife for her Ante-nuptial and Post-nuptial Torts.

(c) Liability of Husband and Wife for Wife's Ante-nuptial and Post-nuptial Breaches of Trust and Devastavit.

SECTION 1.

(a) *Obligation of Husband to support Wife and Family.*

The husband, as head of the household, is under an obligation to support and maintain his wife and family,² in which latter

¹ Chap. ix.

² The duty of the father and mother to support their children will be discussed in Part II., Parent and Child, chap. ii.

term are included the children of his wife by a former marriage.¹ This obligation was, until quite recently, rather moral than legal. It was not until his wife became actually chargeable to a parish or union that he was liable to be punished for refusing or neglecting to support her, and then only as a rogue and vagabond.² The wife, in truth, had no claim on her husband, even when starving and deserted by him; the guardians or overseers of the union or parish, the charges of which have been increased by his wrongdoing, alone could bring the offender to justice under the Poor Law Amendment Act, 1868, and recover the price of her maintenance from him,³ and the justices in making their order are not limited by the amount already allowed by the guardians, or obliged to wait till they have fixed the sum.⁴ A husband is not liable to be proceeded against under the Poor Law Amendment Act, 1868,⁵ or under the Vagrancy Act, 1824,⁶ so as to be compelled to maintain his wife who has left him and lives in adultery, or as a prostitute.⁷ But where a wife is justified in leaving her husband owing to his treatment, and is afterwards requested by him to return to cohabitation, but is justified in refusing to return to it, an order may be made on him by justices under this Act to contribute to her support.⁸ A husband is liable for the necessary support of his wife though judicially separated from him, if he has been ordered by the court to pay alimony to her and does not pay it.⁹ But where the marriage is dissolved he is not liable in any sense for her maintenance or support;¹⁰ unless an order has been made on him to secure to his divorced wife a certain sum of money whether gross or annual,¹¹ or monthly or weekly.¹² If the husband does not keep up the payment of the alimony, the wife cannot prove in his bankruptcy for the arrears.¹³ This liability to support the wife even after divorce may be enforced against the husband by injunction restraining him from dealing with his property where an order has been made against him under section 32 of 20 and 21 Vict. c. 85 securing to her a sum for her maintenance;¹⁴ but

Statutory liability when wife becomes chargeable.

Desertion and prostitution of wife free husband from chargeability.

When husband liable to support divorced wife.

¹ *Hill v. Hill*, [1902] P. 140.

² Under 5 Geo. IV. c. 83, ss. 3 and 4; *Heath v. Heape*, 26 L. J. M. C. 49.

³ 31 & 32 Vict. c. 122, s. 33.

⁴ *Dinning v. The South Shields Union*, 13 Q. B. D. 25.

⁵ 31 & 32 Vict. c. 122, s. 33.

⁶ 5 Geo. IV. c. 83, s. 3; *Rex v. Flintan*, 1 B. & Ad. 227. Under the Act of 1824, a *bonâ fide* belief on the part of the husband that his wife has committed adultery is a defence. *Morris v. Edmunds*, 77 L. T. 56. This is strictly a penal statute, and no order of maintenance can be made under it.

⁷ *Culley v. Charman*, 7 Q. B. D. 89; see *Sibbett v. Ainsley*, 3 L. T. 583; *Mitchell v. Torrington Union*, 76 L. T. 724.

⁸ *Thomas v. Alsop*, L. R. 5, Q. B. 151.

⁹ 20 & 21 Vict. c. 85, s. 26.

¹⁰ See *Watkins v. Watkins*, [1896] P. 225.

¹¹ 20 & 21 Vict. c. 85, s. 32.

¹² *Re Hawkins, Ex parte Hawkins*, [1894] 1 Q. B. 25.

¹³ *Newton v. Newton*, [1896] P. 36.

¹⁴ 29 & 30 Vict. c. 32, s. 1.

such injunction will not be granted in the case where in a suit by the wife for judicial separation an order for alimony *pendente lite* has been made against the husband.¹

Liability of
soldiers.

There is a difference between the liability of a civilian and that of a soldier in respect of the maintenance of his wife, for though a soldier is liable to contribute to her maintenance as though he were a civilian, yet execution in respect of any order or decree for such maintenance is not to issue against his person, pay, arms, ammunition, equipment, instruments, regimental necessities or clothing; nor is he liable to be punished for deserting his wife or leaving her chargeable.² When an order or decree for maintenance has been made on a soldier, it is to be sent to a Secretary of State, who may order a certain portion of his pay according to his rank to be deducted and appropriated towards the maintenance of his wife.³

This obligation on the part of the husband to provide for the maintenance and support of wife and family leads up to the consideration of his liability to be bound by the contracts of his wife for the supply of necessities. But this question will be dealt with in chap. xiv. which treats of Contracts by Married Women.

Husband
deserting, &c.,
wife, when
ordered to
maintain her
and family
under 58 and
59 Vict. c. 39.

Under the Summary Jurisdiction (Married Women) Act, 1895,⁴ which repeals the Married Women (Maintenance in case of Desertion) Act, 1886,⁵ a husband who deserts his wife, or is guilty of persistent cruelty to her, or wilfully neglects to provide reasonable maintenance for her or her infant children whom he is legally bound to maintain, and has by such cruelty or neglect caused her to leave and live separately and apart from him,⁶ may be ordered on a summons heard by justices in petty sessions⁷ to pay to his wife or some other person on her behalf a weekly sum not exceeding £2.⁸ The adultery of the wife, unless condoned or connived at or condoned to by the husband's wilful neglect or misconduct, disentitles her to an order under this Act.⁹ The resumption of cohabitation after an order of judicial separation under this Act annuls the order for payment of the allowance, in like manner as an order of judicial separation pronounced by the High Court is annulled by the resumption of cohabitation by the parties;¹⁰ and where the wife again leaves

¹ *Carter v. Carter*, [1896] P. 35; 20 & 21 Vict. c. 85, s. 22. For the husband's liability for his wife's alimony *pendente lite*, see the different treatises on Divorce Law; for such maintenance is of a peculiar character, and limited to the jurisdiction and practice of the Divorce Court.

² 44 & 45 Vict. c. 58, s. 145 (1).

³ *Ibid.* sect. 145 (2).

⁴ 58 & 59 Vict. c. 39.

⁵ 49 & 50 Vict. c. 52.

⁶ Sect. 4.

⁷ See sect. 8. It is difficult to see how the procedure is to be carried out under this section when the husband has been convicted on indictment.

⁸ Sect. 5.

⁹ Sect. 6. For the effect of the proviso in this section, see per Jeune, P., in *Symons v. Symons*, [1897] P. 176.

¹⁰ Sect. 7.

her husband she cannot enforce the payment of the allowance.¹ The presumption of non-access of husband and wife dates from the time of making the order, as in the case of a judicial separation pronounced by the Divorce Court;² and on an application to vary an order on account of the wife's adultery, evidence, whether that on the part of the husband or the wife, in proof of the paternity of a child born nine months after the separation is receivable.³

It was held under the earlier Act that hearing the case of Procedure, assault and ordering the husband to pay the wife an allowance formed one proceeding, and the court after convicting him could not hear evidence as to his means;⁴ but it would now appear that the wife, after the conviction of the husband of an aggravated assault, may apply for a summons for an order under this Act, which is to be issued and made returnable immediately upon the conviction.⁵ This would enable the husband to call evidence as to his means, for the application for the order would be a separate proceeding. Any application to vary or discharge an order made under this Act must be made to a court of summary jurisdiction of the district in which the original order was made;⁶ and such court has power to alter, vary, or discharge any such order on satisfactory fresh evidence.⁷ Appeals under the Act lie Appeals, from any order or refusal of any order by a court of summary jurisdiction to the Probate, Divorce, and Admiralty Division of the High Court;⁸ but such can only be made as to the order for separation and maintenance, and not as regards the conviction by the Court of Summary Jurisdiction.⁹ The costs of the wife on the appeal whether it is successful or not are to be paid by the husband.¹⁰ It would seem that there is no power under section 11 in a court of summary jurisdiction to state a case for the superior court on a point of law, as the effect of the section is to give a direct right of appeal to the Probate Division, from

¹ *Haddon v. Haddon*, 18 Q. B. D. 778.

² *Hetherington v. Hetherington*, 12 P. D. 112.

³ *Ibid.*

⁴ *Powell v. Powell*, 14 P. D. 177.

⁵ Sect. 8.

⁶ Sect. 7. This includes orders made under the repealed Acts, 41 Vict. c. 19, s. 4, and 49 & 50 Vict. c. 52.

⁷ Such fresh evidence must be of a nature that would afford ground for a new trial or rehearing in any other class of case; as, for instance, evidence that could not reasonably have been made available at the date of the order, or such as must relate to something that has happened since the date of the order, and affords statutory grounds for revision. *Johnson v. Johnson*, [1900] P. 19.

⁸ Sect. 11. The justices' clerks are to take full and proper notes of the proceedings before the justices under this Act, in order to inform the Court of Appeal of what has taken place in the court below (*Robinson v. Robinson*, [1898] P. 153); and this includes the reasons given by the court below for their decision (*Cobb v. Cobb*, [1900] P. 145). For the duty of the appellant to provide two copies of the justices' clerk's notes, see *Walton v. Walton*, [1900] P. 147.

⁹ *Lewin v. Lewin*, [1891] P. 254.

¹⁰ *Ellis v. Ellis*, [1896] P. 25; *Medway v. Medway*, [1900] P. 141; *Pickavance v. Pickavance*, [1901] P. 60.

which fact it may be inferred that no other form of appeal was intended.¹ These appeals are not under the Divorce Act, but at present are governed by the practice regulated by Order LXIX., rr. 4(a), 7, 8, 10, 11, 12, and 16.² The High Court has no jurisdiction to enforce an order for payment of an allowance by injunction;³ the method of enforcing payment is the same as that for enforcing payment of money under an order of affiliation.⁴ If the Court of Summary Jurisdiction thinks that the questions between the parties can be more conveniently dealt with by the High Court, it may refuse to make an order under the Act, and in such case no appeal lies from its decision.⁵ But the High Court, or a judge thereof, may, in proceedings relating to the same subject-matter as that of the application for an order, direct the Court of Summary Jurisdiction to rehear and determine the same.⁶

(b) *Obligation of the Wife to support Husband and Family.*—

Obligation of
the wife to
support hus-
band and
family.
Not recognized
at common law.

Prior to the Married Women's Property Act, 1870, there was no common law of statutory liability on a married woman, even if possessed of separate estate, to support her husband or family. When she became a widow, and was of sufficient ability, she was at once rendered liable under the Poor Law Act of Elizabeth⁷ to maintain her children and grandchildren. In return for the benefits conferred upon her by the Act of 1870, she was rendered for the first time liable (if possessed of separate property) to support her husband and family. Before then the parish or union authorities could not come against her for the charges incurred by them, and so make her contribute towards his or their support.⁸ The Act of 1870 provided that:

"Where in England the husband of any woman having separate property becomes chargeable to any union or parish, the justices having jurisdiction in such union or parish may, in petty sessions assembled, upon application of the guardians of the poor, issue a summons against the wife, and make and enforce such order against her for the maintenance of her husband as by the thirty-third section of the Poor Law Amendment Act, 1868, they may now make and enforce against a husband for the maintenance of his wife who becomes chargeable to any union or parish. Where in Ireland relief is given under the provisions of the Acts relating to the relief of the destitute poor to the husband of any woman having separate property, the cost price of such relief is hereby declared to be a loan from the guardians of the union in which the same shall be given, and shall be recoverable from such woman as if she were a *feme sole* by such and the

¹ *Manders v. Manders*, [1897] 1 Q. B. 474.

² *Swoffer v. Swoffer*, [1896] P. 131.

⁴ Sect. 9.

³ *Gillett v. Gillett*, 14 P. D. 158.

⁵ Sect. 10.

⁶ *Ibid.* See *Foulkes v. Foulkes*, 69 L. T. 461. Fresh evidence will not be received, as a general rule, by the Divisional Court on appeal. *Snape v. Snape*, 62 L. J. P. 153.

⁷ 43 Eliz. c. 2, s. 7.

⁸ *Haley v. Bannister*, 4 Madd. 280; *Hodgens v. Hodgens*, 4 Cl. & F. 323.

same actions and proceedings as money lent.¹ A married woman having separate property shall be subject to all such liability for the maintenance of her children as a widow is now by law subject to for the maintenance of her children : provided always, that nothing in this Act shall relieve her husband from any liability at present imposed upon him by law to maintain her children."²

The husband still remained *prima facie* liable ; and separate estate was a necessary condition to a married woman being rendered liable.³ Under this fourteenth section a married woman with separate estate was held not liable for the support of her grandchildren ;⁴ but by section 21 of 45 & 46 Vict. c. 75, her liability is now extended to their support. That section is as follows :

Married woman now liable for support of her grandchildren.

"A married woman having separate property shall be subject to all such liability for the maintenance of her children and grandchildren as the husband is now by law subject to for the maintenance of her children and grandchildren : provided always, that nothing in this Act shall relieve her husband from any liability imposed upon him by law to maintain her children or grandchildren."

Her liability to maintain her husband is provided for by section 20, which is a re-enactment of section 13 of the Act of 1870. A married woman with separate estate is now brought under the operation of the Poor Law Amendment Act in respect of her statutory liability in the same manner as her husband.

On the analogy of those cases which decided that the adultery of the wife living apart from her husband disentitled her to be maintained by him, it is suggested that the adultery of the husband under like circumstances would disentitle him to be maintained by his wife.⁵

Desertion and adultery of husband disentitle him to support from wife, *quere*.

SECTION 2.

(a) *Liability of Husband and Wife for the Wife's Ante-nuptial Debts and Contracts.*

This section will be divided into two parts : (1) The liability of the husband for his wife's ante-nuptial debts and contracts ; (2) The liability of the wife for her ante-nuptial debts and contracts. Owing to frequent and recent changes of legislation, this question of the liability of the husband and wife for her ante-nuptial debts and contracts must be considered with reference to four different periods. Spouses married before August 9, 1870, are under the common law. Those married between that

Liability of husband and wife for wife's ante-nuptial debts and contracts.

¹ 33 & 34 Vict. c. 93, s. 13.

² Sect. 14.

³ See *Peters v. Cowie*, 2 Q. B. D. 131.

⁴ *Coleman v. Overseers of Birmingham*, 6 Q. B. D. 615.

⁵ See *ante*, p. 261.

date and July 30, 1874, are under the Married Women's Property Act, 1870.¹ Those married between the latter date and January 1, 1883, are under the Married Women's Property Act, 1870, Amendment Act, 1874.² Those married on and after January 1, 1883, are under the Married Women's Property Act, 1882.³

Husband's liability for wife's ante-nuptial debts. At common law.

(1) *Husband's Liability for Wife's Ante-nuptial Debts and Contracts at Common Law.*—The common law liability of husbands married before August 9, 1870, for the debts contracted by their wives before marriage has been described in the following terms:⁴ "With respect to debts which the wife contracted while single, and remained due at the time of the marriage, the husband is liable, and it is but reasonable that the law which, by the marriage, gives to the husband all his wife's personal estate in possession, and the power of recovering or disposing of all her personal property in action or in contingency, that by possibility may fall into possession during the coverture, should make the husband liable for his wife's debts owing at the period of the marriage. This liability, however, as it originates in the marriage, ceases with it, so that if the debts be not recovered during its continuance, the husband will be discharged if he survive his wife,⁵ unless the creditor had recovered judgment against them in her lifetime."⁶ The discharge of the husband will not be altered although he may have received a large fortune with his wife, and it seems to be just, because his liability would have been the same if he had received nothing with her. But a distinction prevails upon this subject which is necessary to be attended to, viz., between such part of the wife's estate which the husband receives *quod maritus*, and such portion of it as does not belong to him in that character, but as the *administrator* of his wife;⁷ in the first case, his responsibility for his wife's debts due at the period of the marriage determines with her life; in the second, he is liable to answer to the extent of her assets, for since he cannot recover her property outstanding at her death, except as her administrator, it will, as in ordinary cases, be assets to pay her debt.⁸ His liability thus extended to the full extent of the assets received by him in such capacity. In order to free the husband, it was not necessary that the coverture should be determined by death alone; the sole liability of the wife revived on a decree of judicial separation.⁹

Liability ceases with the termination of the coverture;

otherwise, where he is her administrator.

¹ 33 & 34 Vict. c. 93.

² 37 & 38 Vict. c. 50.

³ 45 & 46 Vict. c. 75. January 1, 1883, is the date of the operation of this Act.

⁴ 1 Rep. H. & W. 73.

⁵ Roll. Abr. 351.

⁶ *Heard v. Stamford*, 3 P. Wms. 409. This state of the law was distasteful to Lord Chancellor Nottingham (1676), who said he would change it. See *Freeman v. Goodham* (Goodland), 1 Ch. Cas. 295.

⁷ *Ibid.*

⁸ *Turner v. Caulfield*, L. R. 7 Ir. Ch. 347.

⁹ See *Capel v. Powell*, 34 L. J. C. P. 168.

Husbands married between August 9, 1870, and July 30, 1874.—The liability of husbands married between these dates for their wives' ante-nuptial debts was done away with by section 12 of the Act of 1870, which was to the following effect:—

Under M.W.P. Act, 1870.
Liability of husband done away with.

"A husband shall not, by reason of any marriage which shall take place after this Act has come into operation, be liable for the debts of his wife contracted before marriage; but the wife shall be liable to be sued for, and any property belonging to her for her separate use shall be liable to satisfy such debts, as if she had continued unmarried."¹

Under this section, if a woman brought a large fortune to her husband, but owed a considerable amount of ante-nuptial debts, her creditors were defeated of their just rights in respect to the property so acquired by the husband. Though of no practical importance now, the immunity of husbands from liability is preserved to them.² But in respect of their wives' ante-nuptial contracts, their primary and joint liability remained unaffected, and it was necessary to sue the husbands jointly with their wives.³

Effect of Act.

Husbands married between July 30, 1874, and January 1, 1883.—To remedy the mischief just alluded to, the Married Women's Property Act, 1874, was passed; and by its terms the liability of the husband for his wife's ante-nuptial debts was in part restored on the principle enunciated in its preamble, that it was not just that the property which a woman had at the time of her marriage should pass to her husband, and that he should not be liable for debts contracted before the marriage. But his liability for her ante-nuptial contracts was placed on the like footing as that for her debts, and for the first time a limited liability in the husband for his wife's ante-nuptial breaches of contract was recognized. The short effect of the Act is to render the husband *primâ facie* liable⁴ for his wife's ante-nuptial debts and breaches of contract, and jointly suable with her⁵ to the extent of her assets that have come into his hands.⁶ He is liable

Under M.W.P. Act, 1874.
Liability of husband for wife's ante-nuptial debts in part restored.

Husband liable only to extent of assets.

¹ *Conlon v. Moore*, 9 Ir. C. L. 190; *Axford v. Reid*, 22 Q. B. D. 548.

² By the proviso in section 14 of 45 & 46 Vict. c. 75, to the effect that nothing in that Act should operate to increase the liability of any husband married before the commencement of the Act in respect of any debt of his wife, such debt being an ante-nuptial one.

³ *Hancock v. Lablache*, 3 C. P. D. 197.

⁴ This *primâ facie* liability renders unnecessary an allegation by the party suing that the husband received assets of his wife on his marriage; it is for the husband to exercise his option of pleading non-liability under the statute. *Matthews v. Whittle*, 13 Ch. D. 811.

⁵ Sects. 1 and 2. Under section 2 the husband, in addition to any other plea or pleas, may plead that he is not liable to pay the debt, or damages in respect of the assets received by him, or he may confess his liability to some amount, and that he is not liable beyond; if he does not plead such plea he shall be deemed to confess his liability so far as assets are concerned. If the plaintiff allege assets, it would appear that the onus of proving them would be upon him. See Roscoe, N. P. Evidence, p. 1231

⁶ Sect. 2.

to the extent of the assets and funds actually in hand, and only to that extent will the judgment be joint against him and his wife, and the latter will be separately liable for the residue of the debt;¹ so, too, where a judgment is *bonâ fide* recovered in an action against him in respect of and to the extent of such assets, he is free from further liability involved by such debts in any subsequent action, though commenced before judgment signed in the first action.² Though the husband and wife may be jointly sued for the latter's ante-nuptial debts, if the action be not brought during coverture, and the wife survives, she is liable for them as a *feme sole*;³ but to render the husband liable under this Act, both he and his wife must be jointly sued as at common law during coverture.⁴ The joint liability of the spouses affected by this Act are still preserved.⁵

A husband domiciled in England and married here to a woman whose ante-nuptial domicile was Jersey (by the law of which a husband is wholly liable for his wife's ante-nuptial debts) was held liable under this Act only to the extent of the wife's assets received by him within section 5.⁶

Husbands married on and after January 1, 1883.—A husband marrying under the present law is affected by the provisions of section 14 of 45 & 46 Vict. c. 75, which, so far as is material to the subject under discussion, is as follows:—

“A husband shall be liable for the debts of his wife contracted, and all contracts entered into . . . by her before marriage, including any liabilities to which she may be so subject under the Acts relating to joint-stock companies as aforesaid,⁸ to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to, from or through his wife,⁹ after deducting therefrom any payments made by him, and any sums for which judgment may have been *bonâ fide* recovered against him in any proceeding at law, in respect of any such debts and contracts . . . for or in respect of which his wife was liable before her marriage as aforesaid: but he shall not be liable for the same any further or otherwise; and any court in which a husband shall be sued for any such debt shall have power to direct any inquiry or proceedings which

¹ M.W.P. Act, 1874, sect. 4.

³ *Chubb v. Stretch*, L. R. 9 Eq. 555.

⁴ *Bell v. Stocker*, 10 Q. B. D. 129.

⁵ See provisos in sections 13 and 14 of 45 & 46 Vict. c. 75.

⁶ *De Greuchy v. Wills*, 4 C. P. D. 362. This case was rightly decided, though on grounds which do not appear to be correct. The *semble* that if the husband (though domiciled in England) had been married in Jersey he would have become fully liable cannot be well based.

⁷ “Contract” under this Act includes the acceptance of any trust, or of the office of executrix or administratrix. Sect. 24.

⁸ See *post*, p. 273.

⁹ It seems that the words “become entitled to from or through his wife” can only refer to cases where by a settlement, if ante-nuptial (to defeat creditors), or if post-nuptial (without valuable consideration), the husband takes an estate or interest in his wife's real or personal property, or where he survives and takes her undisposed-of real or personal estate, as tenant by the curtesy, or her administrator. In any other way he cannot become “entitled,” for his marital rights are by this Act abrogated and swept away.

Wife separately liable for residue of debt, &c.

Under M.W.P. Act, 1882.

Husband liable for his wife's ante-nuptial debts and contracts to a limited extent.

it may think proper for the purpose of ascertaining the nature, amount or value of such property: provided always, that nothing in this Act contained shall operate to increase or diminish the liability of any husband married before the commencement of this Act for or in respect of any such debt or other liability of his wife as aforesaid."

Proviso preserving existing rights and liabilities.

Under this section and section 15¹ it is not now necessary to bring a joint action against the husband and wife, *i.e.*, during coverture, but the husband may be sued alone, even after the termination of the coverture; and the case of *Bell v. Stocker*² does not apply to husbands married after January 1, 1883. An unsatisfied judgment recovered against a wife for an ante-nuptial debt is no bar to an action for the same against the husband under section 13 of the Married Women's Property Act, 1882.³ But the husband cannot be made liable for an ante-nuptial debt of his wife which has accrued due against the wife more than six years before action brought.⁴

If a husband marry a wife who has entered into an ante-nuptial contract in a representative capacity as trustee, executrix, or administratrix, he will be liable on it only to the extent of her assets acquired by him (unless recovered by other creditors in *bond fide* suits). If he were to adopt his wife's contract, and in so doing alter in any way the position of the parties, it is probable that he would be held solely liable, or at any rate jointly liable with her to the full extent, though his conduct might not amount to an actual intermeddling with the trust.

Husband's liability for wife's ante-nuptial liabilities in her representative capacity.

There can be little doubt that an important alteration has been effected by the Act of 1882, as regards the husband's liability for calls, or to be made a contributory in respect of his wife's shares acquired by her before marriage. Section 78 of the Companies Act, 1862,⁵ makes a husband contributory in respect of such shares. In one case,⁶ in which the bank shares of a woman married in 1878 were settled to her separate use, and remained registered in her name till the bank suspended payment, and calls were made upon the shareholders, including the husband of the married woman, Fry, J., decided that the husband was liable to be made a contributory in respect of his wife's shares, though he had received no assets of his wife on marriage. The ground of the decision was that, although under section 75 of the Companies Act, 1862, the liability of a con-

Husband's liability in respect to wife's ante-nuptial shares, &c.

¹ But see *post*, p. 274.

³ *Beck v. Pierce*, 23 Q. B. D. 316.

⁵ 25 & 26 Vict. c. 89. Section 78 runs: "If any female contributory marries either before or after she has been placed on the list of contributories, her husband shall, during the continuance of the marriage, be liable to contribute to the assets of the company the same sum she would have been liable to contribute if she had not married; and he shall be deemed to be a contributory accordingly."

⁶ *Ex parte Hatcher, Re West of England Bank*, 12 Ch. D. 284.

² *Ubi sup.*

⁴ *Ibid.*

tributory is a debt from the time of becoming a shareholder, such a liability is a statutory liability, having very peculiar incidents of its own under section 78, which makes the husband himself a contributory, and, consequently, distinguishes such liability from ordinary ante-nuptial debts so as not to be within section 5 of the Act of 1874. In other words, the husband was a contributory in his own right, and his liability was a debt due from himself and was not a mere ante-nuptial debt of his wife.¹ Now the fourteenth section of the Act of 1882, which expressly provides that a husband shall be liable for his wife's ante-nuptial debts and contracts, "including any liabilities to which she may be so subject under the Acts relating to joint-stock companies as aforesaid, to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife, &c.; *but he shall not be liable for the same any further or otherwise,*" must be taken to overrule this decision; and by its inconsistency with section 78 of the Companies Act, 1862, to repeal it by implication.² Thus, if a husband acquires no property with his wife on marriage he is free from any liability to be made a contributory in respect of her shares; and if he does acquire property on marriage he is liable in accordance with the provisions and exceptions of the Act to be put on the list of contributories in respect of his wife's shares to the amount of the property so received by him.

Repeal by
implication of
25 & 26 Vict.
c. 89, s. 78.

Liability of
wife for her
ante-nuptial
debts and
contracts.
Before M.W.P.
Act, 1870.

Under M.W.P.
Act, 1870.

Sole liability
of wife for her
ante-nuptial
debts.

(2) *Liability of Wife for her Ante-nuptial Debts and Contracts.*—

The liability of a married woman for her ante-nuptial debts and contracts must also be regarded within the like four periods as that of the husband. At common law it has been seen that the liability of the husband for his wife's ante-nuptial debts lasted only during coverture; and if she survived she became liable;³ so, too, if he became bankrupt, she became in equity again liable to the extent of her property settled to her separate use.⁴

Wives married between August 9, 1870, and July 30, 1874.—Section 12 of the Act of 1870 released a husband from all liability in respect of his wife's ante-nuptial debts, and transferred that liability to the latter, who became liable to be sued alone for them, and any property belonging to her for her separate use was liable to satisfy such debts as if she had continued unmarried.

¹ This decision may technically be right, but seems to be somewhat opposed to the intention of the Legislature in the Married Women's Property Act, 1874.

² This argument is strengthened by section 7 of the Act of 1882, which provides that "all shares . . . which after the commencement of this Act shall be allotted to, or placed, registered, or transferred in or into, or made to stand in the sole name of any married woman, shall be deemed, unless and until the contrary is shown, to be her separate property, in respect of which, so far as any liability may be incident thereto, her separate estate shall alone be liable."

³ *Woodman v. Chapman*, 1 Chapp. 189.

⁴ *Chubb v. Stretch*, L. R. 9 Eq. 555.

These words are very full and not limited in their sense, and under them her separate property is liable to satisfy the claims of her ante-nuptial creditors, though the fund is subject to a restraint against anticipation; and it is immaterial whether her separate property was settled on marriage or otherwise, and by herself or some third person.¹ A judgment creditor's charging order on the wife's interest in a fund to her separate use was held a valid encumbrance;² and an execution creditor who had sued a married woman alone under this section was held entitled to seize jewels settled to her separate use by an ante-nuptial settlement.³ Her liability to be sued in equity for her ante-nuptial debts was a liability to be sued in equity for the purpose of attaching her separate estate.⁴ There is no need, in entering up the judgment on such an ante-nuptial debt against her, to prove the existence of separate property at the date of the judgment.⁵ The proper form of judgment in this class of action is given in *Axford v. Reid*.⁶ Women married between these two dates are still solely liable (if at all), notwithstanding recent changes in legislation.⁷

Wives Married between July 30, 1874, and December 31, 1882 Under M.W.P. Act, 1874.
—As the wife could defeat her creditors under the foregoing state of affairs by marrying without a settlement, in which case her husband took all her property not settled to her separate use, but was not liable to be sued for her ante-nuptial debts, this mischief was remedied by the Act of 1874,⁸ which rendered the husband and wife jointly liable for her ante-nuptial debts, the husband's liability being proportioned to the amount of the assets received by him in right of his wife.⁹ Though the liability of the husband to the extent of the assets received by him in right of his wife is joined to that of the wife under this statute, yet the liability of her separate property (though subject to the restraint against anticipation) to make good the claims of her ante-nuptial creditors remains the same.¹⁰

Wives Married on and after January 1, 1883:—

“A woman after her marriage shall continue to be liable in respect and to the extent of her separate property for all debts contracted . . .” Under M.W.P. Act, 1882. Wife's separate estate primarily liable for ante-nuptial debts and contracts.

¹ *Axford v. Reid*, 22 Q. B. D. 548.

² *Sanger v. Sanger*, L. R. 11 Eq. 470; *London and Provincial Bank v. Bogle*, 7 Ch. D. 773.

³ *Williams v. Mercier*, 9 Q. B. D. 337.

⁴ *Per Cotton, L.J.*, in *Ex parte Jones, Re Grissell*, 12 Ch. D. 484, 491.

⁵ *Downe v. Fletcher*, 21 Q. B. D. 11.

⁶ 22 Q. B. D. 548. “It is adjudged that the plaintiffs do recover the sum of £ and costs to be taxed against the defendant (the married woman), such sum and costs to be payable out of her separate estate whether subject to any restraint against anticipation or not, and not otherwise.” It must be remembered that this decision affects only those married women who come within the provisions of the Act under discussion.

⁷ 45 & 46 Vict. c. 75, s. 13 (proviso).

⁸ 37 & 38 Vict. c. 50.

⁹ See section 5 of 37 & 38 Vict. c. 50.

¹⁰ *Axford v. Reid*, (*ubi sup.*).

by her before her marriage; . . . and she may be sued for any such debt; . . . and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property; and, as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts . . . and for all costs recovered in respect thereof: provided always, that nothing in this Act shall operate to increase or diminish the liability of any woman married before the commencement of this Act for any such debt . . . as aforesaid, except as to any separate property to which she may become entitled by virtue of this Act, and to which she would not have been entitled for her separate use under the Acts hereby repealed or otherwise, if this Act had not passed."

Probable effect
of the new
state of the
law on this
point.

The effect of this section enables the ante-nuptial creditor to be paid out of the whole of the property of the married woman, so far as it is not affected by a valid settlement. The Statute of Limitations now runs against her creditors, for the fiduciary character of her separate property no longer exists as a necessary ingredient.¹ This alteration in the law is of the utmost moment, and it is not too much to say that that it revolutionizes ideas that were current on this subject. Up to this time the husband had been primarily liable either to the full extent of his assets at common law, or to the more modified extent under the Married Women's Property Act, 1874. But now a woman married after January 1, 1883, is made for the first time primarily liable for her ante-nuptial debts and contracts. Not only is the former protection of coverture taken away from her, but she is rendered solely and primarily liable for these liabilities, both where her creditor chooses to proceed against her single-handed, and where he brings his action jointly against her and her husband, and the latter insists upon being recouped for any expenses and charges to which he may have been put in the action in which he is found to be not liable in respect of the ante-nuptial debt, &c. But the effect of section 19, which preserves the effect of restraint upon anticipation, prevents any property settled on her subject to the fetter from being taken in execution for such debt, unless she herself while so indebted has settled it on herself on marriage.² A woman married before the above date may be sued as a *feme sole*, and her separate property rendered chargeable in respect of a liability created before the passing of the Act.³

Liability of
wife in a repre-
sentative capa-
city.

As regards the debts and contracts made by a wife before marriage in a representative capacity as trustee, executrix, or

¹ *Re Hallett, Hastings v. Hallett*, 35 Ch. D. 94.

² *Jay v. Robinson*, 25 Q. B. D. 467; *Birmingham Excelsior Money Society v. Lane*, [1904] 1 K. B. 35.

³ *The Gloucestershire Banking Co. v. Phillips*, (*Creagh, Third Party*), 12 Q. B. D. 533.

administratrix, she is *prima facie* liable for them;¹ and her husband is only jointly liable with her for them in cases where he has acquired or become entitled to any of her property to the extent of the assets received by him,² or where he has acted or intermeddled with the trust or administration.³

A married woman formerly was not at law liable during coverture to be made a contributory in respect of shares and stock held by her previous to marriage; but in equity her separate property alone was liable to make good the claims against her,⁴ and the savings of her separate estate were liable to indemnify her trustee against all calls and liabilities incurred on her behalf in respect of shares standing in the trustee's name.⁵ Under the Act of 1870 she could be the legal owner only of fully paid-up shares, debentures, or other stock in any company or society to which no liability was attached.⁶ Her husband, as has been seen, was liable as a contributory, but only for losses incurred by the company during the period of coverture,⁷ unless he himself was a shareholder;⁸ and he was not liable at all when the company's deed of settlement forbade the husbands of married women shareholders to be placed on the list of contributories in respect of their wives' shares.⁹ But under section 13 of the Married Women's Property Act, 1882, the ante-nuptial debts and contracts for which a married woman is expressly rendered liable include sums for which she may be liable as a contributory either before or after she has been placed on the list of contributories. This section then, it seems, overrules *Hatcher's Case*;¹⁰ and the married woman is rendered solely liable to the extent of her separate estate, while the husband will incur no liability at all if he has received no assets from or through his wife, and only proportionally to their extent and amount when he has so received them. As a measure of protection to companies and societies it is provided "that nothing in this Act shall require or authorize any corporation or joint-stock company to admit any married woman to be a holder of any shares or stock therein to which any liability may be incident, contrary to the provisions of any Act of Parliament, charter, by-law, articles of association, or deed of settlement regulating such corporation or company."¹¹ If it were not for this protection companies might be compelled

Married woman contributory.

Under M.W.P. Act, 1870, married woman could be owner of only fully paid up shares;

under M.W.P. Act, 1882, may be a contributory.

No company, &c., compelled to accept a married woman as a holder of shares to which liability attaches, if contrary to it regulations.

¹ Sect. 18.

² Sect. 14.

³ Sect. 24.

⁴ *Mrs. Mathewman's Case*, L. R. 3 Eq. 781.

⁵ *Butler v. Cumpston*, L. R. 7 Eq. 16.

⁶ 33 and 34 Vict. c. 93, ss. 4 and 5.

⁷ *Ex parte Hatcher, Re West of England Bank*, 12 Ch. D. 284.

⁸ *Kluht's Case*, 19 L. J. Ch. 305.

⁹ *Re London, Bombay, and Mediterranean Bank*, 18 Ch. D. 581. In this case the company had accepted the wife as a shareholder without any concealment by the husband. But where the company had no notice of the marriage of the female shareholder until the winding up, both husband and wife were held liable. *Murgatroyd's Case*, 28 L. T. (European Assurance Arbitration), 105; 17 Sol. Jour. 483.

¹⁰ 12 Ch. D. 284.

¹¹ Sect. 7.

to take as shareholders those whose only personal estate might be the shares held by them, and whom it would be futile to sue on their liability. The liability of a woman married before this Act came into operation in respect of property which, but for its passing, would not have been her separate property, is governed by the Act. As to her separate property to which she became entitled before January 1, 1883, her liability is not increased, but remains the same according to the date of her marriage before the commencement of the Married Women's Property Acts of 1870 and 1874 respectively.¹ The liability of a married woman for her ante-nuptial debts and contracts was and still is a personal one;² so that if judgment is signed against her, and she fails to satisfy it while possessing means, she may be committed to prison under the Debtors' Act.³

Husband may be sued alone or jointly for his wife's ante-nuptial debts.

The husband may be sued alone, or jointly with his wife, for her ante-nuptial debts or contracts, at the option of her creditor.⁴ Where he has received no assets he will not be liable for his wife's ante-nuptial engagements.⁵ But he may have received assets from or through her, and judgment may have been recovered against him;⁶ now, as between husband and wife, the former, if he has been made to satisfy the claims of any of his wife's ante-nuptial creditors, will be entitled to be recouped the amount from her separate estate (for she is now *prima facie* liable for her ante-nuptial debts and contracts),⁷ except perhaps in such cases as where the property was conveyed to him for the purpose of withdrawing it from his wife's creditors. It has been settled that if he has incurred any costs in defending an action in which he is held not liable, he is entitled to be recouped them, and they become a charge on his wife's separate property.⁸

SECTION 3.

(1) *Liability of Husband for Wife's Ante-nuptial and Post-nuptial Torts.*

(a) The liability of a husband for the ante-nuptial torts of his wife is to be regarded with reference to three different periods (and not four as in the case of his liability for her ante-nuptial

Liability of husband for wife's ante-nuptial and post-nuptial torts.

¹ Sect. 13.

² *Robinson v. Lynes*, [1894] 2 Q. B. 577.

³ *Dillon v. Cunningham*, L. R. 8 Ex. 23.

⁴ Sect. 15.

⁵ Sect. 15.

⁶ *Ibid.* The form of the judgment is as follows: "If it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband personally and against the wife as to her separate property; and as to the residue, if any, of such debt and damages, the judgment shall be a separate judgment against the wife as to her separate property only."

⁷ By reason of the *prima facie* liability of the wife, the creditor in any joint or sole action against the husband will be bound to prove that he has received assets from or through his wife. See *Matthews v. Whittle*, 13 Ch. D. 811.

⁸ *London and Provincial Bank v. Bogle*, 7 Ch. D. 773.

contracts), for, as will be seen, the Married Women's Property Act, 1870, did not affect it. Spouses married before July 30, 1874, are under the common law. Those married between that date and January 1, 1883, are under the Married Women's Property Act, 1874.¹ Those married on and after the latter date are under the Married Women's Property Act, 1882,² and the present law.

The theory of the unity of the spouses prevailed equally as at common law regards the torts of the wife as her contracts, and on marriage the husband became liable for all wrongs committed by her previously to, and for which she remained liable at the date of, the marriage. His liability lasted only during the coverture, and unless he was sued before it terminated (whether by death or other causes), he was released from it. This liability was joint, and rendered it necessary to sue the husband and wife jointly, and it was not enough to sue the husband alone.³ The Married Women's Property Act, 1870, left his liability untouched; for the twelfth section, which freed the husband from any responsibility for his wife's ante-nuptial contracts, omitted to include her ante-nuptial torts. This full common law liability is now of antiquarian rather than practical interest, as any such claims against a husband married to his wife before July 30, 1874, would either have been satisfied or barred by the lapse of time.

By the Married Women's Property Act, 1874, a husband marrying after that Act came into force became liable to a limited extent for his wife's ante-nuptial torts. Under section 2 of that Act, "the husband shall . . . in any action brought for damages sustained by reason of any tort committed by the wife before marriage . . . be liable . . . for the damages . . . to the extent only of the assets hereinafter specified." Those assets were specified in section 5 of the same Act. In any action against him for his wife's ante-nuptial torts the husband had to plead his non-liability, otherwise he remained liable.⁴ The husband's limited liability under the Act of 1874 is preserved to him.⁵

By the Married Women's Property Act, 1882,⁶ a husband married after the Act comes into operation (January 1, 1883) is rendered liable only for the wrongs committed by his wife before marriage, to the extent of all property whatsoever belonging to her which he shall have acquired, or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bond*

¹ 37 & 38 Vict. c. 50.

³ *Mitchinson v. Hewson*, 7 T. R. 348.

⁵ 45 & 46 Vict. c. 75, s. 14.

² 45 & 46 Vict. c. 75.

⁴ *Matthews v. Whittle*, 13 Ch. D. 8.

⁶ Sect. 14.

fide recovered against him in any proceeding at law, in respect of any such wrongs for or in respect of which his wife was liable before her marriage, but he shall not be liable for the same any further or otherwise. The husband *may* be sued jointly with his wife in respect of her ante-nuptial torts, which means that he may now for the first time be sued alone, if the plaintiff elect to proceed against him alone.¹ This will enable a person wronged by an ante-nuptial tort of the wife, to sue the husband to the extent of his liability, even after the coverture has ended.² The husband's liability for his wife's ante-nuptial devastavit is treated of elsewhere.³

Liability of husband for wife's post-nuptial torts. At common law wife could not commit a tort.

The tort must be one *simpliciter*, and not arising out of contract.

(b) At common law a married woman could not commit a tort (whether libel, slander, conversion or trespass), whether as agent for her husband or not. He was responsible for it; her torts were his torts, and he must have answered for them. Strictly speaking, she could not commit torts; they were the torts of her husband, and therefore she created as against him a liability.⁴ Whatever her tort was, the suit must have been against her husband and herself, and the suit must have been brought during coverture, but not after, unless he had in any way authorized or adopted it.⁵ The tort for which the husband was to be rendered liable must be a tort pure and simple, and not one founded on or arising out of a contract made by his wife.⁶ Thus it was laid down in *Liverpool Adelphi Loan Association v. Fairhurst*⁷ that an action did not lie against a husband and wife for a false and fraudulent representation by the wife to the plaintiff that she was sole and unmarried at the time of her signing a promissory-note as surety to him for a third person, whereby the plaintiff was induced to advance a sum of money to that person, because where "the fraud is directly connected with the contract with the wife, and is the means of effecting it, and parcel of the same transaction, the wife cannot be responsible, or the husband be sued for it together with the wife." This case cannot be any longer the law as regards the liability of the wife, for a married woman can render herself responsible on her contracts, and therefore liable on any torts arising out of her contracts. If the principle of the case is to be strictly applied, the husband must be held harmless for any torts committed by

¹ Sect. 15.

² The principle of *Bell v. Stocker*, 10 Q. D. B. 129.

³ See *post*, p. 280.

⁴ *Per* Jessell, M.R., in *Wainford v. Heyl*, L. R. 20 Eq. 321.

⁵ *Capel v. Powell*, 34 L. J. C. P. 168. In the following cases the husband has been held liable for the torts of his wife: Libel, *Head v. Briscoe*, 5 C. & P. 484; Slander, *Ferguson v. Clayworth*, 13 L. J. Q. B. 329; Assault and Battery, *Watson v. Thorpe*, Cro. Jac. 239; *Vine v. Saunders*, 4 Bing. N. C. 96; Fraud, *Charlton v. Coombes*, 5 Jur. (N.S.) 904; Trespass, *Smalley v. Kerfoot*, 2 Stra. 1094; Trover, *Keyworth v. Hill*, 3 B. & Ald. 605; *Catterall v. Kenyon*, 3 Q. B. (N.S.) 310.

⁶ *Earle v. Kingscote*, [1900] 2 Ch. 585.

⁷ 23 L. J. Ex. 163. See also *Wright v. Leonard*, 30 L. J. C. P. 365.

the wife in respect of contracts into which she is now for the first time permitted to enter. His former freedom from liability for these torts was based on his wife's incapacity to contract, and his liability ought not to be increased because of the widely extended contractual powers conferred on the married woman. Where the wife is acting as agent for her husband, he will be responsible for her fraud connected with a contract within the scope of her authority¹ or for her negligence,² and his responsibility as principal is not affected by the recent Act.

Wife as agent.

An important question is raised under the Act of 1882, whether the liability of the husband for his wife's torts committed during coverture is in any way altered in the sense of being diminished? It is no doubt altered at the option of the injured person; for by section 1, sub-section 2, a married woman shall be capable of being sued in tort in all respects as if she were a *feme sole*, and *her husband need not be joined with her as defendant*.³ If the word *shall* had been used instead of *need*, then his liability would have been altogether removed; but as the words now stand, he may be joined in an action with his wife. Thus, his full common law liability remains unaffected; and if the injured person elect to sue the husband, there is nothing in this section or in the rest of the Act to deprive the former of proceeding jointly against the husband and wife, and satisfying his claim out of the property of the husband, who in his turn would not have the same right to be indemnified out of his wife's property as he has in the case where he is made liable for her ante-nuptial torts.⁴ Such an action, it is submitted, must equally, on the ground of analogy and of the spirit of the Act, be brought during the existence of the coverture; and here again there is nothing but the common law rules to supply a guide for future practice. It is also suggested that if the injured party elect to go against the wife alone, and her separate property is found insufficient to meet the damages recovered against her, it will not be open to the plaintiff to proceed against the husband, as it were *de novo*, or for the residue of the sum recovered against his wife.

Husband's liability under Act of 1882 for torts of wife.

(2) (a) *Liability of Wife for her Ante-nuptial Torts*.—At common law a woman who had committed a tort, and then married, shifted the sole burden of responsibility from off her own shoulders, and laid it upon those of her husband to share it with her for the period of the coverture. On the termination of the coverture, whether by death, divorce, or judicial separation, she became once more solely liable in respect of the tort, unless it had been

Liability of wife for ante-nuptial torts. Joint.

Sole.

¹ *Taylor v. Green*, 8 C. & P. 316.

² *Miell v. English*, 15 L. T. 249.

³ For the effect of such permissive words, see *Julius v. The Bishop of Oxford*, 5 App. Cas. 214.

⁴ *Seroka v. Kattenberg*, 17 Q. B. D. 117; *Earle v. Kingscote*, [1900] 2 Ch. 585.

satisfied by a judgment against her husband and herself.¹ The responsibility of the husband for his wife's ante-nuptial torts was due to the same cause that rendered him liable for her ante-nuptial debts and contracts, viz., that as he took her property on marriage he took over her responsibilities. The action founded on her tort was necessarily a joint one against herself and her husband.²

No liability in equity.

In equity her separate estate was not rendered liable for her ante-nuptial torts; but the marital responsibility was equally recognized as in law.³ The liability of a woman for her ante-nuptial devastavits will be treated of lower down.⁴

Under M.W.P. Act, 1874.

The non-liability of a married woman during coverture for her ante-nuptial tort was in no way affected by the Married Women's Property Act, 1870, and her husband remained liable for it. But under the Married Women's Property Act, 1874,⁵ the liability of each was modified. The action founded on her ante-nuptial tort was primarily joint against her husband and herself, yet if he could successfully prove his non-liability under the Act on the ground of not having received through the marriage any assets in right of his wife, or of having exhausted any such assets in satisfying other ante-nuptial claims against his wife, the latter became solely liable. If the husband possessed certain assets of his wife acquired by him *jure mariti*, he was liable in damages up to their amount, and she was liable to the residue of such damages.⁶ Under the Married Women's Property Act, 1882,⁷ a married woman is now rendered for the first time liable, in the place of her husband, for her ante-nuptial torts. A woman married after that Act came into operation is now primarily liable to render compensation out of her separate property for her ante-nuptial torts.⁸ It is true that the party injured by the tort of the wife may jointly sue both the husband and the wife, but if he elect to proceed against the wife alone he can do so.⁹ As has been already shown in the case of his wife's ante-nuptial contracts¹⁰ the husband's liability is limited; ¹¹ and if in any joint action it is found that he is not liable at all, he will be entitled to judgment in his favour, whatever the result of the action against the wife may be.¹² The primary liability of the wife for her ante-nuptial torts is rather as regards her husband than as regards the party injured by her tort; ¹³ but if the latter elect to insist on his right of suing the wife alone, as he may do, her full liability is clearly established.¹⁴ The effect of a

Under M.W.P. Act, 1882.

Wife primarily liable for her ante-nuptial torts.

¹ *Vine v. Saunders*, 4 Bing. N. C. 96.

² See *Capel v. Powell*, 34 L. J. C. P. 168.

³ See *Wainford v. Heyl*, L. R. 20 Eq. 321.

⁵ 37 & 38 Vict. c. 50, s. 2.

⁷ 45 & 46 Vict. c. 75, s. 15.

¹⁰ *Ante*, pp. 266 *et seq.*

¹³ Sect. 13.

⁸ Sect. 13

¹¹ Sect. 14.

⁴ See *post*, p. 281.

⁶ Sect. 4.

⁹ Sect. 15.

¹² *Ibid.*

¹⁴ Sect. 15.

judgment against a married woman will be discussed in the next chapter.

(b) *Liability of Wife for her Post-nuptial Torts.*—The sole liability of a married woman for torts committed by her during coverture was a thing unknown to the common law, and is the direct outcome of the legislation of 1882. Before the Married Women's Property Act of that year, a married woman strictly speaking could not commit a tort; her wrong-doing was the wrong-doing of her husband, and he had to answer for it;¹ the action in respect of the tort was joint against the husband and wife, because the action could not be brought against the wife without joining the husband, and unless the husband could be joined, the party injured would be without remedy.²

Liability of wife for post-nuptial torts under M.W.P. Act, 1882.

In equity the separate estate of a married woman was rendered liable for her post-nuptial torts committed in respect of her separate property, such as fraudulent misrepresentations,³ or breaches of trust⁴ connected with it, but not for the breach of an implied duty or trust.⁵ Though her separate property was not liable for her general torts, yet its liability for specific torts committed during marriage marks a difference between a married woman's ante-nuptial and post-nuptial torts, for the former did not render her separate property liable to make compensation, while the latter did.⁶ When she is guilty of a tort, such as fraud or the like, she will not be allowed in equity to derive any benefit from it;⁷ thus she will not be allowed to disappoint a mortgagee who has advanced money on the faith of misrepresentations in which she has concurred;⁸ and she has been held bound to make good a representation made on her behalf to the court while she was an infant, on the faith of which a marriage settlement had been sanctioned.⁹ But where her separate property is subject to the restraint upon anticipation, it cannot be taken to make good her torts, for by no device can the restraint be evaded.¹⁰ In *Cahill v. Cahill*,¹¹ however, Lord Blackburn thought that where she was guilty of a fraud, though her tortious act as a contract was not binding upon her property so restrained, in equity she might be bound in conscience, and therefore compelled to fulfil her contract. But in *Bateman v. Faber*,¹² Lindley, M.R., said she is protected against her own fraud.

Liability of separate estate in equity.

Effect of restraint.

¹ *Wainford v. Heyl*, L. R. 20 Eq. 321.

² *Head v. Briscoe*, 5 C. & P. 484.

³ *Savage v. Foster*, 9 Mod. 35.

⁴ *Wainford v. Heyl* (*ubi sup.*).

⁵ *Davies v. Stanford*, 61 L. T. 234.

⁶ *Vaughan v. Vanderstegen*, 2 Dr. 363.

⁷ *Re Lush's Trusts*, L. R. 4 Ch. App. 591.

⁸ *Sharpe v. Foy*, L. R. 4 Ch. App. 35.

⁹ *Mills v. Fox*, 37 Ch. D. 153.

¹⁰ *Jackson v. Hobhouse*, 2 Mer. 483; *Stanley v. Stanley*, 7 Ch. D. 585.

¹¹ 8 App. Cas. 437.

¹² [1898] 1 Ch. 149.

For her liability to make good losses incurred through her instigation of a breach of trust under the Trustee Act, 1893,¹ see chap. xv.

Liability of married woman on dissolution of marriage.

The married woman was and remains liable for her post-nuptial torts on the dissolution of the marriage, whether by death or divorce,² unless satisfaction has been made in respect of them, or the right of action barred by lapse of time.

Married woman liable to be sued alone, at the option of the injured party.

A married woman is, under the Married Women's Property Act, 1882, now liable to be sued alone at the option of the injured party for any tort committed by her, and her husband need not be joined with her in the action.³ Satisfaction for her wrongdoing is to be made out of the separate property possessed by her at the time of the wrong done, and not, it would seem, as in the case of her contracts, out of property subsequently acquired by her. This fact must have considerable importance in suggesting to intending plaintiffs the expediency of joining or not joining the husband as defendant. It may be taken for granted that if the married woman has little or no property, the husband will, as of old, be joined in the action founded on tort brought against his wife.⁴

Liability of husband and wife for wife's ante-nuptial and post-nuptial breaches of trust and devastavits.

(3) *Liability of Husband and Wife for Wife's Ante-nuptial and Post-nuptial Breaches of Trust and Devastavits.*—It has been deemed advisable to treat this subject under a separate heading, because it involves considerations differing somewhat from those raised by ordinary torts committed by the wife, and the arrangement admits of a comprehensive treatment of the whole subject.

Liability of husband for wife's ante-nuptial breaches of trust and devastavits. Before 1874.

(a) *Ante-nuptial Breaches of Trust and Devastavits of Wife.*

(i) *Liability of Husband.*—In this, as in other cases, there are distinct periods during each of which the liability of the husband varies. Before 1874, where a *feme sole*, as a trustee, or executrix or administratrix, committed a breach of trust, or wasted the goods of her testator or intestate, and married, her husband was liable for the breach of trust⁵ or devastavit as long as the coverture lasted;⁶ and his liability for her breaches of trust extended to breaches of trust arising from her negligence, and not merely her active misconduct.⁷ On her death his liability ceased, except in cases where he became her administrator in order to reduce her choses in action into possession, when he was made liable as such administrator for her breach of trust or devastavit to the extent of the assets derived from the reduction of the chose in action into possession.⁸ Under the Married

Under M.W.P. Act, 1874.

¹ 56 & 57 Vict. c. 53, s. 45; but see *Ricketts v. Ricketts*, 64 L. T. 263; *Bolton v. Currie*, [1895] 1 Ch. 544.

² *Capel v. Powell*, 34 L. J. C. P. 168.

³ Sect. 1, sub-s. 2.

⁴ See *Seroka v. Kattenberg*, 17 Q. B. D. 117; *Earle v. Kingscote*, [1900] 2 Ch. 585.

⁵ *Palmer v. Wakefield*, 3 Beav. 227.

⁶ *Doyle v. Blake*, 2 Sch. & Lef. 239.

⁷ *Bahin v. Hughes*, 31 Ch. D. 390.

⁸ 30 Car. II. c. 7.

Women's Property Act, 1874,¹ the husband's liability for his wife's ante-nuptial breaches of trust or devastavits was limited to the amount of the assets which he had received or might have received in right of his wife. Under the Married Women's Property Act, 1882, he will be liable for her ante-nuptial breaches of trust or devastavits to the extent of all property belonging to her which he shall have acquired or become entitled to from or through her.²

Under M.W.P.
Act, 1882.

(ii) *Liability of Wife*.—The wife was not liable so long as the coverture lasted; but if she survived her husband, she became liable for her ante-nuptial breaches of trust or devastavits which had not been satisfied during coverture.³ Under the Act of 1882, she is *solely* liable for her ante-nuptial breaches of trust and devastavits, unless the husband has acted or intermeddled in the trust or administration,⁴ which words would seem to include an adoption or ratification of her acts after marriage.

Liability of
wife.

(b) *Liability of Husband and Wife for Wife's Post-nuptial Breaches of Trust and Devastavits of Wife*. (i) *Liability of Husband*.—A breach of trust or devastavit committed by the wife during coverture rendered the husband liable for it; and it was immaterial whether the wife had assumed her representative capacity before or after marriage.⁵ The marital liability varied according as the principles of the common law or of equity were applied. At common law he was liable during coverture only; and his liability was based on the assumption that as his wife had no power to act alone, his consent to her tort must be presumed.⁶ A constructive assent was sufficient, for a husband living apart (not judicially separated) from his wife was held liable for her devastavits.⁷ On the death of the wife, or the termination of the coverture, the husband's liability generally ceased, except where he was proceeded against in the capacity of administrator of his wife.⁸ In equity, however, the surviving husband (or his estate) was rendered liable for whatever sums came into his own or his wife's hands and were wasted, on the principle that as such assets were trust property, their misapplication would render the trustees chargeable in equity.⁹

Liability of
husband for
wife's post-
nuptial
breaches of
trust and
devastavits.

Liability in
equity.

If a husband personally commits waste in respect of property of a person whose executrix or administratrix his wife was, and dies leaving his wife executrix, or she becomes his administratrix,

¹ 37 & 38 Vict. c. 50, ss. 2, 5.

² 45 & 46 Vict. c. 75, s. 14.

³ See *Vaughan v. Vanderstegen*, 2 W. R. 293.

⁴ 45 & 46 Vict. c. 75, s. 24.

⁵ *Palmer v. Wakefield*, 3 Beav. 227; *Kingham v. Lee*, 16 L. J. Ch. 491. The husband was, of course, responsible for his own breaches of trust and devastavits committed during the marriage.

⁶ *Adair v. Shaw*, 1 Sch. & Lef. 263.

⁷ *Paget v. Read*, 1 Vern. 143.

⁹ *Ibid.*; *Smith v. Smith*, 4 W. R. 316.

⁸ *Adair v. Shaw* (*ubi sup.*).

and property of her testator or intestate comes into her hands, the estate of her deceased husband is *pro tanto* discharged of its liability.¹

The liability of husbands married before January 1, 1883, remains as it was before the coming into operation of the Married Women's Property Act, 1882.²

(ii) *Liability of Wife*.—A married woman was not liable during coverture for her devastavits or breaches of trust, for in the eye of the law such torts were those of her husband.³ After the termination of the coverture, the wife became liable in equity (and it seems in law also) for devastavits committed by her, and by her husband with her consent during the marriage, not only at the suit of creditors, but also of legatees, or next of kin.⁴

(c) *Liability of Husband and Wife under the Married Women's Property Act, 1882*. (i) *Liability of Husband*.—Under this Act the husband will be liable for his wife's ante-nuptial breaches of trust and devastavits only to the extent of any assets which on marriage he has acquired or become entitled to from or through her, unless he has subsequently acted on or intermeddled in the administration of the trust or of the estate of the testator or intestate, that is, has adopted his wife's wrong-doings.⁵ He will not be liable for her post-nuptial breaches of trust or devastavits unless he has acted or intermeddled in the administration. Mere cohabitation will not now, it is submitted, raise a presumption of intermeddling; there must be some active participation in the tort of the wife, by which the interests of the *cestuis que trustent*, or the interests of the creditors, or legatees, or next of kin of the deceased, are injuriously affected.

(ii) *Liability of the Wife*.—A married woman is now liable to the extent of her separate property for her ante-nuptial breaches of trust and devastavits.⁶ She is also solely liable for these torts committed by her during coverture, whether she has accepted the office or trustee, or executrix, or administratrix before or after marriage, unless her husband has intermeddled with the trust or

¹ *Adair v. Shaw*, 1 Sch. & Lef. 263; *Tyler v. Bell*, 2 Myl. & Cr. 89.

² 45 & 46 Vict. c. 75, s. 14.

³ *Wainford v. Heyl*, L. R. 20 Eq. 321.

⁴ *Adair v. Shaw* (*ubi sup.*); *Soady v. Turnbull*, L. R. 1 Ch. App. 494. "With respect to the devastavit of the wife committed during the coverture the husband was liable in law and in equity, as long as both parties were alive, for the acts of his wife as executrix or administratrix; for as she had no power to act alone, his assent was presumed; and it was held that the husband, though living separate from his wife, should be charged with her devastavit. If the assets were wasted during the coverture either by the husband or wife, a creditor or legatee of the testator might, it would seem, sue the wife as well as the husband, and if she predeceased him her estate was answerable. Upon the death of the wife, the general rule of law was that the liability of the husband (except as her administrator) for his wife's devastavit, committed as well during coverture as before, ceased. But in equity the surviving husband was liable for whatever assets came to the hands of his wife or his own hands during the coverture."

2 Wms. Exors. pp. 1481, 1482.

⁵ Sect. 24.

⁶ *Ibid.*

Liability of wife.

Liability of husband and wife under Act of 1882.

No presumption of intermeddling raised from mere cohabitation.

Liability of wife.

Post-nuptial.

administration, in which case he becomes jointly liable with her. A married woman administratrix can be attached under section 4 of the Debtors Act, 1869,¹ for disobedience to an order of the court to pay money into court which she holds as such administratrix.² A difference in the husband's favour is to be noticed between his liability for his wife's torts in her representative capacity, for which he seems to be liable only when he has himself intermeddled and participated in them, and his liability for her torts in her non-representative capacity, for which his full common law liability seems untouched by this Act. On the death of the married woman her separate estate will continue to be responsible for her wrongs. The Married Women's Property Act, 1882,³ is not retrospective to make a married woman liable for a post-nuptial breach of trust committed by her before the Act came into force.⁴

The husband is bound at law to bury his wife in a suitable manner, that is, the reasonable funeral expenses can be recovered against him.⁵ If he fails in his duty, any person who voluntarily employs an undertaker and pays him for performing the funeral, may recover the reasonable expenses.⁶ This liability continues where the husband and wife are apart, whether because of his absence,⁷ or her living separate from him;⁸ and an infant husband is as much bound as an adult.⁹ It would seem that where a wife dies possessed of separate estate the husband is not thereby relieved from his legal liability to pay for her funeral expenses.¹⁰ But where he is executor of his wife's will made under a testamentary power of appointment, he may retain out of her estate the amount of her funeral expenses, though her will does not contain a charge for such expenses, and her estate is insolvent.¹¹ There is a corresponding duty on the widow to bury her husband; and her infancy does not free her from her liability.¹²

Obligation on surviving spouse to bury the deceased.

¹ 32 & 33 Vict. c. 62.

² *Re Turnbull, Turnbull v. Nicholas*, [1900] 1 Ch. 180.

³ Sect. 1, sub-s. 2.

⁴ *Davies v. Stanford*, 61 L. T. 234.

⁵ *Ambrose v. Kerrison*, 20 L. J. C. P. 135.

⁶ *Ibid.*

⁷ *Jenkins v. Tucker*, 1 H. Bl. 90.

⁸ *Bradshaw v. Beard*, 31 L. J. C. P. 273.

⁹ *Chapple v. Cooper*, 13 L. J. Ex. 286.

¹⁰ See *Willeter v. Dobie*, 4 W. R. 669.

¹¹ *Re McMyn, Lightbown v. McMyn*, 33 Ch. D. 575.

¹² *Chapple v. Cooper (ubi sup.)*.

CHAPTER XIV.

CONTRACTS BY MARRIED WOMEN.

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CONTRACTS BY MARRIED WOMEN.

OWING to recent legislation contracts by married women, as forming a peculiar and separate branch of the law, occupy a much less conspicuous position than in former times, for the modern tendency is to assimilate them to those of men and unmarried women. But there is much that is still peculiar to them, which can only be explained and illustrated by a reference to the earlier state of the law and the social views on which such law was based.

This chapter will be divided into five sections, as follows:

Section 1. Contracts by Married Women with Third Persons.

Section 2. Contracts by Married Women with their Husbands.

Section 3. Contracts by Married Women as Agents whether for Third Persons or their Husbands.

Section 4. Incidents of Contractual Power.

Section 5. Liability of Married Women in respect of their Contracts.

SECTION I.

Contracts with Third Persons.

At common law one effect of coverture was the incapacity of a married woman to enter into contracts with third persons binding upon her.¹ This disability or incapacity was due not only to the theory of her suspended separate existence during marriage, but to the fact that she had no property of her own in respect of which she could contract, for of personalty she had none; and she could not defeat her husband's interest in her realty. A contract, then, of a married woman was "altogether void, and no action would lie against her husband or herself for the breach of

Common law
incapacity to
contract.

¹ *Marshall v. Rutton*, 8 T. R. p. 547.

it.”¹ If a married woman executed a promissory note, and after the death of her husband made a fresh promise to pay it without any new consideration, she was not bound by either promise, for the first was null and void for want of capacity to make, and the second because of the want of consideration; and a promise by a married woman to pay a debt barred by the Statute of Limitations was ineffectual.² But in order to carry out the requirements of social life, this strict common law doctrine was modified by exceptions; thus, a married woman was enabled to enter into a contract as the agent of her husband, and as such agent she could bind him. If her husband had given her a power of attorney under seal she could have executed a contract under seal on his behalf, so as to bind him or entitle him to sue upon it; or in cases of simple contract, if he had expressly or impliedly held her out as his agent, or expressly or impliedly ratified what she had done.³ This agency on her part was, as it is now, a question of fact, which must be proved or rebutted by evidence produced;⁴ but under the present state of the law the presumption is that she is not acting as her husband’s agent.⁵ A married woman was also allowed to make binding contracts in cases where her husband was *civilititer mortuus*, as, for instance, when under a sentence of outlawry or banishment,⁶ or of transportation, or of penal servitude for a term of years or for life;⁷ also where her marriage was dissolved by Act of Parliament;⁸ or where her husband was an alien enemy,⁹ or was an alien who had never been in the kingdom.¹⁰ These exceptions were “founded on the principle of the husband being under the necessity of absenting himself from this kingdom, and that his return to it was forbidden, and did not depend upon his own will and pleasure.”¹¹ So, too, if she carried on in the City of London a trade apart from her husband who was a freeman of the City, she might enter into a binding contract.¹²

In equity the contracting power of a married woman was recognized. The Court of Chancery administering equity allowed her to possess property apart from her husband, over which she exercised sole control, and of which she was capable of disposing.¹³ Equity founded her capacity to contract on a fiction, that it was

¹ Per Curiam, *The Liverpool Adelphi Loan Association v. Fairhurst*, 23 L. J. Ex. 163.

² *Pittam v. Foster*, 1 B. & C. 248.

³ *M’George v. Egan*, 7 Sc. Rep. 112; see Addison on Contracts.

⁴ See *Jolly v. Rees*, 33 L. J. C. P. 177; *post*, p. 313.

⁵ 45 & 46 Vict. c. 75, s. 1, sub-s. 3.

⁶ *Lady Belknap’s Case*, Co. Litt. 132 b; *Newsome v. Bowyer*, 3 P. Wms. 37.

⁷ *Carroll v. Blencow*, 4 Esp. 27; *Sparrow v. Carruthers*, cited 1 T. R. 6; and

⁸ 2 Wm. Bl. Rep. 1197.

⁸ 2 Br. H. & W. 70.

⁹ *Derry v. Duchess of Mazarine*, 1 Lord Raym. 147.

¹⁰ *Kay v. Duchess of Piennes*, 3 Camp. 123; but see *Barden v. Keverberg*, 2 M. & W. 61.

¹¹ 2 Rop. H. & W. 121.

¹² *Caudell v. Shaw*, 4 T. R. 361.

¹³ For the growth of the Separate Estate, see next chapter.

Capacity to contract as agent.

Her agency a question of fact.

Capacity to contract in equity in respect of separate estate.

not the married woman, but her separate property, that was put forward as the contracting party, which would take upon itself all the liabilities arising out of the contract. When a married woman contracted debts or entered into engagements, equity deemed she was honest, and desired to satisfy the first claims of her creditors; it consequently held her separate property liable to make good these engagements. As a result, it was held necessary that, to make a binding contract, a married woman must be possessed of free separate property at the time of entering into such contract or engagement.¹ The existence of separate property at the time of entering into a contract is still necessary where the obligation arises before the date of the passing of the Married Women's Property Act, 1893.²

Her present full responsibility has been a matter of gradual growth. In an earlier stage of the law it was necessary to show that she had acted with respect to her separate property, that is, that she had evinced an intention to deal with it. This was carried a step further, and her separate property was held bound by her general engagements in writing which did not refer to or make mention of it.³ The writing was deemed to be an execution of a power; but this theory was rightly denied by Lord Cottenham, in *Owens v. Dickenson*.⁴ The liability of her separate estate was put upon its true ground by Turner, L.J., in *Johnson v. Gallagher*; ⁵ the equitable principle of a married woman's liability being, that where she contracts a debt which she can only satisfy out of her separate estate, the latter will be made liable,⁶ though her husband ⁷ or a stranger ⁸ join in the contract giving rise to the liability.

A married woman who had property settled to her separate use without any restraint or alienation was deemed a *feme sole*, and could dispose of it accordingly.⁹ Thus in equity she could contract, rendering her free separate estate liable, where she contracted by bond,¹⁰ bill of exchange accepted ¹¹ or endorsed by her,¹² promissory note,¹³ or covenant to pay a sum of money; ¹⁴ where she so contracted that she must clearly have intended to bind her separate property, as being the only means of satisfying the

¹ See *Pike v. Fitzgibbon*, 17 Ch. D. 454.

² 56 & 57 Vict. c. 63; *Palliser v. Gurney*, 19 Q. B. D. 519; *Soflaw v. Welch* [1899] 2 Q. B. 419.

³ *Hulme v. Tenant*, 1 Bro. C. C. 16; 1 W. & T. L. C. 521.

⁴ 4 Jur. 1151.

⁵ 30 L. J. Ch. 298.

⁶ *Picard v. Hine*, L. R. 5 Ch. App. 274.

⁷ *Hulme v. Tenant* (*ubi sup.*); *Latouche v. Latouche*, 34 L. J. Ex. 85.

⁸ *Heatley v. Thomas*, 15 Ves. 596.

⁹ Sugd. Pow. 173. For the further effect of Restraint against Anticipation, see next chapter.

¹⁰ *Peacock v. Monk*, 2 Ves. 193

¹¹ *Stuart v. Lord Kirkwall*, 3 Madd. 387.

¹² *MacHenry v. Davies*, L. R. 10 Eq. 88.

¹³ *Field v. Sowle*, 4 Russ. 112.

¹⁴ *Mayd v. Field*, 3 Ch. D. 587.

obligation into which she had entered;¹ or where she entered into any general engagement on her part, if it appeared that it was made with reference to and upon the faith or credit of the estate, and whether it was so or not was a question to be judged of by the court on all the circumstances of the case;² and the *onus* of such proof was on the creditor.

A married woman could contract where she had a power of appointment over property which she contracted to sell; but she could not contract so as to bind property which was not her separate property, or over which she had no power of appointment. In exercising the power she must have observed all necessary formalities which went to the substance of the power, or her contract was void,³ though mere formalities were supplied against her.⁴

She might have contracted to bind her real estate by deed acknowledged under the Fines and Recoveries Act,⁵ with the concurrence of her husband;⁶ or without his concurrence where she had obtained an order dispensing with it.⁷

Within recent years a married woman has acquired the position of a *feme sole*, which has been altogether a creature of statutory enactments; and when in this position she has been enabled to contract as well as to dispose of her property.

The Divorce and Matrimonial Causes Act, 1857,⁸ by its twenty-fifth section, enacted that "in every case of a judicial separation the wife shall, from the date of the sentence, and whilst the separation shall continue, be considered as a *feme sole* with respect to property of every description which she may acquire, or which may come to or devolve upon her."⁹ By section 26, it enacts that in every case of a judicial separation the wife shall, whilst so separated, be considered as a *feme sole* for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding;¹⁰ and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as plaintiff or defendant. Provided that where upon any such judicial separation alimony has been decreed or ordered to be paid to the wife, and the same shall not be duly paid by the husband, he shall be liable for necessaries¹¹ supplied for her use.

¹ *London Chartered Bank of Australia v. Lemprière*, L. R. 4 P. C. 572; *Wainford v. Heyl*, L. R. 20 Eq. 321.

² *Johnson v. Gallagher* (*ubi sup.*).

³ *Martin v. Mitchell*, 2 J. & W. 413.

⁴ *Stead v. Nelson*, 2 Beav. 245.

⁵ 3 & 4 Wm. IV. c. 74.

⁶ *Besant v. Wood*, 12 Ch. D. 605, 621.

⁷ *Goodchild v. Dougal*, 3 Ch. D. 650.

⁸ 20 & 21 Vict. c. 85.

⁹ *Dawes v. Creyke*, 30 Ch. D. 500; *Davenport v. Marshall*, [1902] 1 Ch. 82.

¹⁰ See *Re Hughes, Brandon v. Hughes*, [1898] 1 Ch. 529.

¹¹ For whether a wife who has been judicially separated under this Act or the

Contract in respect of property over which married woman had power of appointment.

Contract to bind her real estate.

Statutory capacity.

20 & 21 Vict. c. 85. On judicial separation, wife considered a *feme sole* with respect to her property, contracts, and torts.

A married woman, deserted by her husband, who had obtained a protection order from a police magistrate within the metropolitan district, or from justices in petty sessions under section 21 of the same Act, or from the judge-ordinary (now the judge of the Probate, Divorce, and Admiralty Division), under 21 & 22 Vict. c. 108, s. 6, was deemed a *feme sole*, as though she had been judicially separated, and while the order lasted she obtained all the rights and privileges of a single woman.¹

Married woman under protection order in like position as if judicially separated.

Under the Summary Jurisdiction (Married Women) Act, 1895,² a court of summary jurisdiction can now make an order which will have the force of a decree of judicial separation in cases where the husband has been convicted of an aggravated assault upon his wife or of persistent cruelty to her, or of wilful neglect to provide reasonable maintenance for her or her infant children, whom he is legally liable to maintain, and has by such cruelty or neglect caused her to leave and live separately and apart from him. But an order under this Act, though having the effect of a decree of judicial separation, is not a decree of judicial separation in a matrimonial cause.³ The wife on the pronouncement of the sentence acquires the position of a *feme sole*.

Judicial separation under Summary Jurisdiction (Married Women) Act, 1895.

In 1870, the important Married Women's Property Act⁴ of that year was passed. "This Act created fresh categories of separate estate, and in respect of such separate estate conferred upon her (a married woman) powers of contracting, &c., which in equity she possessed before, and also gave her certain remedies which she might employ in a court of law in respect of such property. But the Act did not in other respects alter her position, or confer upon her any further contractual powers which she did not possess before."⁵ But it seems that she did acquire a capacity to contract which she did not possess before, namely, to effect a policy of insurance upon her own life or on that of her husband for her separate use.⁶

M.W.P. Act, 1870.
Extent of married woman's separate estate enlarged, but not her contractual powers.

The Married Women's Property Act, 1882,⁷ has conferred upon her very nearly the like full contractual power possessed by a man or an unmarried woman; the principal condition necessary to make her contract valid was the possession of her separate property. The Act provides that "a married woman shall be

M.W.P. Act, 1882.

Summary Jurisdiction (Married Women) Act, 1895, can recover against her husband as "necessaries," the costs of proceedings taken by her for dissolution of marriage, see *post*, p. 325.

¹ See *post*, chap. xv.

² 58 & 59 Vict. c. 39, s. 4, repealing 41 Vict. c. 19, s. 4. This jurisdiction can be exercised by the court before whom the husband is found guilty of an aggravated assault on indictment.

³ See *Sweet v. Bishop of Ely*, [1902] 2 Ch. 508.

⁴ 33 & 34 Vict. c. 93.

⁵ Per Jessel, M.R., in *Howard v. Bank of England*, L. R. 19 Eq. 295.

⁶ Sect. 10.

⁷ 45 & 46 Vict. c. 75.

capable of entering into and rendering herself liable in respect of and to the extent of her separate property or any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*.”¹ The word “contract” includes the acceptance of any trust or of the office of executrix or administratrix.² Every contract under this Act entered into by a married woman with respect to and to bind her separate property binds not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may hereafter acquire.³ The effect of these provisions was that a married woman with separate estate at the time of incurring a liability became enabled to enter into all sorts and kinds of contracts, and to bind her property, both that which she had at the time of entering into the contract, and that which she might subsequently acquire, unless she was restrained from anticipating her fortune.

Onus of proof of separate property formerly on creditor.

Previous to the coming into operation of the Act, every contract made by a married woman must have been either made with express reference to her separate estate, or have been a contract of such a nature as must have been intended to be so referred, in order to bind the separate estate of which she was capable of disposing at the time of making the contract.⁴ When the reference was not express, the *onus* of proving that the married woman, living with her husband, so contracted as to bind her separate property, lay upon the creditor, and was a fact to be decided by the evidence in each case; ⁵ her “general engagements,” such as her bonds, bills of exchange, promissory notes and the like, were capable of binding her separate property.⁶

New presumption created against married women in respect of their contracts.

But sub-section 3 of section 1 enacts that “every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown.” The effect of this sub-section was to create a new presumption in law, namely, that a contract made by a married woman is made in respect of her separate estate. The former law on this subject has been well summarized by Sir G. Jessel, M.R.,⁷ who said: “A married woman, or rather her separate estate, was liable to make good all contracts which are made by her with express reference to the separate estate, or which from the nature of the contract itself must be intended to be so referred; but she is not liable even for general contracts which from their nature cannot be so referred.” Where a married woman was living with her husband,

¹ Sect. 1, sub-s. 2.

² Sect. 24.

³ Sect. 1, sub-s. 4.

⁴ *Wainford v. Heyl*, L. R. 20 Eq. 321.

⁵ *Johnson v. Gallagher*, 30 L. J. Ch. 298.

⁶ *Ibid.*

⁷ *Wainford v. Heyl* (*ubi sup.*).

and made a contract under circumstances consistent with her being the agent of her husband, the fact of her cohabitation with him was, if not a strong presumption of her agency on his behalf, at any rate *prima facie* evidence of it, and he had to rebut the presumption; but now the *onus* is shifted on to the wife to show and prove her agency, if she desire to protect her property. This important alteration of the law must have a marked effect upon the relations of a married woman with those who hold negotiable instruments, drawn, accepted, or indorsed by her in her own name, and with nothing on their face to show agency on her part. If she now renders herself liable on a negotiable instrument, without stating on its face that she is her husband's agent, her liability, so far as he is concerned, is sole and confined to herself, though formerly the husband might have been sued as acceptor on a bill which he did not expressly authorize her to accept.¹ She will, however, be freed from liability where she can prove that she was agent for her husband or some disclosed principal; but where she has acted as agent for an undisclosed principal (other than her husband), the right of the creditor to sue her at his option ought not, it seems, to be defeated by her proving that she was acting for the undisclosed principal, and not to bind her own property. Many contracts which formerly were held not to bind a married woman's separate property will now do so.

Not liable
where agency
on her part is
proved.

Till recent times, where she was not possessed of separate property, she could not enter into a valid contract; as formerly she could not contract to bind property over which she had no power of appointment,² so now she cannot validly charge her property which she is restrained from anticipating.³ The restraint not only affects her capacity to charge her property during coverture,⁴ but her debt or contract cannot be enforced against her property even after coverture has terminated, and the restraint no longer exists.⁵

Effect of
restraint upon
anticipation.

A married woman in the future will be *prima facie* liable for contracts, even those arising *quasi ex contractu*, or creating a legal obligation, some of which formerly were held not to bind her. Thus she will be liable generally on her bills of exchange, promissory notes, and cheques,⁶ where having separate estate she contracts to take shares in her own name in a joint-stock company, which is afterwards wound up;⁷ she will be liable for

Liability of
married
woman on con-
tracts formerly
not binding.

¹ *Lindus v. Bradwell*, 5 C. B. 583. This case will be of no authority under the altered state of the law.

² *Marsha l v. Rutton*, 8 T. R. 545.

³ *Pike v. Fitzgibbon*, 17 Ch. D. 454. See the principle in *King v. Lucas*, 23 Ch. D.

⁴ *Chapman v. Biggs*, 11 Q. B. D. 27.

⁵ For a fuller discussion of this subject, see *post*, chap. xv. s. 4.

⁶ See Bills of Exchange Act, 1882, 45 & 46 Vict. c. 61, s. 23; see *ante*, p. 287.

⁷ *Mrs. Mathewman's Case*, L. R. 3 Eq. 781.

Married
woman now
liable in
assumpsit.

the rents and profits of an estate upon which she has entered and occupied under a mistaken impression it was her own property;¹ so, too, where she has a general power of appointment over her personalty, and she charges it in favour of her creditors.² She will also be liable for costs of suits improperly instituted against her husband.³ She formerly was not, but now will be, liable as to her separate property, on what may be termed an implied *assumpsit*, or on a legal obligation, under the following circumstances: For work done by a solicitor in respect of her property, though there be no actual contract on her part to pay him;⁴ or for work done by a solicitor whom she, as the wife of a lunatic, instructs to act for her and her children in a suit to which she is not a party, and which does not relate to her own property,⁵ or for repayment of money when paid to her under a mistake;⁶ or where money has been paid to her under a consideration which has wholly failed.⁷ Where she lives apart from her husband, and has separate estate, she will be rendered liable on her contracts;⁸ whether, having ample separate property, she can bind her husband for necessaries when living apart because of his misconduct is not clearly decided.⁹ She probably cannot. It would seem to depend less upon whether her separate estate is sufficient to maintain her decently in her proper position than whether his implied authority to her to pledge his credit could be said still to exist. Where she carries on a trade apart from her husband she will also be absolutely liable on her contracts.¹⁰

Liability of
married women
binds not only
property at
date of contract
but after-
acquired
property.

In more recent times it seemed only right and proper that where a married woman had a right to contract and did contract, that she should bind not only the property which she possessed at the date of entering into the contract, but that which she afterwards acquired. Malins, V.C., followed this idea in *Pike v. Fitzgibbon*,¹¹ in which he held the married lady's subsequently acquired property liable to satisfy debts contracted by her before it came into existence. Parliament gave legislative sanction to the principle enunciated in the Vice-Chancellor's judgment by enacting sub-section 4 of section 1 of the Act under discussion, to the effect that "every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or

¹ See *Wright v. Chard*, 29 L. J. Ch. 82, 415.

² *London Chartered Bank of Australia v. Lemprière*, 4 L. R. P. C. 572.

³ *M. v. C.*, L. R. 2 P. & D. 414.

⁴ *Callow v. Howle*, 1 De G. & Sm. 531.

⁵ *Re Pugh*, 17 Beav. 336.

⁷ *Duke of Bolton v. Williams*, 2 Ves. 138.

⁸ *Hodgson v. Williamson*, 15 Ch. D. 87.

⁹ See *Davidson v. Wood*, 32 L. J. Ch. 400; *post*, p. 319. ¹⁰ Sect. 1, sub-s. 5.

¹¹ 14 Ch. D. 837. The learned judge was, however, overruled by the Court of Appeal, 17 Ch. D. 454.

⁶ *Wright v. Chard* (*ubi sup.*).

entitled to at the date of the contract, but also all separate property which she may thereafter acquire." But the effect of this Act is not retrospective; therefore, contracts effected by married women before the date of its operation would be governed by the law prevailing at the time at which they were made;¹ so a judgment in an action on a contract made by her before the above date could not be executed against property to which she became entitled after the date of the contract.² This subsequently acquired property must be as free from the restraint against anticipation as the property possessed by the married woman at the time of entering into the contract; from this it follows that after the words "all separate property she may thereafter acquire," words to the effect, "over which she has unfettered power of disposition" must be read.

The contractual capacity, then, of a married woman depends under this Act, as under the principles of equity, upon the possession of property settled to her separate use (whether by force of the statute or gift of private parties) with which she is free to deal.³ Sub-section 3 of section 1 enacts that "Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate estate, unless the contrary be shown." This presumption is conditioned upon her possessing free separate property at the time when she enters into a contract; and where she does not possess any separate property at that period, any such presumption is rebutted. Thus, to make a valid contract under the Act a married woman must still possess some free separate property in respect of which she must be deemed to have contracted;⁴ and the *onus* of proving that at the time of the contract or incurring the debt she possessed such free separate property is on the person who seeks to enforce his right against her.⁵ He need not allege in his statement of claim against her that she was in the possession of separate property at the time of the contract, unless he seeks to obtain summary judgment against her estate in default of appearance to the writ.⁶ Separate estate with a restraint against anticipation on it is not such free separate property.⁷ If, therefore, a married woman had no existing free separate property at the time of making a contract,

Free separate property necessary to validity of contract.

When allegation of separate estate against married woman necessary.

Separate property subject to restraint not free.

¹ *Conolan v. Leyland*, 27 Ch. D. 632.

² *Turnbull v. Forman*, 15 Q. B. D. 234, approving of *Conolan v. Leyland* (*ubi sup.*), and disapproving of the effect of the decision in *Bursill v. Tanner*, 13 Q. B. D. 691; *Re Home, Ex parte Home*, 54 L. T. 301; *Smith v. Whitlock*, 55 L. J. Q. B. 286.

³ See *post*, chap. xv. s. 4.

⁴ *Palliser v. Gurney*, 19 Q. B. D. 519; *Stogdon v. Lee*, [1891] 1 Q. B. D. 661; *Re Shakspear, Deakin v. Lakin*, 30 Ch. D. 169.

⁵ *Palliser v. Gurney* (*ubi sup.*); *Whitaker v. Van der Smissen*, 4 T. L. R. 707; *Everett v. Paxton*, 65 L. T. 383.

⁶ *Tedley v. Griffith*, 57 L. T. 673.

⁷ *Re Glanvill, Ellis v. Johnson*, 31 Ch. D. 532; *Pelton (Brothers) v. Harrison*, [1891] 2 Q. B. 422.

such contract was null and void, and did not bind subsequently acquired property, though it might have been free from any such restraint.¹

Presumption
against
married
woman must be
reasonable.

In a series of cases under this Act it has been decided that the presumption in sub-section 3 of section 1 of the Act that her contract is entered into with respect to and to bind her separate property must be a reasonable one, and is not satisfied when at the time of the contract her free separate property is mainly represented by her personal clothing,² or where such is a very small sum of money in proportion to the amount involved in the contract, and she is restrained from anticipating the corpus of her property;³ or where the husband would be primarily liable for the contract entered into by her, as for a solicitor's costs incurred by her in procuring a divorce from her husband.⁴ Alimony which has been decreed to a married woman on judicial separation is not separate estate in respect of which she can be deemed to contract.⁵ But if she possesses free separate property, it need not be money or securities for money, but may consist of such articles of luxury as jewelry, furs, or the like, and she may be reasonably deemed to have contracted in respect of such.⁶ Again, where she has income derived from property (which she is restrained from anticipating) paid periodically to her, while such income is unspent and she contracts debts bearing a reasonable proportion to the amount of such unspent income, she will be bound by her contract.⁷ Where, however, a married woman is a member of a trading firm, she will be deemed to have sufficient separate estate to enable her to sue or be sued on her contract, and the fact of her husband being also a member of the firm does not remove that presumption.⁸ If she pay money into court in order to obtain leave to defend an action brought against her she cannot afterwards be allowed to urge that such money could not properly be taken in execution to satisfy her creditor's claim.⁹ The words in sub-section 3 of section 1, "unless the contrary be shown, only admit evidence of there being no free separate property in respect of which a married woman could reasonably be deemed to have contracted and not of any intention or absence of intention so to contract at the time of making the contract."¹⁰

¹ *Re Shakspear, Deakin v. Lakin (ubi sup.)*.

² *Leake v. Driffield*, 24 Q. B. D. 98.

³ *Braunstein v. Lewis*, 65 L. T. 449.

⁴ *Harrison v. Harrison*, 13 P. D. 180.

⁵ *Anderson v. Hay*, 7 T. L. R. 113.

⁶ *Bonner v. Lyon*, 38 W. R. 541.

⁷ *Everett v. Paxton (ubi sup.)*. In this case the court was divided, Grantham, J., upholding the decision of the county court judge, which was in accordance with the terms of the text, Smith, J., dissenting.

⁸ *Eddowes v. Argentine Loan and Mercantile Agency Co.*, 62 L. T. 602.

⁹ *Bird v. Barstow*, [1892] 1 Q. B. 94.

¹⁰ *Bonner v. Lyon*, 38 W. R. 541. This case was not cited, it would seem, in *Braunstein v. Lewis*, either before Day, J., 64 L. T. 265, or in the Court of Appeal (65 L. T.

They would, of course, admit evidence of her contracting as agent and not as principal, whether for her husband or a stranger.

Where a married woman is sued otherwise than in contract, proof of the existence of separate estate at the time of the contract is not necessary, as in such a case her liability to be sued is general.¹ This will now render her liable to be sued in respect of many matters in which she would have been held not liable under the former law.

This Act has so widely extended the scope of the contractual powers of a married woman that nearly all the ordinary incidents of a full contractual capacity will ensue; thus debts contracted by her since the operation of the Act will be statute barred if not paid or sufficiently acknowledged within the period of limitation.² A debt contracted by her before this Act came into force is barred after six years if unacknowledged by analogy to the Statute of Limitations.³ So, too, the requirements of the Statute of Frauds must be complied with by her; and she will be liable not only for express but for implied contracts, for which formerly she was not held responsible.⁴ Her verbal engagements, too, will not bind her where the statute requires in the case of a *feme sole* that it should be made in writing, as where she verbally undertakes to pay the debt of another.⁵ As a debtor she will be entitled to alien or dispose of her separate property before her creditor has proceeded to judgment, and the latter is not on his part entitled to any mesne process anterior to judgment by which to restrain her from so dealing with her separate property.⁶

Wide liability under the Act.

There is now no reason why a decree of specific performance should not be pronounced against a married woman in respect of her contract, provided she had free separate property at the time of entering into the contract if made before December 5, 1893, and is not incapacitated by any restraint against anticipation from

Specific performance decreed against married woman.

449), and the court in the later case seems to have lost sight of the liability of the married woman's after-acquired property to satisfy an earlier debt or contract. *Bonner v. Lyon* would seem to be more correct.

¹ *Whittaker v. Kershaw*, 45 Ch. D. 230. In *Hood Barrs v. Cathcart*, [1894] 2 Q. B. 574, Kay, L.J., said it was difficult to reconcile this decision with *Palliser v. Gurney*, 19 Q. B. D. 519, *Stogdon v. Lee*, [1891] 1 Q. B. 661, and *Leake v. Driffield*, 24 Q. B. D. 98.

² *Re Hastings, Hallett v. Hastings*, 35 Ch. D. 94.

³ *Ibid.* This case explains away and overrules *Norton v. Turvill*, 2 P. Wms. 144, and *Hodgson v. Williamson*, 15 Ch. D. 87. In these two cases the statute was held not to run against her creditor's claim, which was held to be in the nature of a charge upon a trust fund in existence, and the statute does not apply to trusts. But this doctrine was erroneous, and is long since exploded. Lord Redesdale has said the proper expression was "in obedience to," and not "by analogy to," the statutes. See *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 630.

⁴ *Jones v. Harris*, 9 Ves. 493; *Aguilar v. Aguilar*, 5 Madd. 414.

⁵ *Re Sykes' Trusts*, 6 L. T. 350.

⁶ *Robinson v. Pickering*, 16 Ch. D. 660.

dealing with the property the subject-matter of the decree for performance.¹ Since the above date the possession of separate property at the date of the contract is not necessary.

Married woman non-trader not amenable to Bankruptcy Laws.

In one important respect a married woman is on a different footing to a man or a single woman; she cannot be made bankrupt in respect of her debts and liabilities unless she carries on a trade apart from her husband; that is to say, she cannot be made amenable to the bankruptcy laws in respect of her ordinary contracts.² If as a non-trader she becomes insolvent, there is no means by which her separate estate can be rateably divided among her creditors, but the claims of the latter will be discharged in order of priority.³

Contracts under M.W.P. Act, 1893.

Contracts under Married Women's Property Act, 1893.—A considerable alteration in the law affecting the contractual capacity of married women has been effected by the passing of the Married Women's Property Act, 1893;⁴ but as the provisions of this Act are not retrospective⁵ it is thought necessary to consider the law at various periods anterior to December 5, 1893, the date of its coming into force. It has been seen that to render a married woman's contract valid and effective she must have possessed free separate property at the moment of its inception, in respect of which she could reasonably be deemed to have contracted;⁶ that is, there were two conditions precedent to an effective contract by her, (1) the existence of separate property; (2) its freedom from any restraint against anticipation. Section I of the Act enacts that "Every contract entered into by a married woman, otherwise than as agent, (a) shall be deemed to be a contract entered into by her with respect to and to bind her separate property, whether she is or is not possessed of or entitled to any separate property at the time when she enters into such contract." The effect of this is to put a married woman on an equal footing with men or unmarried women so far as her contractual capacity and liability depend upon her having or not having any separate estate at the time of making the contract. If she is actually penniless, or has only separate property which she is restrained from anticipating at the time of entering into a contract, her contract is now valid and will bind any after-acquired free separate property.⁷ This in effect overrules *Palliser v. Gurney*,⁸ *Stogdon v. Lee*,⁹ *Re Shakspear*, *Deakin v. Lakin*,¹⁰ *Leake v. Driffield*,¹¹ and *Braunstein v. Lewis*.¹² The effect of the present

Separate property not now necessary for valid contract.

¹ Fry. Sp. Perf. 686-690; and see the judgment of Lord Blackburn in *Cahill v. Cahill*, 8 App. Cas. p. 436.

² Sect. 1, sub-s. 5.

³ *Johnson v. Gallagher*, 30 L. J. Ch. 298; *secus* if she die insolvent; see p. 237.

⁴ 56 & 57 Vict. c. 63.

⁵ See *Softlaw v. Welch*, [1899] 2 Q. B. 419.

⁷ Sub-sect. b.

⁸ 19 Q. B. D. 519.

¹⁰ 30 Ch. D. 169.

¹¹ 24 Q. B. D. 98.

⁶ *Ante*, pp. 293 *et seq.*

⁹ [1891] 1 Q. B. 661.

¹² 65 L. T. 449.

enactment may not have been altogether in the minds of the Legislature when they passed the Married Women's Property Act, 1882, but it is not difficult to see that the effect of some of the last-mentioned decisions cut down to the most slender dimensions the alteration sought to be introduced by the earlier Act. It will be now unnecessary to allege in a statement of claim or prove in an action brought against a married woman on a contract or liability made or incurred since the passing of the Act that she was possessed of separate estate at the date of the contract or incurring the liability, whether the plaintiff seeks summary judgment or not; and *Tetley v. Griffith*¹ is no longer law as regards contracts made since December 5, 1893. It will be equally not necessary to prove the existence of separate property at the date of the judgment; but if as a fact she does not possess any free separate property at the latter date, so far the judgment will be ineffectual; but it would become operative if subsequently she became possessed of free separate property. The contract must be one recognized by law and rendering her liable on it, and a mere acknowledgment subsequent to the Act of sums advanced to her before the Act which she was under no legal liability to repay is not a contract within the section.²

There is a proviso in the Act which prevents any impairing of the effect of a restraint against anticipation, making the property affected by it non-available for satisfying any liability or obligation arising out of her contracts; but the fact of the restraint no longer has the effect of rendering the property practically non-existent for contractual purposes.³

It will be observed that in this section⁴ of the Act the expression "otherwise than as agent" is substituted for "unless the contrary be shown" in sub-section 3 of section 1 of the Act of 1882.⁵ This is a corollary to the largely increased contractual capacity flowing from the existence of separate property being no longer necessary to the validity of a married woman's contracts. The presumption against her that her contract is her own is greater than it was under the Act of 1882, especially as interpreted by the decisions in the cases above-mentioned. The burden of proof that the married woman possessed separate estate is no longer on the creditor; and if she seeks to be quit of the liability incurred by her in her own name, the *onus* of proof is on her to show that at the time of entering into the contract she was acting as agent for her husband or some third person; and the ordinary principles governing the relations of principal and agent will be as applicable to her as to a man

Effect of
restraint
preserved.

¹ 57 L. T. 673.

² *Re Wheeler, Hankinson v. Hayter*, [1904] 2 Ch. 66.

³ This overrules *Harrison v. Harrison* (13 P. D. 180) on this point.

⁴ Sect. 1.

⁵ 45 & 46 Vict. c. 75.

or an unmarried woman. But there is still one important respect in which a married woman is on a different footing to a man or a single woman, viz., her non-liability to be made a bankrupt in respect of her debts and liabilities unless she carries on a trade apart from her husband; that is to say, she is not amenable to the bankruptcy laws in the matter of her ordinary post-nuptial contracts,¹ even after she has become a widow.² This non-liability remains unaffected by the Married Women's Property Act, 1893. It may now be said that the only law peculiar to the separate estate of a married woman is the equity principle governing the effect of the restraint against anticipation.

SECTION 2.

Contracts with Husband.

Contracts between husband and wife.

Invalid at law.

The common law doctrine of the unity of the persons of husband and wife operated to prevent them contracting with each other, and the wife's personality was for most purposes suspended during the coverture. While coverture lasted the wife was incapable at law of contracting with her husband, for if she had been allowed to do so, her separate existence would have been clearly recognized.³

When valid in equity.

But in equity a married woman was permitted to contract with her husband in respect of her separate estate,⁴ and sue him with regard to it.⁵ A woman without separate estate was not capable of validly contracting with her husband any more than with a stranger.⁶ A simple post-nuptial contract by a married woman to convey land (not settled to her separate use) to her husband could not be enforced by him even though he had performed his part of the contract.⁷ Apart from her separate property, as where she was at arm's length with her husband, whenever a wife was placed in the position of a single woman, she was enabled to contract with him;⁸ thus, she might validly contract to live separate from her husband,⁹ or to compromise a divorce suit.¹⁰ She could also submit matters to arbitration, as the right to compromise is incident to the right to sue.¹¹ Under

¹ 45 & 46 Vict. c. 75, sect. 1, sub-s. 5.

² *Re Hewett, Ex parte Levene*, [1895] 1 Q. B. 328, and see *Re Lynes, Ex parte Lester*, [1893] 2 Q. B. 113.

³ *Lanoy v. Duchess of Athol*, 2 Atk. 444.

⁴ *Hewison v. Negus*, 22 L. J. Ch. 655; *Teasdale v. Braithwaite*, 5 Ch. D. 630; *Woodward v. Woodward*, 11 W. R. 1007.

⁵ *Woodward v. Woodward (ubi sup.)*.

⁶ See *Walrond v. Walrond*, John. 18.

⁷ *Williams v. Walker*, 9 Q. B. D. 576.

⁸ *Vansittart v. Vansittart*, 4 K. & J. 62.

⁹ *Besant v. Wood*, 12 Ch. D. 605. See *post*, chap. xvii., Agreements for Separation.

¹⁰ *Hart v. Hart*, 18 Ch. D. 670.

¹¹ *Macgregor v. Macgregor*, 21 Q. B. D. 424. See *Cahill v. Cahill*, 8 App. Cas. 420.

the Married Women's Property Act, 1882,¹ a married woman, so far as her separate estate is concerned, has acquired an unlimited power of contracting with all persons, including her husband;² and any property coming to her through a contract with her husband and from him is her separate estate; and any coming from the wife would equally be the husband's.³ Thus, where a wife buys furniture or other chattels of the husband, which remain at the matrimonial domicile, though they are in the apparent possession of the husband, yet the title being in the wife draws after it the legal possession of the goods.⁴

Another result of the common law doctrine of the unity of husband and wife was that they could not validly make gifts to one another by any conveyance whether of real or personal property, to take effect in possession, reversion, or remainder.⁵ Their capacity to make a valid bequest to each other was based on the fact that the gift or legacy could not take effect till the coverture was at an end. But equity has altogether modified this doctrine of law; and gifts from one to the other which are *bona fide* and not fraudulent will be supported.⁶ In former times, to make a gift of real estate between husband and wife valid, the parties must have had recourse through the Statute of Uses⁷ to a trustee, who served as a conduit-pipe of the interest passing from the husband to the wife; the incapacity of the married couple to contract with each other prevented the husband standing seised to the use of the wife.⁸ If the husband had assigned property to trustees without valuable consideration on behalf of his wife, he might by his conduct constitute himself an agent of his wife and the trustees in respect of the property so assigned.⁹ The like doctrine prevailed where the parties were reversed. The wife also could take from the husband by a purchase made by him in her name, or in their joint names, which was presumed to have been intended as a gift and advancement to her, unless evidence of a different intention was adduced.¹⁰ By section 50 of the Conveyancing Act, 1881,¹¹ husband and wife are rendered capable of conveying to each other their real property and choses in action either alone or jointly with another person. The effect of this section is merged in the wider powers and capacities of the

Gifts and loans between husband and wife; invalid at law.

When valid in equity.

Gift of realty.

Conveyancing Act, 1881

¹ 45 & 46 Vict. c. 75, sect. 1, sub-s. 2.

² See *Boston v. Boston*, 73 L. J. K. B. 17.

³ This capacity to contract with each other, with the result of the wife taking as her separate property what she obtains from her husband, is seemingly one of the many opportunities the spouses have for practising fraud on each other's creditors.

⁴ *Ramsay v. Margrett*, [1894] 2 Q. B. 18.

⁵ Co. Litt. 187 b; 1 Br., H. & W. 29; and see *Phillips v. Barnett*, 1 Q. B. D. 440.

⁶ *Lucas v. Lucas*, 1 Atk. 270; *Beard v. Beard*, 3 Atk. 72. When such will be deemed fraudulent and void as against creditors, see *ante*, chap. viii. pp. 154 *et seq.*

⁷ 27 Hen. VIII. c. 10.

⁸ 1 Rep. H. & W. 53. See also *Ashworth v. Outram*, 5 Ch. D. 923.

⁹ *Re Lulham, Brinton v. Lulham*, 53 L. T. 9.

¹⁰ *Kingdon v. Bridges*, 2 Vern. 67.

¹¹ 44 & 45 Vict. c. 41.

Married Women's Property Act, 1882, and a wife may give to and receive from her husband real property, chattels real and property of every description; and if she be the donee the intervention of a trustee is not requisite. If the effect of the wife's gift of her realty is to convey the legal estate, her acknowledgment under the Fines and Recoveries Act¹ should be taken.

Husband and wife were also able to make a valid gift of chattels to each other, but clear evidence was required of an intention to make the gift, as by an assignment to a trustee in trust for the person to be benefited, or by a distinct and irrevocable act of donation, by which, if necessary, equity deemed the donor to be trustee for the donee.² In order to transfer property by gift there must either be a deed or instrument of gift, or there must be a direct delivery of the thing to the donee.³

A husband might make a gift of a chattel to his wife by a gift to her separate use to some third person to hold it in trust for her; but the intervention of a trustee was never at any time an absolute necessity;⁴ for the husband might, by some unequivocal and complete act, divest himself of the property in the chattel and constitute himself a trustee for his wife in respect of it. The declaration or intention to make a gift, in order to make the gift from husband to wife valid, must have been clear and unequivocal, because in the case of a gift of chattels by one stranger to another, there must be a delivery of the chattels in order to make the gift complete, whereas in the case of husband and wife, there could not have been such a delivery; for assuming the chattels to have been given to the wife, yet they remained in the legal possession of the husband; consequently it was impossible to give that completion to the gift that was necessary in the case of a gift between strangers.⁵ An exception to this principle of law was in the case of the wife's paraphernalia.⁶ Gifts by mere transfer from husband to wife were imperfect in their character, and were not perfected in equity, on the principle that a transfer does not operate as a declaration of trust, otherwise every imperfect instrument would be made effectual by being converted into a perfect trust.⁷ But by the operation of the

¹ 3 & 4 Wm. IV. c. 74, ss. 77-80, as amended by 45 & 46 Vict. c. 39, s. 7.

² See *Mews v. Mews*, 15 Beav. 529.

³ Per Abbott, C.J., in *Irons v. Smallpiece*, 2 B. & Ald. 551.

⁴ *Lady Cowper's Case*, cited in *Graham v. Londonderry*, 3 Atk. 395.

⁵ *Milroy v. Lord*, 4 De G. F. & J. 264; *Grant v. Grant*, 34 L. J. Ch. 641; *Richards v. Delbridge*, L. R. 18 Eq. 11; *Re Breton, Breton v. Woolven*, 17 Ch. D. 416; *Re Whittaker v. Whittaker*, 21 Ch. D. 657. In this last case a piano bought for a wife to learn to play was held to be her separate property.

⁶ See next chapter, section 8.

⁷ *Milroy v. Lord* (*ubi sup.*), *Richards v. Delbridge* (*ubi sup.*), *Re Breton, Breton v. Woolven* (*ubi sup.*); *Re Whittaker, Whittaker v. Whittaker* (*ubi sup.*). There have been cases to the contrary such as *Baddeley v. Baddeley*, 9 Ch. D. 113; and *Fox v. Hawks*, 13 Ch. D. 822; but their correctness has not been accepted.

Married Women's Property Act, 1882,¹ husband and wife may as freely make gifts to one another both of real and personal property as to strangers, and the intervention of a trustee is no longer necessary in the case of the wife,² and so transactions between husband and wife which formerly were ineffectual as being but imperfect gifts would now be valid and good assignments. But where the facts still disclose such an imperfect gift as where the donor took no steps to put the donee in physical possession of the object, when able to do so, but retained that possession himself, equity will, as formerly, refuse to perfect it. After the death of the husband, a gift by him to his wife cannot, as a rule, be established by her uncorroborated evidence; but such must be clear and unequivocal to support it;³ for the position of the parties enables fraud to be easily perpetrated; and the court, through the infirmity of human testimony, is liable to be deceived. But the inference from a certain state of facts that the surviving spouse made a gift to the deceased spouse may be rebutted by the uncorroborated evidence of the survivor.⁴

Gifts between husband and wife must now be proved, just as Valid gifts. gifts between strangers. The following have been held valid gifts between husband and wife: A transfer by the husband of stock already purchased into the wife's name, or their joint names;⁵ a transfer by him in the names of himself and his wife and a stranger, the latter being deemed a trustee for the wife;⁶ allowing a wife to receive a legacy, with the proceeds of which an account at a bank is opened and investments made by her;⁷ a verbal ante-nuptial agreement that money standing to the credit of the wife on deposit at a bank in her maiden name should be her separate property.⁸ Where stock is standing in the sole name of a married woman, the *onus* of proving that it is not her property is on her husband or those claiming under him.⁹

The following have been held not to be gifts: Moneys belonging to a husband proved to have been invested by the wife without his consent, for such remain in equity his property;¹⁰ savings by her out of moneys allowed for household purposes cannot be invested by her as her separate property without his consent,¹¹ unless they are living apart;¹² if such savings are invested in the wife's sole name, the *onus* of proving that they are not the wife's separate property is on the husband or his representatives.¹³ It

¹ 45 & 46 Vict. c. 75.

² Sect. 1, sub-sect. 1.

³ *Re Whittaker, Whittaker v. Whittaker*, 21 Ch. D. 657.

⁴ *Green v. Carlill*, 4 Ch. D. 882.

⁵ *Lucas v. Lucas*, 1 Atk. 270; *George v. The Bank of England*, 7 Price, 646; *Re Eykyn's Trusts*, 6 Ch. D. 115.

⁶ *Re Eykyn's Trusts (ubi sup.)*.

⁷ *Parker v. Lechmere*, 12 Ch. D. 256.

⁸ *Ex parte Whitehead, Re Whitehead*, 14 Q. B. D. 419.

⁹ 45 & 46 Vict. c. 75, ss. 6, 7.

¹⁰ *Barrack v. McCulloch*, 5 W. R. 38.

¹¹ *Brooke v. Brooke*, 17 L. J. Ch. 401.

¹² *Ibid.*

¹³ 45 & 46 Vict. c. 75, ss. 6, 7.

When gift
void under the
bankruptcy
law.

is not, however, every gift by a husband to a wife that is valid for all purposes; and a gift that may be good as between the parties¹ may be ineffectual as against his creditors; so where a gift was for the purpose of preserving the thing given for the enjoyment of the donee, it was held to be a voluntary "settlement of property" within the meaning of section 47 of the Bankruptcy Act, 1883,² and void against the trustee in bankruptcy of the donor or settlor;³ and section 10 of the Married Women's Property Act, 1882, provides that:—

"Nothing in this Act contained shall give validity as against creditors of the husband to any gift by a husband to his wife of any property which, after such gift, shall continue to be in the order and disposition or reputed ownership of the husband, or to any deposit or other investment of moneys of the husband made by or in the name of his wife in fraud of his creditors; but any money so deposited or invested may be followed as if this Act had not passed."

Legacy to
wife has no
priority.

But if a wife buys property of her husband which remains in the matrimonial domicile and so is in the apparent possession of the husband, yet her title to it is effective.⁴ Thus a distinction is to be drawn between a gift and a sale by husband to wife. A gift to a wife by way of legacy, with immediate payment directed, does not create priority for the legacy; and if the husband's personal estate is insufficient to pay all the legacies in full, that in favour of the wife is liable to abatement.⁵

Gifts by wife
to husband.

The capacity of a wife to make a gift of her separate property to her husband as well as to strangers has long been recognized; and a gift of such property to her husband was deemed to be valid, unless she could prove fraud, duress, or the like, on his part;⁶ in which case the husband would become a trustee for her.⁷ This would seem to be still the law; and to sustain a gift from the wife to the husband the latter must produce cogent evidence of her intention to make it;⁸ and where the husband is shown to have obtained a large voluntary benefit from his wife, his influence as husband will be presumed; and unless that presumption is displaced the transaction will be set aside.⁹ This *onus*

¹ *Groves v. Groves*, 3 Yo. & Jer. 163. See also *Curtis v. Price*, 12 Ves. 103; *French v. French*, 6 De G. M. & G. 95.

² 46 & 47 Viet. c. 52.

³ *Re Vansittart, Brown v. Vansittart*, [1893] 1 Q. B. 18. The word "settlement," in this case was held to include a gift of chattels (jewels) from husband to wife.

⁴ *Ramsay v. Margrett*, [1894] 2 Q. B. 18.

⁵ *Re Schweder's Estate, Oppenheim v. Schweder*, [1891] 3 Ch. 44. In this case *Blower v. Morrett*, 2 Ves. Sen. 400, was followed, but *Hardy v. Hardy*, 17 Ch. D. 798, was dissented from.

⁶ *Essex v. Atkins*, 14 Ves. 542; *Lynn v. Ashton*, 1 R. & M. 190.

⁷ *Wassell v. Leggett*, [1896] 1 Ch. 554.

⁸ *Rich v. Cockell*, 9 Ves. 369; *Hughes v. Wells*, 9 Ha. 749; and see *Re Whittaker*, 21 Ch. D. 657.

⁹ *Bischoff's Trustee v. Frank*, 89 L. T. 188.

exists notwithstanding the change introduced by the Married Women's Property Act, 1882; and it is probable that a married woman will not be permitted to give a fund in court to her husband without having her consent first taken in court.¹ A gift is more readily assumed in the case of the income of her separate property; and if she pay the income of her separate estate to her husband, that fact may operate as a gift to him;² and if while living together she either pays or allows him to receive such income for joint family purposes, that fact would constitute a gift, and she would not be allowed to recall it.³ When there is a question whether a pecuniary transaction between husband and wife amounts to a gift on her part or no, there is no difference of principle applicable depending upon the fund affected being principal or income.⁴ The rule in equity is that, when husband and wife have lived together, the wife cannot charge her husband or her husband's estate as her debtor for arrears of her separate income which she has permitted him to receive. The object of this rule, according to Lord Hardwicke, was to prevent such accounts between husband and wife which it would be impossible to determine according to the rights after the death of the parties.⁵ Thus, if while living together the husband *quid* husband receives his wife's dividends, and she assents to or acquiesces in his expenditure of them in a particular manner for his own purposes, she is not entitled to recall them; but, on the other hand, if they separate and he continue to receive them and so apply them, he would be deemed to receive them as trustee only from the date of the separation, and would be liable to account for them.⁶

But the above rule is not so applicable where the husband receives the capital separate property of the wife;⁷ thus the transfer of her separate property into her husband's name is not *per se* sufficient evidence of a gift to him for his own use,⁸ even

What are not gifts.

¹ See *Wadsworth v. Dayrell*, 4 W. R. 689.

² *Woodward v. Woodward*, 3 De G. J. & S. 672; and see *Mercier v. Mercier*, [1903] 2 Ch. 98.

³ *Powell v. Hankey*, 2 P. Wms. 82; *Caton v. Rideout*, 1 Mac. & G. 599; *Re Young, Trye v. Sullivan*, 28 Ch. D. 705; *Edward v. Cheyne* (No. 2), 13 App. Cas. 385; *Re Flamank, Wood v. Cock*, 40 Ch. D. 461.

⁴ *Mercier v. Mercier* (*ubi sup.*).

⁵ Per Lord MacNaghten in *Edward v. Cheyne* (*ubi sup.*).

⁶ See *Dixon v. Dixon*, 9 Ch. D. 587.

⁷ *Darkin v. Darkin*, 17 Beav. 578; *Scales v. Baker*, 28 Beav. 91; *Dixon v. Dixon*, (*ubi sup.*); *Re Curtis, Hawes v. Curtis*, 52 L. T. 244; *Re Flamank, Wood v. Cock* (*ubi sup.*); *Re Hawes, Burchell v. Hawes*, 62 L. J. Ch. 463. In *Darkin v. Darkin*, the whole of the purchase money of an estate conveyed to the husband consisted of moneys belonging to the wife which had been invested in the joint names of the husband and wife; after the death of the husband, the widow was held entitled to the property as against the husband's devisee. In *Scales v. Baker* the estate was purchased in part out of the wife's separate property and conveyed to the husband, and no intention to make a gift was established: the wife was held entitled to a lien on the estate to the extent of her share of the purchase-money.

⁸ *Rich v. Cockell*, 9 Ves. 369.

where it can be shown that she allowed the property to be transferred; and the burden is on the husband or his representatives to show that the wife had given him the property.¹ If the wife is willing to make a gift of her separate estate to her husband, which is transferred into their joint names, but he refuses to accept it, and treats the property as his wife's the husband will be treated as a trustee and not as donee.² But if she knowingly and voluntarily allows her husband to use her separate capital property for his business purposes and not by way of mere loan, she will be deemed to have made a gift of it to him;³ also where she appoints her separate property for his and her own absolute use and benefit, and she and her husband concur in the sale and transfer of such property.⁴ Where a wife living together with her husband permits him to make investments with her property in their joint names, the ordinary incidents of property held in joint tenancy apply, and such investments will accrue to the survivor.⁵ A husband has no equity to recoup himself for money which he has expended in improving an estate purchased with his wife's separate property which she was restrained from anticipating; and which money he prevailed on her trustee to advance.⁶

If a married woman carrying on a trade apart from her husband were to make a voluntary gift to him under circumstances which would, in the event of her bankruptcy, entitle the trustee to follow the property, the husband would be compelled to restore it. So, too, a gift by a wife to her husband of property which continues in her order and disposition would not prevail against the claim of her trustee in bankruptcy;⁷ but such a gift might prevail against her creditors where she was not made a bankrupt. If a husband is a solicitor and his wife is settling her property in his favour, there is a duty cast on him to explain most fully the provisions in his favour, and after his death the burden of proof will lie on his representatives to uphold it.⁸

A husband formerly at common law could not make a valid loan to his wife, both because it was in the nature of a contract, and whatever property might have passed by delivery reverted to him in virtue of his marital right. But in equity the husband was enabled to sue his wife in respect of her separate estate.⁹ The husband can make a valid loan to his wife of property, whether specific chattels or other things. The Married Women's Property Act, 1882, has not interfered with his right against his

¹ *Re Curtis, Hawes v. Curtis*, 52 L. T. 244.

² *Re Blake, Blake v. Power*, 60 L. T. 663.

³ *Gardner v. Gardner*, 1 Giff. 26.

⁴ *Hale v. Sheldrake*, 60 L. T. 292.

⁵ *Re Young, Trye v. Sullivan*, 28 Ch. D. 705.

⁶ *Wiles v. Cooper*, 15 L. J. Ch. 129.

⁷ See 45 & 46 Vict. c. 75, s. 10.

⁸ *Lovesey v. Smith*, 15 Ch. D. 655.

⁹ *Butler v. Butler*, 16 Q. B. D. 374.

wife's separate property, and he can maintain an action against her to charge her separate estate for money lent by him to her after marriage.¹ The loan would become the separate property of the wife, and be unaffected by the control of the husband, except so far as he had the right to recall it, when the purposes for which it was made were at an end, or the period for which it was lent was terminated, or he deemed it advisable to recall it.

In equity the capacity of a wife who had separate estate to make a valid loan to her husband was clearly recognized, and she might have sued her husband, or proved against his estate after death, like any other creditor.² Her capacity for making loans to her husband is fully recognized by the Married Women's Property Act, 1882;³ but in respect of them she is postponed till his other creditors have been paid in full. Section 3 of that Act enacts:

By wife to husband.

M.W.P. Act, 1882.

"Any money or other estate of the wife lent or intrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise, shall be treated as assets of her husband's estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the amount or value of such money or other estate, after, but not before all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied."⁴

Wife's claim postponed to those of husband's other creditors in bankruptcy.

This is an application of the principle embodied in the Partnership Law Amendment Act, 1865,⁵ which in its turn has been repealed and re-enacted by the Partnership Act, 1890,⁶ that where money is advanced by way of loan to a person engaged in business in consideration of a share in the profits of the business, on such trader being adjudged a bankrupt, entering into an arrangement, whether in writing or oral,⁷ to pay his creditors less than twenty shillings in the pound, or dying in insolvent circumstances, the lender shall not be entitled to recover his loan till the claims of the other creditors of the borrower for valuable consideration have been satisfied. The wife living with her husband is deemed to share in a larger manner than his other creditors in the advantages and profits of her loan and advance made to him in the way of his business or trade, whatever the terms as to the

Partnership Acts, 1865 and 1890.

¹ *Butler v. Butler*, 16 Q. B. D. 374.

² *Woodward v. Woodward*, 11 W. R. 1007.

³ 45 & 46 Vict. c. 75, s. 3.

⁴ See *Re Genese, Ex parte District Bank of London*, 16 Q. B. D. 700. This section, it will be seen, adopts the principle of the "reputed ownership" clause of the Bankruptcy Acts, so as to pass to the husband's creditors any property lent to him by his wife, and in his order and disposition; though such reputed ownership must be sole and not joint, *Ex parte Dorman* (L. R. 8 Ch. App. 54); thus, furniture, &c., the separate property of the wife, in the joint occupation of the married couple, will not form part of the husband's assets.

⁵ 28 & 29 Vict. c. 86, s. 5 (Bovill's Act).

⁶ 53 & 54 Vict. c. 39, ss. 2 (3 d), 3.

⁷ See *Re Fort, Ex parte Schofield*, [1897] 2 Q. B. 495.

interest she is to receive may be.¹ This principle has been applied where the woman was not lawfully married to but was living with the man.² The third section of the Married Women's Property Act, 1882, is limited in its effect to cases of the *bankruptcy* of the husband, and would not apply to an arrangement to pay a composition to his creditors. By the joint operation of section 3 of 45 & 46 Vict. c. 75, and of section 10 of the Judicature Act, 1875, her claim is liable to be postponed where she is a creditor against the insolvent estate of her husband which is being administered by the Court of Chancery, for the latter section provides that in the administration by the court of the assets of any person who may die . . . and whose estate may prove insufficient for the payment in full of his debts and liabilities, the rules in bankruptcy shall prevail and be observed as to debts and liabilities provable;³ but if the widow be executrix or administratrix of her late husband, whose estate is insolvent, her common law right of retainer is not affected by this section of the Judicature Act, or the third section of the Married Women's Property Act, 1882; and if assets come to her hand as such representative of her husband, she will be allowed to retain out of them the amount of a loan made by her to him in his business out of her separate estate.⁴ Formerly a wife was allowed to prove in the administration of her dead husband's estate for the amount of a transaction which amounted to a loan and not a gift on her part;⁵ but with the exception just pointed out that would not now be permitted. The effect of the section under discussion is not retrospective.⁶ The words "or otherwise" in this section seem to have very little meaning, for they have been held not to refer to a case where a loan was made by a wife to her husband for private purposes, though he was in trade,⁷ or to a case where a loan was made by her to a trading firm of which her husband was a member.⁸ Whatever they may mean they do not cut out the previous limitation, "for the purpose of any trade or business carried on by him."⁹

When claim of wife not postponed.

The wife's claim would seem only to be postponed where the loan has been made to the husband as a sole trader. Where she lends money to her husband who is in trade or business, the *onus* is not on her to show that the money

¹ Per Cave, J., in *Re Tidswell, Ex parte Tidswell*, 56 L. J. Q. B. 548.

² *Re Beale, Ex parte Corbridge*, 4 Ch. D. 246.

³ *Re May, Crawford v. May*, 45 Ch. D. 499; *Re Leng, Tarn v. Emmerson*, [1895] 1 Ch. 652.

⁴ *Re May, Crawford v. May (ubi sup.)*; *Re Ambler, Woodhead v. Ambler*, [1905] 1 Ch. 697.

⁵ *Woodward v. Woodward*, 11 W. R. 1007.

⁶ *Re Home, Ex parte Home*, 54 L. T. 301.

⁷ *Re Tidswell, Ex parte Tidswell (ubi sup.)* See *Mackintosh v. Pogose*, [1895] 1 Ch. 505.

⁸ *Re Tuff, Ex parte Nottingham*, 19 Q. B. D. 88.

⁹ By the Court of Appeal in *Re Clark, Ex parte Schulze*, [1898] 2 Q. B. 330.

was not lent for the purposes of his trade or business.¹ If she take a security for the loan she will be allowed to retain it till her claim has been satisfied,² for the principle of Bovill's Act applies only where the sole security is the personal responsibility of the trader.³ If, too, at her husband's request she deposits with his bankers title-deeds of her separate real estate as security for advances to be made by them in his business, and such advances are made and afterwards paid off by her, she is entitled to prove in his bankruptcy for the amounts so paid by her in competition with his other creditors.⁴ She will not be postponed where her husband has fraudulently converted her separate property without her consent.⁵ So, too, trustees of a marriage settlement who have power to apply money brought into settlement by the wife for the husband's advancement, and do not advance it for his trading or business purposes on his personal or other security, would not be postponed under this section.⁶

Where she advances money to her husband not for his trade or business purposes, the equity rule which regarded the property of the wife lending money to her husband as a mere surety for his debts, giving her all the rights of a surety will be preserved. These included the valuable right of having her real estate exonerated after her husband's death out of his real and personal property in cases where she had mortgaged her realty in order to pay off his debts.⁷ But where the money is shown to have been advanced for his trading or business purposes, then the provisions of this section will prevail; and any claim to be exonerated will have effect given to it only after the husband's other creditors have been fully satisfied. If, therefore, a wife join in making a promissory note with her husband who is not in trade but is made bankrupt, though liable on the note she would be entitled to deduct from the sum payable by her the amount of the dividend paid by his estate.⁸ But if the husband were in trade or business she would not be able to set off against the claim against her on the note the amount of the dividend payable by his estate or claim for a dividend till all his creditors had been paid the full amount of their debts.

Equity of
exoneration.

In a case where a wife lent money to a husband secured by a bond conditioned to pay interest, and the couple lived together

When Statute
of Limitations
does not run

¹ *Re Cronmire, Ex parte Cronmire*, [1901] 1 Q. B. 480. This practically overrules the decision of Cave, J., in *Re Genese, Ex parte District Bank of London*, 16 Q. B. D. 700. But the earlier decision seems the more correct of the two.

² *Ex parte Sheil, Re Lonergan*, 4 Ch. D. 789.

³ Lind. Part. 59.

⁴ *Re Cronmire, Ex parte Cronmire (ubi sup.)*.

⁵ See principle of *Lacey v. Hill*, 4 Ch. D. 537; S. C. 3 App. as. 94.

⁶ See *Re Kershaw's Trusts*, L. R. 6 Eq. 322.

⁷ *Earl of Huntingdon v. Countess of Huntingdon*, 2 Bro. P. C. 1; *Robinson v. Ges*, 1 Ves. Sen. 252; *Ferguson v. Gibson*, L. R. 14 Eq. 335. See *ante*, p. 198.

⁸ See *Davies v. Jenkins*, 6 Ch. D. 728.

against wife's
loan to
husband.

in amity for more than twenty years, and she during coverture never required the interest to be paid to her, and no interest was ever paid, or acknowledgment of the debt ever made by the husband during coverture, and for twenty years after he had survived his wife, it was held on the principle that as the hand to pay and to receive was the same, no payment over of interest was necessary, that the Statute of Limitations did not run, and the bond on the death of the husband was still subsisting.¹

Loan by hus-
band to wife as
separate trader
and bankrupt,
postponed,
quere.

Since the passing of the Married Women's Property Act, 1882, the question may be litigated as to what is the position of a husband who has made a loan to his wife, who, carrying on a trade or business separately from him, has been adjudicated a bankrupt. By sub-section 5 of section 1, she may carry on a trade apart from her husband, and may be made bankrupt in respect of such separate trading. If the husband make her a loan for the purposes of her separate business and she becomes bankrupt, will he be entitled to rank in competition with her other creditors; or will his claim be postponed till those of the other creditors have been satisfied, on the application of the principle of Bovill's Act above mentioned? ² As the bankruptcy law is regulated by statute, and as by it every *bonâ fide* creditor has a right to a share in the bankrupt's property available for distribution, if the husband is a *bonâ fide* creditor, he would *primâ facie* be entitled to prove in competition with the rest of the creditors and share in any dividend that might be declared. But probably the decision of the courts would depend upon the facts in each case. If the trade or business were carried on nominally apart from the husband, who participated in the profits and reaped jointly with his wife the benefit of his own advance, his claim would no doubt be postponed. If, on the other hand, it were shown that the advance was *bonâ fide*, and he in no way derived any benefit from the trade or business in the way of sharing profits or otherwise, then his claim would probably be admitted *pari passu* with those of the other creditors.

Bill of sale
between
spouses valid.

A husband and wife may execute a valid conveyance of chattels to each by mere delivery; and if any question as to the possession of such goods arises, it will be determined in favour of the spouse who has the title to them.³ They can also execute a *bonâ fide* bill of sale to each other.⁴

¹ *Re Dixon, Heynes v. Dixon*, [1899] 2 Ch. 561.

² 28 & 29 Vict. c. 86 as amended by 53 & 54 Vict. c. 39.

³ *Ramsay v. Margret*, [1894] 2 Q. B. 18.

⁴ *Ibid.*

SECTION 3.

Contracts by Married Women as Agents whether for Third Persons or their Husbands.

Marriage, as has already been shown, operated at common law to disable a married woman from contracting so as to bind herself or her husband, though in equity she could contract so as to charge her separate property. But coverture did not take away the wife's capacity to be an agent for third persons or for her husband, or to bind the latter by her contracts made with his assent or ratified by him.

Where a married woman is directly employed by a third person as agent, or her engagements are ratified by him, the ordinary law regulating the relations of principal and agent will be applied. Under the old law it was the authority of her principal, whether evinced by his direct mandate or by subsequent ratification, that clothed her contract with validity, and without that authority her contract was null and void; it bound neither herself nor the person for whom she purported to act. Parol evidence that some person other than the married woman was the principal may be given.¹ Under the Married Women's Property Act, 1882,² when a married woman enters into a contract she is deemed to do so on her own behalf and with the intent to bind her separate property, unless the contrary is proved, and one method of proving the contrary is by showing she acted as an agent only. Under the more recent Married Women's Property Act, 1893,³ she acquires complete contractual power. Here the phraseology is altered; for it runs: "Every contract hereinafter entered into by a married woman *otherwise than as agent*, shall be deemed to be a contract entered into by her with respect to and to bind her separate property, whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract." As the law now stands, a married woman who is affected by the Act of 1882, can escape liability for her contracts by showing that she did not possess any separate estate or any free separate estate at the time of the contract, or was acting as agent only; while one who is affected by the Act of 1893 can only escape liability for her valid contract by showing she acted as agent only. It is immaterial whether such agency is on behalf of third persons or her husband. If a married woman hold herself

Married
woman agent
for third
persons.

M.W.P. Act,
1882.

M.W.P. Act,
1893.

¹ *Edmunds v. Bushell*, L. R. 1 Q. B. 97; *Evans*, Prin. & Agent, 358.

² 45 & 46 Vict. c. 75, s. 1, sub-s. 3.

³ 56 & 57 Vict. c. 63, s. 1 (a).

out as agent, but is found to have no authority to contract as such, she would be liable to an action on the implied warranty, or to an action for deceit, if the other contracting party was unaware of her want of authority.

If the wife is alleged to have acted on the express authority of her husband, questions of law in the matter can scarcely arise; her express authority must be proved, like the express authority of any other agent, and the only dispute would be as to whether the facts proved did or did not constitute her such express agent. As long as the wife's authority lasts she can render her husband liable for contracts entered into by her within the scope of her authority, but which can be revoked at any moment by him.¹ The husband, too, may be made liable by estoppel through his own conduct, as where he recognizes her authority by paying debts contracted by her.²

The question here for discussion is how a wife can act as agent for her husband so as to bind him, or render him liable on contracts, whether for necessities supplied to her for her use alone, or for the use of the household generally, or on contracts not connected with necessities. The capacity of the wife to bind her husband as his agent is not a novel doctrine of the law, for it is laid down in Fitzherbert,³ that "a man shall be charged in debt for the contract of his bailiff or servant, where he giveth authority to his bailiff or servant to buy and sell for him; and so for the contract of his wife, if he giveth his authority to his wife; otherwise not." The law is also stated by Bayley, J.,⁴ to be as follows: "If a man without any justifiable cause turn away his wife, he is bound by any contract she may make, for necessities suitable to her degree and estate. If the husband and wife live together, and the husband will not supply her with necessities, or the means of obtaining them, then although she has her remedy in the ecclesiastical court, yet she is still at liberty to pledge the credit of her husband for what is strictly necessary for her own support. But whenever the husband and wife are living together, and he provides her with necessities the husband is not bound by contracts of the wife except where there is reasonable evidence to show that the wife has made the contract with his assent." Thus the husband's liability may arise from the contract having been made by his wife as his agent, whether connected or not with necessities, or in respect of necessities only, from his improper refusal or neglect to supply her with necessities.

A wife was treated as agent for her husband under circum-

¹ *Ex parte Vernall, Re Cook*, 10 Morr. Bank. Rep. 8.

² See *Wallis v. Biddick*, 22 W. R. 76. See *post*, p. 318, for a fuller discussion of this subject.

³ F. N. B. G. 120.

⁴ In *Montague v. Benedict*, 3 B. & C. 631, 635.

Wife as agent
for husband,
express
authority.

How far wife
as agent can
bind her
husband.

Liability of
husband based
on the law of
principal and
agent.

stances which, if she had been a stranger, would not have constituted her his agent. It was and is a well-recognized principle that no person can be made liable as drawer, indorser, or acceptor of a bill of exchange or promissory note, who has not signed it as such;¹ but in one case it has been held that the drawee of a bill of exchange accepted by his wife in her own name, but by his authority, was liable upon the bill as acceptor.² But now, unless the agency appeared on the face of the instrument, her acceptance in her own name would bind her alone; because, owing to the altered relations between husband and wife, the rule of law as to negotiable instruments would apply equally to them as to strangers; and the presumption is that the liability is that of the wife alone.³

Where the wife is only implicitly authorized, as his agent, to contract for necessities, then the chief difficulties arise, and the scope and extent of her agency and authority can only be gathered from the conduct of the parties. If a husband hold out his wife as his agent, and afterwards become a lunatic, a third person who deals with the wife during his lunacy, but without notice of it, can recover from the husband in respect of a contract made on his behalf, by his wife, during his lunacy, though as between the spouses her agency was determined by his lunacy.⁴ But where a wife was found to have an implied authority to pledge his credit for necessities, her authority was revoked by his death, even though she had contracted before she could possibly have known of it.⁵ This authority on the part of the wife to pledge her husband's credit is not a mere creature of law, but must be based upon some substantial conduct of the husband expressly or implicitly assenting to be bound; thus, where the wife had certain house repairs executed while the husband was a lunatic, she was held not to have had authority to pledge his credit for things other than necessities, which the repairs were found not to be;⁶ yet he would be held liable, though a lunatic, where his wife, having an insufficient allowance, incurred expenses on his behalf which could be brought under the description of necessities;⁷ or for money advanced to and applied by her in the purchase of necessities.⁸ The authority of a wife

Implied
authority

Agency of wife
a question of
fact.

¹ See 45 & 46 Vict. c. 61, s. 23; see also the same section for the exceptions to the rule.

² *Lindus v. Bradwell*, 5 C. B. 583.

³ See 45 and 46 Vict. c. 75, s. 1, sub-s. 3.

⁴ *Drew v. Nunn*, 4 Q. B. D. 661.

⁵ *Smout v. Ilbery*, 12 L. J. Ex. 357; *Blades v. Free*, 9 B. & C. 167. But these cases may very probably not be followed in the future, as they seem to strain the law.

⁶ *Richardson v. Dubois*, L. R. 5 Q. B. 51. See *Smout v. Ilbery* (*ubi sup.*).

⁷ *Read v. Legard*, 20 L. J. Ex. 309.

⁸ *Davidson v. Wood*, 32 L. J. Ch. 400; *Re Wood's Estate*, 1 De G. J. & S. 465. This case would not now be so decided, because the wife had separate property. See *Liddlow v. Wilmot*, 2 Stark. 86.

derived from cohabitation to bind her husband's credit does not extend to the borrowing of money by her, though the money is spent by her in the purchase of necessaries.¹

The question of the liability of the husband for the contracts of his wife for the supply of necessaries will be divided into two parts:—

(1) Where the contract by the wife was made while living with her husband.

(2) Where the contract by the wife was made while living apart from her husband.

(1) *Where the Contract was made by the Wife while living with her Husband.*—The mere fact of cohabitation does not imply a legal mandate making the wife an agent in law to bind her husband, and to pledge his credit.² His liability for the debts contracted by his wife for necessaries rests solely on the doctrine of principal and agent. The wife cannot bind the husband without his assent, *express* or *implied*. The authority of a wife to pledge the credit of a husband is a delegated, not an inherent authority.³ It is the duty of the husband to cherish and support his wife and family; and she, as his agent, may make valid contracts on his behalf; but as he has to sustain the burden of the debts contracted, his judgment should be permitted to regulate the expenditure according to his means.⁴ During cohabitation, there is a presumption arising from the very circumstances of the cohabitation of the husband's assent to contracts made by the wife for necessaries suitable to his degree and estate; that is to say, a wife has an implied authority to pledge her husband's credit for such things as fall within the domestic department ordinarily confided to her management, and are necessary and suitable to the style in which her husband chooses to live;⁵ that is, she has the right to pledge his credit for such necessaries until she has notice of his dissent. Though this presumption extends, as a rule, only to the wife's contracts for goods suitable to the husband's degree and estate, yet if he knowingly permit her to assume an appearance beyond that estate and degree, he will be liable for goods which might reasonably be supplied to a person in her assumed station of life, and the tradesman is not bound to inquire into the truth of her style and appearance, for that concerns her husband alone.⁶ From this it follows that the husband will *not* be responsible for goods supplied to his wife beyond his station in life without his assent.⁷

¹ See *Knox v. Bushell*, 3 C. B. (N.S.) 334.

² See the cases of *Debenham v. Mellon*, 6 App. Cas. 24, and *Morel v. Westmorland (Earl of)*, [1904] A. C. 11. ³ Per Lush, J., in *Eastland v. Burchell*, 3 Q. B. D. 435.

⁴ *Manby v. Scott*, 1 Sid. 109.

⁵ *Etherington v. Parrott*, 2 Lord Raym. 1006; *Phillipson v. Hayter*, L. R. 6 C. P. 38.

⁶ *Waithman v. Wakefield*, 1 Camp. 120; *Meredith v. Footner*, 12 L. J. Ex. 183.

⁷ *Montague v. Benedict*, 3 B. & C. 631.

Liability of husband on contract of wife for necessaries.

Contract made by wife while living with husband.

Presumption of authority to pledge his credit arises from cohabitation.

It would be going too far to say that extravagance on the part of the wife would negative the presumption of her husband's implied assent, but it would be evidence to go to the jury that she had acted without his authority.¹ But mere grumbling or remonstrance on his part at his wife's extravagance would not be sufficient evidence to show that he had withheld his authority to her to purchase expensive articles.²

This presumption holds good, not only in the case of a wife but of a mistress living with a man, and who passes for his wife ; and it is immaterial whether the person supplying the goods was or was not aware of the relations between them,³ and this liability on the man's part will continue, even after the cohabitation has ceased, unless the parties supplying the goods are affected with knowledge of the separation.⁴ The liability would be the same where the delegated person was a sister, or housekeeper, or steward, or bailiff.

Presumption holds good in case of a mistress ;

or other delegate.

The question has been asked many times whether the fact of cohabitation implies a mandate in law to the wife making her agent of her husband, so as to bind him and pledge his credit. The proper answer is neither in the affirmative nor negative, but rather that the mandate from cohabitation must be an *implication of fact*, and not a *conclusion of law*.⁵ No man is to be bound against his will, and if the husband, like any other principal, can show that his assumed agent had no authority from him to pledge his credit, it will be open to him to do so. In other words, where a wife is living with her husband, the presumption is that she has his authority to bind him by her contracts for articles suitable to that station which he permits her to assume, but that presumption may be rebutted by showing that she had not such authority. This doctrine was laid down in the two important cases of *Jolly v. Rees*, and *Debenham v. Mellon*, and is now settled law.⁶

Mandate from fact of cohabitation an implication of fact, and not a conclusion of law.

In *Jolly v. Rees*, the majority of the court (Earle, C.J., and Williams and Willes, JJ., Byles, J., dissenting) laid down the following proposition :⁷ " We consider that the wife cannot make a contract binding on her husband unless he gives her authority

Presumption of wife's authority rebuttable. *Jolly v. Rees*.

¹ *Lane v. Ironmonger*, 14 L. J. Ex. 35.

² See *Morgan v. Chelwynd*, 4 F. & F. 457.

³ *Watson v. Threlkeld*, 2 Esp. 637.

⁴ *Ryan v. Sams*, 17 L. J. Q. B. 271 ; *Monro v. de Chemant*, 4 Camp. 215.

⁵ *Lane v. Ironmonger* (*ubi sup.*) ; *Jolly v. Rees*, 33 L. J. C. P. 177 ; *Debenham v. Mellon*, 6 App. Cas. 24 ; S. C. in Court of Appeal, 5 Q. B. D. 394 ; *Morel v. Westmorland* (*Earl of*), [1904] A. C. 11.

⁶ See *Morel v. Westmorland* (*Earl of*) (*ubi sup.*).

⁷ 15 C. B. (N.S.) 628, at p. 639. The facts of this case were as follows : The goods in respect of which the action was brought were supplied by the plaintiffs upon the orders of Mrs. Rees during the years 1860 and 1861. They consisted of drapery and millinery goods suitable for persons in the position of Mrs. Rees and her daughters. The prices were fair and reasonable. The orders were conveyed by letter, and the goods were directed to Llanelly station, none being sent directly to the defendant's house. The defence set up was, that the wife had a sufficient allowance to enable her to obtain

as his agent to do so. We lay down this as the general rule, premising that the facts do not raise the question, What might have been the rights of the wife, either if she was living separate without any default on her part towards her husband, or if she had been left destitute by him? . . . Where a plaintiff seeks to charge a husband on a contract made by his wife, the question is whether the wife had his authority, express or implied, to make the contract; and that if there be express authority, there is no room for doubt, and if the authority is to be implied, the presumptions which may be advanced on one side may be rebutted on the other; and although there is a presumption that a woman living with a man, and represented by him to be his wife, has his authority to bind him by her contract for articles suitable to that station which he permits her to assume, still this presumption is always open to be rebutted."

Debenham v. Mellon.

In *Debenham v. Mellon*,¹ it was held that where a husband neither does, nor assents to, any act to show that he has held out his wife as his agent to pledge his credit for goods supplied on her order, the question whether she bears that character must be examined upon the circumstances of the case. In the House of Lords, Selborne, L.C., said:² "The first question before your lordships is, whether the mere fact of marriage implies a mandate by law, making the wife (who cannot herself contract, unless so far as she may have separate estate) the agent-in-law of her husband, to bind him, and to pledge his credit, by what otherwise would have been her own contract, if she had been a *feme sole*. On that point, I think it enough to say that, according to all the authorities, there is no such mandate in law from the fact of marriage only, except in the particular case of necessity—a necessity which may arise when the husband has deserted the wife, or has by his conduct compelled her to live

Mandate to
pledge hus-
band's credit
in cases of
necessity.

articles of the description of those in question without pledging her husband's credit for them, and that he had expressly prohibited her doing so. It was conceded that the plaintiffs had received no notice of the defendant's prohibition to his wife to pledge his credit. Upon the findings of the jury, the learned judge directed a verdict for the plaintiffs for the amount claimed, but with leave for the defendant to move to enter a verdict for him, if the court should see fit. The court entered the verdict for the defendant.

¹ 6 App. Cas. 24; S. C. Court of Appeal, 5 Q. B. D. 304. The facts of the case were as follows: The plaintiffs sued for the price of articles of dress sold by them to the defendant's wife. It was admitted that the prices were reasonable, and it was not disputed that the articles of dress were necessities for the defendant's wife, in the sense that they were suitable to her degree and condition in life. The defendant relied upon a secret revocation of his wife's authority to pledge his credit. The defendant and his wife were called as witnesses, and stated that by an arrangement made between them he was to furnish her with money to supply herself and her children with clothes, and that he had positively forbidden her to exceed it. They lived together, and an allowance of £52 a year was paid by the husband to the wife for that purpose. In some years the allowance was increased to £62. The judge asked the jury whether, at the time when the goods were ordered, the defendant had withdrawn from his wife authority to pledge his credit, and had forbidden her to do so; the jury answered the question in the affirmative. Judgment was entered for the defendant.

² 6 App. Cas. pp. 31, 32.

apart from him, without properly providing for her, but not when the husband and wife are living together, and when the wife is properly maintained; because there is, in that state of circumstances, no *prima facie* evidence that the husband is neglecting to discharge his necessary duty, or that there is any necessary occasion for the wife to run him into debt for the purpose of keeping herself alive, or supplying herself with lodging or clothing. I therefore lay aside that proposition; and, thinking it clear that there is no mandate in law by the mere fact of marriage applicable to such a state of circumstances as we have at present to consider, I pass to the next question, whether the law implies a mandate to the wife, from the fact, not of marriage, but of cohabitation? If it does, on what principle? Cohabitation is not (like marriage) a status, or a new contract; it is a general expression for a certain condition of facts. If, therefore, the law did imply any such mandate from cohabitation, it must be as an implication of fact, and not as a conclusion of law." His lordship also stated that though a husband may not intend to hold her out as his agent, and though she may not actually have had authority, he may have so conducted himself as to entitle a tradesman dealing with her to rely upon some appearance of authority for which he ought to be responsible. Lord Blackburn, in the course of his judgment, remarked:¹ "The question comes to be, first, had she, from her position as wife, authority to pledge her husband's credit, although the husband had revoked that authority? I grant that the fact of a man living with his wife, frequently, and indeed always, does afford evidence that he intrusts her with such authorities as are commonly and ordinarily given by husband and wife. . . . In the ordinary case of the management of a household the wife is the manager of the household, and would necessarily get short and reasonable credit on butchers' and bakers' bills and such things; and for these she would have authority to pledge the credit of the husband. I think that if the husband and wife are living together, that is a presumption of fact from which the jury may infer that the husband really did give his wife such authority. But even then, I do not think the authority would arise, so long as he supplied her with the means of procuring the articles otherwise. But that is not the present question, which is this: Had the wife a mandate to order the clothes which it would be proper for her in her station in life to have, though the husband had forbidden her to pledge his credit, and had given her money to buy clothes? I think, for the reason given by the majority of the judges in *Jolly v. Rees*, and also by the judges in the Court of Appeal in this case, that there is no authority and no principle for saying

Presumption
arises not from
marriage, but
cohabitation.

¹ 6 App. Cas. pp. 36, 37.

that the wife had authority to pledge her husband's credit. I quite agree that if the husband knew that the wife had got credit, if he had allowed the tradesman to suppose that he himself had sanctioned the transactions by paying them, or in other ways, it might very well be argued that he would have given such evidence of authority that if he did revoke it, he would be bound to give notice of the revocation to the tradesmen and to all who had acted upon the faith of his authority and sanction. That would be the general rule, for where an agent is clothed with an authority, and afterwards that authority is revoked, unless that revocation has been made known to those who have dealt with him, they would be entitled to say, 'The principal is precluded from denying that that authority continued to exist, which he had led us to believe, as reasonable people, did formerly exist.'

Where goods supplied are necessities, *onus* of disproof of liability is on husband.

This implied authority to pledge the husband's credit is not, therefore, a mere creature of law, but must be based upon some substantial conduct of the husband. Where goods within the category of necessities are supplied to the wife living with her husband, she will be deemed to have an implied authority from him to contract,¹ and the *onus* is on the latter to show that they were furnished under circumstances not rendering him liable to pay for them;² though evidence is clearly admissible to rebut the implied authority to contract for such goods,³ and that credit was given to the wife herself,⁴ or that the orders were extravagant, or that she had separate income.⁵ The husband may also show that the goods sought to be charged for were not necessities, on the ground that his wife was already well supplied with others of the same kind and description;⁶ for a wife supplied with necessities according to the state and degree in society of her husband, has no right or power without his previous authority or subsequent sanction⁷ to pledge his credit for expensive articles supplied secretly to her,⁸ even where he sees them, but disapproves of their purchase.⁹

Husband may show goods were not necessities.

Where a husband makes his wife a sufficient allowance for household management and supply of necessities, she cannot

Sufficient allowance by husband *prima facie* negatives

¹ *Emmett v. Norton*, 8 C. & P. 506; *Jolly v. Rees*, 33 L. J. C. P. 177. *Ruddick v. Marsh*, 1 H. & N. 601, has been cited as an authority for this proposition, but it really goes further, and has been questioned by Bramwell, L.J., in *Debenham v. Mellon*, 5 Q. B. D. 394.

² *Clifford v. Laton*, 3 C. & P. 15.

³ *Reneaux v. Teakle*, 22 L. J. Ex. 241.

⁴ *Jewsbury v. Newbold*, 26 L. J. Ex. 247.

⁵ *Freestone v. Butcher*, 9 C. & P. 643.

⁶ The proper question to be left to the jury is not whether the articles were or were not necessities, but whether the wife had authority to pledge her husband's credit. *Reid v. Teakle*, 22 L. J. C. P. 161.

⁷ *Seaton v. Benedict*, 5 Bing. 28.

⁸ *Montague v. Baron*, 5 D. & R. 532; *Montague v. Benedict*, 3 B. & C. 63; *Montague v. Espinasse*, 1 C. & P. 356, 502.

⁹ *Atkins v. Curwood*, 7 C. & P. 567.

pledge his credit without his authority,¹ as, for instance, where he has forbidden her to use his credit;² and *à fortiori*, if the tradesman know of the allowance, and during the husband's temporary absence supply his wife with the goods, the goods in such a case are supplied at the tradesman's peril.³ If there is a joint matrimonial fund on which both husband and wife can draw for the payment of household necessities, the mere fact of cohabitation does not imply a joint liability of husband and wife for necessities ordered by her, so as to entitle the tradesman after obtaining judgment against the wife to proceed against the husband.⁴ If the husband has held his wife out as his agent and allowed her to contract debts and liabilities in his name, but subsequently withdraws from her that authority, effective notice of such withdrawal must be given to those with whom she has been allowed to contract, and a mere general notice of withdrawal is not sufficient;⁵ and if such notice is not proved to have come to the knowledge of the creditor, the husband will be bound by any contracts his wife may have made with such creditor after the withdrawal. This is equally so in the case of a woman who lives with a man as his mistress.⁶

right of wife to pledge credit for necessities.

Where the husband gives express notice to tradesmen and others not to allow credit to his wife, and they do so, he is not liable.⁷ He can also render himself free from liability by refusing to allow his wife any longer to have the authority to pledge his credit; but this prohibition must be direct, present, positive, and absolute, and not a mere complaint of extravagance, and a declaration that he will not pay her bills in the future. It was doubted by Pollock, C.B., in *Johnston v. Sumner*,⁸ whether the husband had the power to limit his wife's authority by any private arrangement of the sort. The Chief Baron there said: "If a man and his wife live together, it matters not what private arrangement they make, the wife has all the usual authorities of a wife." This, as a broad and unqualified assertion, cannot now be taken to be law, for it is in direct conflict with the law laid down in *Jolly v. Rees*,⁹ and *Debenham v. Mellon*,¹⁰ and was directly questioned in the latter case by Lord Selborne, who said: "When the Chief Baron Pollock, in *Johnston v. Sumner*, said, that all the usual authorities of a wife under those circumstances might be assumed, 'notwithstanding any private arrangement,' I suppose him to have in view that state of facts, under cohabitation, when

Notice by husband to tradesmen not to give credit.

Husband may limit his wife's authority by private arrangement; but his acts must not be inconsistent with such arrangement.

¹ *Atkins v. Pearce*, 26 L. J. C. P. 252.

² *Ex parte Holmes, Re Cook*, 10 Morr. Bank. Rep. 12.

³ *Holt v. Brien*, 4 B. & A. 252; *Reneaux v. Teakle (ubi sup.)*.

⁴ *Morel v. Westmorland (Earl of) and wife*, [1904] A. C. 11.

⁵ See *Hodge v. Cooper*, 10 L. J. C. P. 218.

⁶ See *Ryan v. Sams*, 12 Q. B. 460.

⁷ *Manby v. Scott*, 1 Sid. 109; *Etherington v. Parrott*, 2 Lord Raym. 1006.

⁸ 27 L. J. Ex. 341.

⁹ *Ubi sup.*

¹⁰ 6 App. Cas. 24.

a wife is managing her husband's house and establishment, which usually raises the presumption. If an appearance of authority is once, in fact, created by the husband's acts, or by his assent to the acts of his wife, it may be right to hold, that, as between the husband and a person relying upon that appearance of authority, it cannot be got rid of by a mere private understanding or agreement between the husband and wife."

Liability of
husband by
estoppel.

From this it follows that though the mere fact that a husband living with his wife and allowing her to manage his household in the usual way does not constitute her his "ostensible agent" so as to make her contracts binding on him, or require notice to a tradesman not to give her credit in order to protect himself from liability, yet he may be rendered liable on a contract made by his wife though she has no actual authority, if he has held her out as his authorized agent, or if, knowing she has been contracting as his agent, he stands by and allows another to deal with her as such; for the doctrine of estoppel by which a man is concluded by his own act to say the truth is equally applicable to the relation of husband and wife as to that of parties not so related, for as Erle, C.J., said, in *Jolly v. Rees*,¹ "the husband as well as every principal is concluded from denying that the agent had such authority as he was held out by his principal to have, in such a manner as to raise a belief in such authority, acted on in making the contracts sought to be enforced. Such liability is not founded on any rights peculiar to the conjugal relation, but on a much wider ground." Where the goods ordered by the wife are consumed in the household and are necessities, it is a very fair inference to be drawn that the husband assented to his wife's contract, and was aware of the circumstances under which they were ordered. If such goods were not necessities stronger evidence would be required to bring home to him the fact that he had assented to their being ordered, and so rendering himself liable for their price. If he sell goods so ordered by his wife, it will be some evidence of his having ordered them.² This estoppel usually arises where he pays the bills sent in by tradesmen for goods ordered by his wife, and so induces the creditor to believe that she had authority to pledge his credit.³ In such a case, if the husband wish to protect himself from further liability, he should give specific notice to the tradesmen that the ostensible authority of his wife has been withdrawn. Thus a husband has been held liable for debts contracted by an adulterous wife living under the same roof with him, though he did not cohabit with her;⁴ and a man was similarly held liable for the debts of a woman with whom he lived as his kept

¹ 15 C. B. (N.S.) 640.

² See *Freestone v. Butcher*, 9 C. & P. 645.

³ See *Wallis v. Biddick*, 22 W. R. 76.

⁴ *Norton v. Fazan*, 1 B. & P. 226.

mistress, but after she had left him, but the creditor was ignorant of the separation.¹

(2) *Where the Contract by the Wife was made while living apart from her Husband.*—The separation between husband and wife may be voluntary on both sides, or involuntary on the part of one. Where the wife lives apart from her husband the presumption is that she has not authority to bind her husband, even for necessities; and it is incumbent on the person supplying her with goods to show that she is living apart from her husband under such circumstances as to give her an implied authority to bind him;² and that the goods supplied were necessities.³ The reason of this rule is, that as marriage casts on the husband the duty of supporting his wife, it is just that any man who holds out a woman to society as his wife should maintain her as such, and it would not be fair to cast upon the tradesman the task of inquiring of the wife whether or not she had the authority of her husband to pledge his credit. But where the wife is living alone, the presumption is rightly the other way; for when the tradesman trusts her, he trusts her as a *feme sole*, or if as a married woman, he must more than suspect that she cannot be on such terms of confidence with her husband as to induce the latter to intrust her with authority to bind him by her contracts. Separation is *de facto* a revocation of the wife's authority; and the husband is not bound to notify it to the world at large in order to protect himself.⁴ If a wife with an ample separate income lives apart from her husband (even though such separation is caused by his misconduct), and contracts debts for what would be held to be necessities, she would not, it seems, have an authority to pledge his credit in respect of them.⁵ But the presumption in favour of the husband, just as the presumption against him, may be rebutted by the facts of the case produced in evidence. This splits up this part of the subject into two portions:—

Wife's contract for necessities while living apart from husband. Wife has no presumed authority to pledge his credit; but may have by implication.

Separation *de facto* a revocation of wife's authority

(a) Where the husband is not liable. (b) Where the husband is liable.

(a) *Where the Husband is not liable.*—The rule applicable to these questions was thus laid down by Lord Mansfield:⁶ “When husband and wife live separate, the person who gives credit to the wife is to be considered as standing in her place, inasmuch as the husband is bound to maintain her; and the spiritual

Husband not liable.

¹ *Ryan v. Sams*, 12 Q. B. 460.

² *Johnston v. Sumner*, 27 L. J. Ex. 341.

³ *Mainwaring v. Leslie*, 2 C. & P. 507.

⁴ *Wallis v. Biddick*, 22 W. R. 76.

⁵ See *Freestone v. Butcher*, 9 C. & P. 643.

In *Ozard v. Durnford*, Selw. N. P. 229

court, or a court of equity, will compel him to grant her an adequate alimony; but if she elope from her husband and live in adultery, or if upon separation the husband agrees to make her a sufficient allowance, *and pays it*, in either of those cases the husband is not liable, because in the former case she forfeits all title to alimony, and in the latter has no further demands on her husband. And as in all cases the creditor is to be considered as standing in the wife's place, it imports him, when the wife lives apart from her husband, to make strict inquiry as to the terms of separation, for in such cases he must trust her at his peril." If the wife leave the husband at her own instance and through her own fault, as where she elopes from him and lives in adultery, he is not liable for debts and contracts made by her during the separation, for her adultery (to be proved at the trial) when living apart from him destroys her implied agency to pledge his credit;¹ and under the poor law he is not liable to support her.² This is so even when he himself has committed it and turned his wife out of doors without any imputation upon her, and she subsequently commits adultery.³ A wife who commits adultery while living with her husband has the ordinary authority to pledge his credit.⁴ If a husband desert his wife or compel her to leave him but allows her a competent maintenance, he is not liable for goods supplied to her, for such are not "necessaries" if she has the means herself to procure them.⁵ If husband and wife separate on mutual terms, on which he agrees to make her a definite allowance which she accepts as sufficient, and which he continues to pay regularly, she cannot by pledging his credit obtain an increase of that allowance; nor is it possible for a creditor who trusts her to make her husband pay more than he has agreed to do.⁶ This separation must be mutual, that is, *bonâ fide*; and if the wife's consent to separate was obtained by force or fraud, she though living apart from her husband, would have the like authority to pledge his credit as if he had wrongfully turned her out of his house.⁷ Where the husband makes his wife a *sufficient* allowance, and pays it, he is not liable for her debts. The sufficiency of allowance is a proper question for the consideration of the jury;⁸ but it is not necessary for the husband to prove that the wife's creditor knew

Authority to
pledge hus-
band's credit
lost by adultery
of wife living
apart from him.

Separation by
mutual consent.

Payment of
sufficient
allowance.

¹ *Ham v. Toovey*, Selw. N. P. 268; *Morris v. Martin*, Stra. 647; *Emmett v. Norton* 8 C. & P. 500; *Hardie v. Grant*, 8 C. & P. 512; *Cooper v. Lloyd*, 6 C. B. (N.S.) 519; in this case the wife was permitted to give evidence of her adultery.

² *Culley v. Charman*, 7 Q. B. D. 80.

³ *Govier v. Hancock*, 6 T. R. 603. This is really harsh law, for the act of the husband has in all probability conduced to the misconduct of the wife, and he has by his own conduct deprived himself of the right of putting her away.

⁴ *Robinson v. Gosnold*, 6 Mod. 71; *Needham v. Bremner*, L. R. 1 C. P. 583.

⁵ *Mizen v. Pick*, 3 M. & W. 481.

⁶ *Eastland v. Burchell*, 3 Q. B. D. 432.

⁷ See Lush, *Husb. & W.* p. 375.

⁸ *Hodgkinson v. Fletcher*, 4 Camp. 70; *Emmett v. Norton*, 8 C. & P. 500.

that he (the husband) made and paid his wife a sufficient allowance.¹

There are two cases in the books, namely, *Hornbuckle v. Hornbury*² and *Harrison v. Hall*,³ which go to show that where a husband allows his wife a separate maintenance, and afterwards promises to pay the amount of a debt contracted by her, he is bound by his promise, and liable to pay the debt. But these cases can no longer be considered law; for it is now well settled that where husband and wife agree to live apart, and he consents to pay, and she to receive, a certain allowance, which he regularly pays,⁴ he will not be liable for her contracts, and the adequacy of the allowance, even if it prove insufficient, does not concern third parties, and so forms no question for a jury to consider.⁵ The authority the wife possesses is one of necessity only, and if she agree to accept a given allowance as sufficient, she will be deemed to consider it enough to supply herself with the necessities of life. It is not necessary to free him from responsibility that tradesmen and others should be affected with notice of the separate allowance.⁶ Where husband and wife agree to live apart, she having separate estate, he will not be liable to a stranger advancing her money for necessities; her acceptance of such advances would now amount to a binding of her separate estate.⁷ Separation by divorce,⁸ or by decree of judicial separation, frees the husband from liability, except in the latter case where alimony has been decreed and not paid; but where alimony is regularly paid, the wife has no authority to pledge the husband's credit.⁹ But where the alimony decreed is more in amount than an agreed sum stipulated for in a prior separation, the payment of the smaller sum is a sufficient satisfaction of the husband's liability.¹⁰

When separate maintenance agreed upon, its adequacy or inadequacy cannot be called in question.

Separation by act of law

(b) *Where the Husband is liable.*—The husband is liable for his wife's debts for necessities when he has *agreed* to make his wife an allowance, and he does *not* pay it.¹¹ He is also liable where, separating by mutual consent from his wife, but without an agreement as to the amount of allowance, he either does not allow her any, or only an insufficient amount.¹² The sufficiency or

Husband liable when agreed allowance not paid. When separate maintenance not agreed upon, its sufficiency or insufficiency may be called in question.

¹ *Holt v. Brien*, 4 B. & Ald. 252.

² 1 M. & Rob. 135.

³ 2 Stark. 177.

⁴ *Beale v. Arabin*, 36 L. T. 249. Where he has agreed to transfer property to trustees on behalf of his wife, he must show that the trustees have taken possession of it under the agreement; *Burrell v. Booty*, 8 Taunt. 343.

⁵ *Eastland v. Burchell*, 3 Q. B. D. 432. See also *Biffin v. Bignell*, 31 L. J. Ex. 189.

⁶ See *Hodgson v. Williamson*, 15 Ch. D. 87.

⁷ *Mizen v. Pick*, 3 M. & W. 481, not following the language used by Lord Eldon in *Rawlins v. Vandyke*, 3 Esp. 250; see also *Turner v. Winter*, Selw. N. P. 229.

⁸ *Capel v. Powell*, 34 L. J. C. P. 168.

⁹ *Hunt v. De Blaquièrre*, 5 Bing. 553.

¹⁰ *Negus v. Forster*, 46 L. T. 675; but this decision does not seem to be above criticism.

¹¹ *Beale v. Arabin* (*ubi sup.*); *Nurse v. Craig*, 2 N. R. B. & P. 148.

¹² *Hodgkinson v. Fletcher* (*ubi sup.*).

Authority of
necessity.

Husband's
liability in
other cases.

insufficiency is a matter for the consideration of the jury.¹ Again, he is liable where he is in default by reason of his conduct, as where he turns his wife out of doors, and she has not the physical or pecuniary means of support; for in such a case it may be inferred that she has an authority of necessity.² Under such circumstances the husband is liable to refund the funeral expenses of his wife, whether incurred by an undertaker or other volunteer.³ He is also liable for necessities supplied to his wife, where he unjustly expels her from under his roof,⁴ and she goes with a credit suitable to her means;⁵ or where he by his cruelty or ill-treatment compels her to leave him.⁶ Necessaries in such a case are things that are reasonably fit for her degree in the ranks of society, and may amount to what in the case of others would be articles of luxury.⁷ The ill-treatment need not be personal violence, though she must reasonably apprehend personal violence, or be subjected to gross outrage, such as the introduction of a prostitute into the house.⁸ A well-grounded fear of being improperly detained would entitle her to leave his house.⁹ He is also liable when he has deserted her;¹⁰ also where after condoning her adultery and taking her back to his home he subsequently deserts her or turns her out of doors;¹¹ or where after conniving at her adultery he turns her out of doors.¹² But if a husband after turning his wife out of doors makes her a *bonâ fide* offer to return, and she has no well-grounded fear of personal violence, it would seem that her authority to pledge his credit is determined.¹³ Where the wife has this authority she does not derive it from her husband's will or any doctrine of agency, so the latter cannot at any moment and at his own pleasure determine it so as to affect her right to be supplied with necessities or of those who have supplied them to be paid for the things so supplied.¹⁴ This authority does not extend to the case of a woman who has been living with a man, who is not his wife, but has been turned out of doors or deserted by him.¹⁵

If the wife is living with her husband and has a separate income, she would still seem to possess the ordinary authority to

¹ But if the parties had agreed on a sum, then such a question could not properly be left to the jury, for the contracting parties are the best judges of what is reasonable and sufficient. See *ante*, p. 320.

² *Boulton v. Prentice*, Selw. N. P. 233; *Manby v. Scott*, 1 Sid. 109. See also *Johnston v. Sumner*, 27 L. J. Ex. 341.

³ *Ambrose v. Kerrison*, 20 L. J. C. P. 135.

⁴ *Rawlins v. Vandyke* (*ubi sup.*).

⁵ *Emery v. Emery*, 1 Y. & J. 501.

⁶ *Houlston v. Smyth*, 3 Bing. 127; *Boulton v. Prentice* (*ubi sup.*).

⁷ See *Bazeley v. Forster*, L. R. 3 Q. B. 563.

⁸ *Houlston v. Smyth* (*ubi sup.*).

⁹ *Malletieu v. Lyon*, 1 F. & F. 431.

¹⁰ *Jenner v. Morris*, 30 L. J. Ch. 361; *Deare v. Soutten*, L. R. 9 Eq. 151.

¹¹ *Harris v. Morris*, 4 Esp. 41.

¹² *Wilson v. Glossop*, 19 Q. B. D. 379.

¹³ *Boulton v. Prentice* (*ubi sup.*).

¹⁴ See *Lush, Husb. & W.* 361.

¹⁵ *Munro v. De Chemant*, 4 Camp. 215.

pledge his credit for the supply of necessaries. If the things ordered by her were not necessaries the fact of her possessing separate income would afford an almost conclusive presumption that the contract was on her own behalf and not that of her husband.¹

No fixed rule can be laid down as to what are and are not Necessaries. necessaries. "Necessaries" is a relative word, varying with the rank, profession, position, and fortune of the parties; that which might be a necessary for a peeress would be extravagant and wasteful luxury for the wife of a village apothecary.² In order to protect creditors the court will permit the test of the position which the parties have chosen to assume and parade, and not their real pecuniary means and resources, for the purpose of ascertaining whether the articles supplied are or are not necessaries. The husband is held to be the proper person to decide what station and appearance in life he should assume, and so confer upon his wife the *prima facie* authority to pledge his credit for things suitable and necessary for that station in life.³ Necessaries are things which cannot well be dispensed with; and, as applied to a wife, things which it is reasonable she should enjoy, and not merely articles which she is compelled to purchase.⁴ That which is a necessary at one time may not be so at another; a gown purchased when really wanted may be a necessary, but a similar gown purchased when the wardrobe is full cannot be so. It is, however, an elastic term, and many things are described by it which in popular language could hardly be termed necessaries, but have been brought within the category in order to further the ends of justice. Evidence will now be admitted to the effect that the wife was at the time when she ordered the goods sufficiently supplied with articles of the like nature, so that the articles supplied by the creditor were not in the category of necessaries.⁵ When a tradesman supplies goods to a married woman, it is incumbent upon him to prove affirmatively that they fall within the category of necessaries.⁶

The following is a shortlist of various things which have been held to be necessaries, and not necessaries, for the supply of which a wife might or might not (as the case may be) pledge the husband's credit. The ordinary necessaries are food, drink, lodging, fuel, washing, Food, drink, clothing,⁷ and medical attendance where living with the husband,⁸ lodging, &c.

¹ See *Freestone v. Butcher*, 9 C. & P. 643.

² See *Lane v. Ironmonger*, 13 M. & W. 368; and *Bazeley v. Forder*, L. R. 3 Q. B. 562.

³ See *Manby v. Scott*, 2 Sm. L. C. 429; *Morgan v. Chetwynd*, 4 F. & F. 451; *Jolly v. Rees*, 33 L. J. C. P. 177.

⁴ *Bazeley v. Forder* (*ubi sup.*).
⁵ See *Baines v. Toye*, 13 Q. B. D. 410; this was a case of alleged necessaries supplied to an infant. See the principle enunciated in 56 & 57 Vict. c. 71, s. 2 (Sale of Goods Act, 1893).

⁷ *Wallis v. Biddick*, 22 W. R. 76.

⁸ *Harris v. Lee*, 1 P. Wms. 438.

and when wrongfully turned out of doors by him, or where it is necessitated by his ill-treatment.¹ So, too, suitable furniture² and repairs to the husband's house³ have been treated as necessities. The expenses of an attorney in assisting the wife to exhibit articles of the peace against her husband, even though she has a sufficient maintenance,⁴ also legal expenses incurred in defending a wife prosecuted for keeping a bawdy-house, her husband being aware of that fact, and also being personally known to her attorney.⁵ Costs in a petition for divorce which the wife was compelled to bring;⁶ the expenses incurred in a genuine and proper suit for judicial separation;⁷ also legal expenses incurred by a deserted wife—(i) preliminary and incidental to a suit for restitution of conjugal rights; (ii) in obtaining counsel's opinion as to the effect of an ante-nuptial agreement for a settlement; (iii) in obtaining professional advice as to the proper mode of dealing with creditors who were pressing for payment for goods supplied her since desertion; (iv) and in preventing a distress in the house occupied by her for arrears of rent owed by her husband.⁸ "Extra costs," or those not allowed on taxation between party and party, incurred in divorce proceedings reasonably undertaken by the wife, can be recovered as necessities.⁹ The *onus* of proof that the proceedings were necessary is on the solicitor seeking to recover them.¹⁰ Such costs as the above will still clearly be recoverable in the case of a wife married before the Married Women's Property Act, 1882, came into force, and it would seem, where she was married after it became law, but does not possess any property of her own or any free separate property. But it has been doubted whether the wife's solicitor can recover such costs where she was married after the Act came into force, and had free separate property in respect of which she could validly contract.¹¹ If the wife is the guilty party and has separate property she ought clearly to be made liable for costs; so, too, if she brings, though innocent, an unsuccessful suit against her husband. In divorce proceedings costs of the wife payable by the husband are not limited to those paid into court, or secured by the husband for that purpose.¹²

The following have been held not to be necessities. Articles

¹ *Stocken v. Patrick*, 29 L. T. 507; *Foristall v. Lawson*, 34 L. T. 903.

² *Hunt v. De Blaquière*, 5 Bing. 550.

³ See *Richardson v. Dubois*, L. R. 6 Q. B. 51.

⁴ *Turner v. Rookes*, 10 A. & E. 47; see also *Shepherd v. Mackoul*, 3 Camp. 326. But see *Re Wingfield and Blew (Solicitors)*, [1904] 2 Ch. 665.

⁵ *Shepherd v. Mackoul* (*ubi sup.*).

⁶ *Rice v. Shepherd*, 6 L. T. 432; *Wilson v. Ford*, L. R. 3 Ex. 63.

⁷ *Brown v. Ackroyd*, 5 E. & B. 819.

⁸ *Wilson v. Ford* (*ubi sup.*).

⁹ *Ottaway v. Hamilton*, 3 C. P. D. 393.

¹⁰ *Taylor v. Hailstone*, 52 L. J. Q. B. 101.

¹¹ *Ottway v. Ottway*, 13 P. D. 141; *Ash v. Ash*, [1893] P. 231.

¹² *Robertson v. Robertson*, 6 P. D. 119.

Legal ex-
penses under
certain circum-
stances.

Suits in matri-
monial causes.

Not neces-
saries.

of mere luxury and ornament are not necessities, such as articles of jewelry not suited to the position of the wife.¹ The expenses of an indictment preferred by the wife against her husband for assault.² The principle upon which these expenses are disallowed and treated as unnecessary, but those incurred in exhibiting articles of the peace against the husband are allowed,³ is that in the former instance the wife seeks to *punish* her husband, in the latter she only *claims protection* against him. The counterpart of a deed of separation made for the wife's trustee;⁴ expenses incurred by the wife justifiably living apart from her husband in resisting his endeavours to recover the custody of their child over seven years of age living with her;⁵ so, too, a solicitor's costs incurred by a wife in endeavouring to procure a judicial separation, are not, and so cannot be recovered as, "necessaries" against the husband, unless the necessity for such proceedings can be made out in point of fact; and it is not enough that the solicitor had reasonable grounds for supposing upon her statements that the proceedings ought to be taken.⁶

Articles of
mere luxury
and ornament.

Among the items not considered as included among "necessaries" in section 26 of the Matrimonial Causes Act, 1857,⁷ but recoverable by the wife where there had been a decree of judicial separation whether under that Act or the Summary Jurisdiction (Married Women) Act 1895,⁸ and the decreed alimony had been punctually paid by the husband, were her costs in proceedings for dissolution of marriage subsequent to the separation, and she was deemed able to pledge his credit for such notwithstanding her legal position as a *feme sole*. But this section has been held to prevent a wife recovering such costs against her husband where she has been judicially separated and he has kept up the payment of the decreed alimony.⁹ On the other hand, it has been held that the practice of the Divorce Court, which is based on the discretionary functions of the judge to direct a husband whose wife has been judicially separated from him to find security for such costs as may be considered necessary to enable the wife to bring a suit for dissolution of marriage, still remains in force.¹⁰

¹ *Montague v. Benedict*, 3 B. & C. 631.

² *Grindell v. Godmond*, 5 A. & E. 755.

³ *Turner v. Rooke*, 10 A. & E. 47.

⁵ *McCredy v. Taylor*, 7 Ir. Rep. C. L. 256.

⁶ *Taylor v. Hailstone*, 52 L. J. Q. B. 101.

⁷ 20 & 21 Vict. c. 85. See *ante*, p. 288.

⁹ *Re Wingfield and Blew (Solicitors)*, [1904] 2 Ch. 665.

⁸ 58 & 59 Vict. c. 39.

¹⁰ See *Sheppard v. Sheppard*, [1905] P. 185. The views of the Court of Appeal in *Re Wingfield and Blew* (*ubi sup.*), and the President of the Probate, Divorce and Admiralty Division in *Sheppard v. Sheppard* (*ubi sup.*), on the effect of section 26 are irreconcilable, and until an authoritative decision is given solicitors conducting proceedings for dissolution of marriage on behalf of a wife should protect themselves by not incurring greater expenses than can be covered by the alimony *pendente lite* actually paid or secured by the husband.

⁴ *Ladd v. Lynn*, 2 M. & W. 265.

The capacity and authority of a married woman to pledge her husband's credit for necessities when living apart from him has not been altered by the Married Women's Property Acts of 1882 and 1893, except that where she is possessed of separate property of her own it will be easily presumed against her that she intended to contract in respect of it.¹ If, therefore, a married woman living apart from her husband, whether voluntarily or by reason of his wrongful conduct, has sufficient separate estate to maintain herself, whether derived from settled property or her own exertions, she will not have any authority of necessity to pledge his credit; and it has been decided that if she lives apart from him through his wrongful conduct, but has obtained an order protecting her earnings, she possesses no such authority.²

SECTION 4.

Incidents of Contractual Power.

(1) *Separate Trading by Married Woman.*—Owing to her contractual disability at common law a married woman could not, as a rule, trade apart from her husband except as his agent; there were, however, certain exceptions to this rule; thus, where her husband was civilly dead, as when undergoing a sentence of transportation for felony;³ and by the custom of the City of London she might carry on a trade within the City as a *feme sole*.⁴ Under the Divorce Act, 1857,⁵ a decree of judicial separation entitled her to carry on a separate trade as a *feme sole*; so, too, an order protecting her earnings under the Divorce Acts, 1857⁶ and 1858,⁷ and the Matrimonial Causes Act, 1878.⁸ The Married Women's Property Act, 1870,⁹ increased the protection of her separate trade earnings; and the Married Women's Property Act, 1882,¹⁰ entitles her to hold as her separate property everything acquired by her trading carried on separately from her husband.

Separate trading does not necessarily imply that the wife is living apart from the husband, but that he does not intermeddle with her business;¹¹ but where the husband and wife are living together, and the wife carries on the business, the presumption,

¹ See observations in *Otway v. Otway*, 13 P. D. 141, and *Ash v. Ash*, [1893] P. 231.

³ *Ex parte Franks*, 7 Bing. 762.

⁴ *Ex parte Charrington*, 1 Atk. 206; *Lavie v. Phillips*, 3 Burr. 1782.

⁵ 20 & 21 Vict. c. 85, ss. 25, 26.

⁶ *Ibid.* s. 21.

⁷ 21 & 22 Vict. c. 108, s. 6.

⁸ 41 Vict. c. 19, s. 4. This is now repealed by 58 & 59 Vict. c. 39, but practically re-enacted by it.

⁹ 33 & 34 Vict. c. 93, s. 1.

¹⁰ 45 & 46 Vict. c. 75, s. 2.

¹¹ *Ashworth v. Outram*, 5 Ch. D. 923.

it is submitted, will still be that she is the agent of her husband in reference thereto.¹ But, as before the Act of 1882, a married woman may carry on to her separate use any trade or business which her husband, either expressly or impliedly, agrees she shall carry on after her marriage on her separate account as she carried it on before (whether his agreement be proved from his express words or from his acquiescence for a long period) though all the while they are living together.² She may carry on a business in partnership with her husband, or with partners other than her husband.³ Whether the wife carries on the trade apart from her husband, or really under his direction, is a question to be determined in each case by the evidence.⁴ Where the husband is really the master of the business, holds himself out as the proprietor, and renders himself liable as principal to third parties, in such a case the wife's trading could not be said to be separate.⁵ But before the Act of 1882 if a wife carried on a trade or business apart from her husband, the latter could not properly be made liable on a debtor's summons for her trade debts.⁶

Although by virtue of the above statutes a married woman had considerable power over the disposition of her property, and greater facilities for acquiring property, it was not until the Married Women's Property Act, 1882, that she was rendered liable to the bankruptcy law in respect of her contracts. The Married Women's Property Act, 1870, conferred no further contractual powers upon her than she possessed before,⁷ and notwithstanding a doubt expressed to the contrary,⁸ it was clearly laid down that a married woman was not liable to the bankruptcy law, even though she had separate estate. In the case of *Ex parte Jones, Re Grissel*,⁹ James, L.J., said: "A married woman who contracts in that way (that is, so as to bind her separate estate) is not a debtor in any sense of the word, and she not being a debtor the whole foundation of the appellant's case fails. A debtor's summons is a summons against a debtor. The respondent is not a debtor, and therefore there was no legal authority to issue a debtor's summons against her, and no proceedings in bankruptcy founded upon it could be effectually taken." And Cotton, L.J., said: "It is said that a married woman is a debtor, because she is liable to have proceed-

Married woman's liability to be made bankrupt

¹ *Phillipson v. Hayter*, L. R. 6 C. P. 38.

² *Ashworth v. Outram* (ubi sup.); *Re Dearmer, James v. Dearmer*, 53 L. T. 905.

³ See *Eddowes v. Argentine Loan and Mercantile Agency*, 63 L. T. 364.

⁴ *Ashworth v. Outram* (ubi sup.). See *Lovell v. Newton*, 4 C. P. D. 7; and *Whittaker v. Whittaker*, 21 Ch. D. 657.

⁵ *Laporte v. Costick*, 23 W. R. 133.

⁶ *Ex parte Shepherd, Re Shepherd*, 10 Ch. D. 573.

⁷ Per Jessel, M.R., in *Howard v. Bank of England*, L. R. 19 Eq. 295.

⁸ Per Mellish, L.J., in *Ex parte Holland, Re Heneage*, L. R. 9 Ch. App. 307.

⁹ 12 Ch. D. 484.

ings taken against her to obtain satisfaction of such a debt as this out of her separate estate. But that involves a fallacy. A debtor must be a person who can be sued personally for a debt, and who is liable to all the consequences of a personal judgment. But that is not at all the position of a married woman; even though she has separate estate, proceedings cannot be taken against her personally to enforce payment of a debt." But her trade earnings under this Act became upon her death equitable assets and divisible *pari passu* among her creditors.¹ When she carried on a trade on her separate account apart from and free from the interference of her husband, she was in law deemed to be his agent, or the agent of the trustees of any ante-nuptial or post-nuptial settlement which allowed her to do so; and in neither case was she liable to be made bankrupt; while if the trade assets were her separate property, the trade creditors had no remedy either against her husband or her trustees.² Though formerly she could not be made a bankrupt, yet an order under the Debtors Act³ might have been made on her (though her property was settled to her separate use without power of anticipation) for payment of a judgment debt by instalments without any proof of her means.⁴ By the Married Women's Property Act, 1882,⁵ it is provided that "every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a *feme sole*."

M.W.P. Act,
1882.

Trade must be
carried on
apart from
husband.

A married woman will now in respect of her separate property be liable to be made a bankrupt, but her liability is rather proprietary than personal. But it is only in respect of her trading that she is liable to the bankruptcy law, and if she does not carry on a separate trade she cannot be made a bankrupt;⁶ nor can she be so made where the business is under the partial control of her husband.⁷ She can be made bankrupt in respect of unpaid separate trade debts, though she has ceased to carry on her late trade;⁸ either on the ground that having undischarged trade debts at the date of the petition was evidence from which it ought to be inferred she was still carrying on her late trade, or that having once carried on a trade she continued, even after she had ceased to do so, to be subject to the bankruptcy laws in respect of the debts incurred by her during the period of her trading. Where she is carrying on the business as

¹ *Re Poole's Estate, Thompson v. Bennett*, 6 Ch. D. 739.

² 2 Rep. H. & W. 164 *et seq.*

⁴ *Dillon v. Cunningham*, L. R. 8 Ex. 23.

⁵ 45 & 46 Vict. c. 75, s. 1, sub-s. 5.

⁶ *Re Gardiner, Ex parte Coulson*, 20 Q. B. D. 249.

⁷ *Re Helsby, Ex parte Helsby*, 63 L. J. Q. B. 261.

⁸ *Re Dagnall, Ex parte Soan and Morley*, [1896] 2 Q. B. 407; *Re Worsley*, [1901] 1 Q. B. 309.

³ 32 & 33 Vict. c. 62.

her own, she is not the less carrying it on separately from her husband because they happen to be living together, and he takes some part in the management of it.¹ If a receiving order is made against her as a single woman, and she marry before she is adjudicated a bankrupt, all proceedings founded on the receiving order fall to the ground if she is not carrying on the trade apart from her husband.² But even where she does carry on a separate trade she is not amenable to all the provisions of the bankruptcy law; thus, a bankruptcy notice under section 4, sub-section 1 (g) of the Bankruptcy Act, 1883, cannot be issued against a married woman though carrying on a separate trade, as it directs the debtor personally to pay the sum recovered by the creditor in the action.³ But if she does any act in respect of her separate trading, which, if done by a man or a single woman, would render him or her liable to the penal provisions of the Debtors Act, 1869, she will be equally liable to them, as, for instance, if she commits any of the bankruptcy offences enumerated in sections 11 to 13 of that Act.

Since a married woman trader can now be made a bankrupt, and section 19 of the Act provides that "no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors," it follows that any settlement of her property by a trader either before or after marriage would contravene the provisions of section 47 of the Bankruptcy Act, 1883,⁴ and be void against her trustee in bankruptcy. But where the restraint is imposed by a stranger on his gift, it will have effect given to it by removing the property so affected from out of the reach of her creditors, though she traded apart from her husband.⁵ Any attempt to restrain herself from anticipating her property will be ineffectual. A married woman who trades separately from her husband and has been adjudicated a bankrupt cannot be compelled to execute a deed exercising a general power of appointment by deed or will in favour of her trustee in bankruptcy, for a general power of appointment by deed or will of which she is the donee, but which has not been exercised by her, is not separate property within the meaning of section 1, sub-section 5 of the Married Women's Property Act, 1882; though if she were a *feme sole* it might become "property" under section 44

Restraint upon anticipation of her own property in settlement ineffectual against the bankruptcy laws.

¹ *Re Worsley (ubi sup.)*.

² *Re A Debtor, Ex parte The Debtor*, [1898] 2 Q. B. 576.

³ *Re Lynes, Ex parte Lester & Co.*, [1893] 2 Q. B. 113.

⁴ 46 & 47 Vict. c. 52.

⁵ See *Pelton (Bros.) v. Harrison*, [1891] 2 Q. B. 422. A contrary view to this has been taken by Cozens-Hardy, J., in *Re Wheeler's Settlement Trusts, Briggs v. Ryan*, [1899] 2 Ch. 17. But this latter decision does not seem to be in consonance with the authorities.

(ii) of the Bankruptcy Act, 1883; but section 152¹ of that Act safeguards the provisions of the Married Women's Property Act, 1882.² Her life interest, however, in property which is settled on her without restraint on anticipation passes to her trustee, as the claim of the trustee in such a case is not an interfering with or affecting the settlement within the meaning of section 19 of the Married Women's Property Act, 1882.³

It seems uncertain as regards married women who, as separate traders, are affected by the Act of 1882, whether the existence of separate property is or is not necessary at the time when their trading liabilities were incurred in respect of which an adjudication in bankruptcy has been made; in one case membership of a trading firm of a married woman was held to be a presumption of the existence of separate estate.⁴ As regards her trading contracts and liabilities entered into since the passing of the Married Women's Property Act, 1893,⁵ the existence of specific separate estate is not necessary.

This quasi-personal liability of a married woman limited to her *separate trading* is an instance of the very tentative method in which alterations in the law are usually effected by English legislation. In some respects she is made complete mistress of her property, save such as she is validly restrained from alienating; she is endowed with full powers of contracting in respect of that property, and of disposing of it unfettered by any control or interference of her husband. She may be sued alone in respect of it. But she is not to be made a bankrupt, except she happens to carry on a trade separately from him. The distinction between traders and non-traders has been abolished among men, and there does not, in the face of the considerable alteration in the status of the married woman effected by the Act of 1882, seem to be any valid ground for preserving it in the case of married women. The old common law theory of the unity of husband and wife is a thing of the past; but the equity creature and fiction—the separate estate—is still largely recognized.

(2) *Capacity to effect Policies of Insurance on own Life and that of Husband*.—Before the Married Women's Property Act, 1870, but few policies of insurance could have been effected by married women on their own lives or those of their husbands, except as agents for their husbands, because of their incapacity to make binding contracts. If a wife insured her own life with the consent

¹ "Nothing in this Act shall affect the provisions of the Married Women's Property Act, 1882."

² *Re Armstrong, Ex parte Gilchrist*, 17 Q. B. D. 521.

³ *Re Armstrong, Ex parte Boyd*, 21 Q. B. D. 264.

⁴ *Eddowes v. Argentine Loan and Mercantile Agency Co.*, 62 L. T. 602.

⁵ 56 & 57 Vict. c. 63, s. 1.

of her husband, the right to the policy was a chose in action of the wife, which became her husband's property.¹

In order to effect a valid insurance upon the life of another, the insurer must have some interest in the life of the insured.² A married woman was presumed to have an insurable interest in her husband's life;³ while the husband, on the contrary, was bound to show that he had such insurable interest.⁴ The Married Women's Property Act, 1870,⁵ recognized this want of insurable interest on the part of the husband in his wife's life, for while it gave him the larger power of effecting a policy for the separate use of his wife and the benefit of his children, it enabled him only to do so on his own life. The Married Women's Property Act, 1882,⁶ recognizes his want of insurable interest in his wife's life; but since husband and wife are now practically placed on the like footing as regards their mutual rights in each other's property, the capacity for insuring his wife's life ought by analogy to be extended to the husband.

Insurer must have insurable interest in life of insured.

A husband may effect a policy of insurance on his own life for the benefit of (i) his wife; (ii) or of his children; (iii) or of his wife and children; (iv) or any of them.⁷ The husband had this power under section 10 of the Married Women's Property Act, 1870, and the terms of the two sections on this point are substantially the same.

Policy effected by husband on his own life.

Under the Act of 1882,⁸ a married woman may effect a policy upon her own life or the life of her husband for her separate use; and the same and all benefit thereof shall inure accordingly. She may effect a policy (i) on her own life, or on her husband's, for her separate use; (ii) or on her own life, and expressed to be for the benefit of her (a) husband, or (b) her children, or (c) husband and children, or (d) any of them. But she cannot insure her husband's life in his favour, or in that of their children. The effect of taking out a policy which is expressed to be for the benefit of the parties therein named is to constitute a declaration of an executed trust on behalf of such parties, who will take according to their interests therein expressed. But where the policy effected by the one spouse, whether under the Act of 1870 or of 1882, is declared to be for the benefit of the other spouse and the children, but the interests of the respective parties are not otherwise declared, it has been held that on the death of the settlor the surviving spouse and children take as joint-tenants;⁹

Policy effected by wife on her own life or that of husband.

Interests expressed on face of policy.

Interests not expressed.

¹ See *Re Watson, Ex parte Merrett*, 7 Morr. Bank. Rep. 65.

² 14 Geo. III. c. 48.

³ *Reed v. The Exchange Association Co.*, Peake, Add. Cas. 70.

⁴ *Hanson v. Blackwell*, 4 Ha. 434.

⁶ 45 & 46 Vict. c. 75, s. 11.

⁵ 33 & 34 Vict. c. 93, s. 10.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Re Seyton, Seyton v. Satterthwaite*, 34 Ch. D. 511; *Re Davies' Policy Trusts*, [1892] 1 Ch. 90. In *Re Seyton*, North, J. (following the decision of Hatherley, L.C., in *Newell v. Newell*, L. R. 7 Ch. 253), dissented from the ruling of Chitty, J., in *Re*

and this is so where the spouse of the insuring spouse has died, and the latter has married again and leaves a widow or widower surviving and a second family.¹ But where a man has effected a policy on his own life under section 10 of the Married Women's Property Act, 1870, "for the benefit of his wife, or if she be dead, between his children in equal proportions, and that wife die and he marries again and has a family by the second wife; on his death the children of the two marriages take as joint-tenants, but the second wife is not entitled to participate in the moneys of the policy."² If a husband pay the premiums on a policy effected by his wife, he or his estate has no lien on the capital sum insured to the amount advanced by him, unless by virtue of a contract with his wife as beneficial owner of the policy, or he had paid them under a mistake as to his title to the policy.³

Policy forms no part of the estate of the insured as long as any object of the trust remains unperformed.

The trust created is a trust in favour of the objects named in the policy, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts. But if the trust cannot be performed because there is no object for it to operate upon or as being contrary to public policy, then a resulting trust is created in favour of the settlor's estate.⁴ Thus, where a husband who effected an insurance policy on his own life for the benefit of his wife, was murdered by her, the trust created by the policy in her favour under this section having become incapable of being performed by reason of her crime, it was held that the insurance money formed part of the estate of the insured.⁵ But as between the legal representatives of the settlor and the insurers no question of public policy arose.⁶ If it is proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, the creditors will be entitled to receive out of the moneys payable under the policy a sum equal to the premiums so paid;⁷ that is to say, the trustee in bankruptcy of the settlor will have no interest in the policy beyond the amount of the premiums fraudulently paid. The payment of a premium to keep up a policy of insurance is not a "settlement" within section 47 of the Bankruptcy Act, 1883; so that where a husband by a post-nuptial settlement

Adams' Policy Trusts, 23 Ch. D. 525, in which the learned judge expressed his opinion that the surviving spouse would take a life interest in the policy fund, and the children a joint-tenancy in remainder. He also explained the judgment of Malins, V.C., on the second application to the court in the case of *Re Mellor's Policy Trusts* (7 Ch. D. 200), who had held that such words in a policy amounted to a settlement on the surviving spouse and children by creating vested interests as joint-tenants in such of them as were living at the settlor's death. In *Re Davies' Policy Trusts*, Chitty, J., followed the decision in *Re Seyton*.

¹ *Re Browne's Policy*, *Browne v. Browne*, [1903] 1 Ch. 188.

² *Re Griffiths' Policy*, [1903] 1 Ch. 739.

³ See *Re Leslie*, *Leslie v. French*, 48 L. T. 564.

⁴ *Cleaver v. Mutual Reserve Fund Life Association*, [1892] 1 Q. B. 147.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ Sect. 11. See *Holt v. Everall*, 2 Ch. D. 266.

assigned a policy of insurance on his own life for his wife and children, and voluntarily kept it up by paying the premiums, and became bankrupt and died, his trustee in bankruptcy was held not entitled to any part of the policy moneys.¹

Such a policy effected under section 10 of the Married Women's Property Act, 1870, by a husband who dies after the Married Women's Property Act, 1882, has come into force, does not vest in his personal representatives in trust for the beneficiaries, but a trustee for the purposes of the Act must be appointed under section 10; in other words, the provisions of section 11 of the Married Women's Property Act, 1882, are not retrospective.² In such a case the petition in the matter is rightly entitled only "In the Matter of the Married Women's Property Act, 1870."³

The insured may by the policy, or by any memorandum under his or her hand, appoint a trustee or trustees of the moneys payable under the policy, and from time to time appoint a new trustee or new trustees thereof, and may make provision for the appointment of a new trustee or new trustees thereof, and for the investment of the moneys payable under any such policy. In default of any such appointment of a trustee, such policy, immediately on its being effected, shall invest in the insured and his or her personal legal representatives in trust for the purposes aforesaid; but the nomination of a payee does not constitute the payee a trustee.⁴ If at the time of the death of the insured, or at any time afterwards, there shall be no trustee, or it shall be expedient to appoint a new trustee or new trustees, a trustee or trustees, or a new trustee or new trustees may be appointed by any court having jurisdiction under the provisions of the Trustee Act, 1850, or the Acts amending and extending the same. The receipt of a trustee or trustees duly appointed, or in default of any such appointment, or in default of notice to the insurance office, the receipt of the legal personal representative of the insured shall be a discharge to the office for the sum secured by the policy, or for the value thereof, in whole or part.⁵ This latter provision, which is new, would seem to enable the trustee to realize, if necessary, the surrender value of the policy, which formerly he could not do. The application to the court for the appointment of a trustee should be made by petition,⁶ or, if

Appointment of trustees under M.W.P. Act, 1870.

Appointment of trustees : by the insured under M.W.P. Act ;

by the court.

¹ *Re Harrison and Ingram, Ex parte Whinney*, [1900] 2 Q. B. 710.

² *Re Turnbull, Turnbull v. Turnbull*, [1897] 2 Ch. 415.

³ See *Re Kuyper's Policy Trusts*, [1899] 1 Ch. 38.

⁴ See *Fry, L.J.*, in *Cleaver v. Mutual Reserve Fund Life Association (ubi sup.)*.

⁵ Sect. 11.

⁶ See *Re Mellor's Policy Trusts*, 6 Ch. D. 127; 7 Ch. D. 200. Where there is no trustee of a policy effected under the Act of 1870, the petition for the appointment of such trustee should be entitled both in the matter of the Trustee Act and in the matter of the Act of 1882. See *Soutar's Policy Trusts*, 26 Ch. D. 236. But see *Re Adam's Policy Trusts*, 23 Ch. D. 525; and *Re Turnbull, Turnbull v. Turnbull*, [1897] 2 Ch. 415.

under the provisions of the Conveyancing Act, 1881, by summons at chambers. Where the interests of infants are involved and the appointment of trustees is necessary, the court acting under its general jurisdiction will not appoint less than two trustees.¹

To be a partner.

Incapacity a common law

Capacity in equity.

Married woman capable of being a partner both with her husband as well as strangers.

(3) *To be a Partner.*—The capacity or incapacity of a married woman to be a partner is only one branch out of many of the main question whether she had or had not the capacity to contract. At common law a married woman not having any contractual power of her own could not be a partner, except as her husband's agent; and if she were *de facto* a partner, it was her husband and not herself who in law was treated as the real partner.² But in equity a married woman who was possessed of separate estate, and was trading in or belonging to a partnership, was treated as a partner, and so far as her separate estate was concerned was liable for the partnership debts.³

Under the Married Women's Property Act, 1882, her capacity for entering into partnership, not only with third persons, but with her husband is recognized, for all her property of whatsoever description is her separate property, which, unless she is legally restrained from dealing with it, will be answerable for any debts she may contract. If a married woman was under the former law a member of or partner in a trading firm, she was presumed to have separate property necessary to give validity to her contracts.⁴ But since the Married Women's Property Act, 1893,⁵ it is immaterial whether she actually possesses property of her own or not; for under that Act the existence of separate property is not a condition precedent to the validity of her contracts. Her position when she has advanced money to her husband for the purposes of his trade or otherwise without taking security has been previously discussed.⁶

Married woman as a shareholder.

As an incident of her capacity to be a partner, a married woman was capable of being a shareholder in a corporation or company, if the charter of incorporation or deed of settlement did not exclude her; and in equity she could contract to take shares so as to bind her separate property.⁷ Under the Married Women's Property Act, 1870,⁸ a married woman who was entitled to fully paid-up shares to her separate use, could compel the company by *mandamus* to register her legal title in respect of them.⁹ But under that Act the shares held by a married

¹ *Re Howson's Policy Trusts*, W. N. [1885] 213; *Schultze v. Schultze*, 56 L. J. Ch. 356.

² *Burlington's Case*, 3 De G. M. & G. 18.

³ *Lind. Part. 6*; *Mrs. Mathewman's Case*, L. R. 3 Eq. 781.

⁴ *Eddowes v. Argentine Loan and Mercantile Agency Co.*, 62 L. T. 602.

⁵ 56 & 57 Vict. c. 63.

⁶ See *ante*, p. 305 *et seq.*

⁷ *Mrs. Mathewman's Case* (*ubi sup.*).

⁸ 33 & 34 Vict. c. 93.

⁹ *Reg. v. Carnatic Railway Co.*, L. R. 8 Q. B. 299.

woman must have been fully paid up, without any liability attaching to them.¹ By virtue of the Act of 1882² she can be a shareholder, whether solely or jointly, of partly paid-up as well as fully paid-up shares, and she can compel registration of either class of investments.³ But even now she cannot compel any corporation or joint-stock company to admit her as a holder of any shares or stock to which any liability may be incident, contrary to the provisions of any Act of Parliament, charter, by-law, articles of association, or deed of settlement regulating such corporation or company.⁴ Formerly, where her shares were not held to her separate use, she could not vote in respect of them; but where they were held to her separate use, she was entitled to do so, and her husband's disapproval did not render her vote invalid.⁵ It is now clear that a married woman will be entitled to vote in respect of shares which she holds independently of her husband, who will in no way be able to control her right.

Statutory
limitation as to
fully paid-up
shares no
longer applies.

Right to vote.

(4) *To be a Trustee.*—A married woman, under the old state of the law, was not disqualified from being appointed a trustee; but her appointment was attended by many inconveniences, and there were several reasons why she should not have been chosen. The wife's personality was merged in that of her husband, and her will was not always her own, and when a trust was confided to a *feme covert*, the husband, who was answerable for her acts, exercised no little influence. Indeed, as he was in general liable for her breaches of trust, whether committed before or after marriage,⁶ he was bound for his own protection to look to the manner in which she discharged the office; accordingly, she was not allowed to execute the trust without his concurrence.⁷ A disclaimer, therefore, by the husband operated as a disclaimer of the trust by the wife. Again, a married woman could not execute the proper assurances for conveying the legal interest of the trust property (if realty), without obtaining the consent of her husband, and going through the expensive and onerous process necessitated by the Fines and Recoveries Act;⁸ she could not by herself convey real estate devised to her merely in trust for sale.⁹ But if she obtained an order from the court, under section 91 of the last Act, dispensing with her husband's concurrence, she could execute a conveyance of the trust property without acknowledging the deed.¹⁰ So, too, the payment of the

Husband's
concurrence
formerly
necessary.

¹ Sects. 4, 5.

² 45 & 46 Vict. c. 75, ss. 6, 7, 8.

³ *Ibid.* s. 7.

⁴ *Palmer v. Wakefield*, 3 Beav. 227.

⁵ Lewin on Trusts, p. 33, and the cases there cited.

⁶ 3 & 4 Wm. IV. c. 74.

⁷ *Avery v. Griffin*, L.R. 6 Eq. 606.

⁸ *Goodchild v. Douglas*, 3 Ch. D. 650.

⁹ *Ibid.* ss. 7, 12.

¹⁰ Lind. Comp. § 310.

Married woman can now accept the trust without the consent of the husband.

purchase-money required the joint receipt of husband and wife.¹ If a married woman obtained a protection order, she was enabled by section 7 of 21 & 22 Vict. c. 108, to exercise the office of trustee as though she were single. But now she may be appointed sole trustee, or jointly with others, and can accept the trust without first obtaining the consent of her husband,² and she has all the rights, duties, and liabilities of an ordinary trustee,³ and in consequence her husband is in no way liable for her breaches of trust, if he do not intermeddle with the trust.⁴ She can now receive or transfer the various classes of property enumerated below,⁵ to which she is solely or jointly entitled as trustee, without the concurrence of her husband,⁶ which before the passing of this Act she could not do.⁷ But if the shares, stock, or other investment were standing or placed in the joint names of herself or her husband, she would not acquire the right to deal with them without his concurrence.⁸ Where, then, personal property is invested in the name of a married woman, solely or jointly with another, not her husband, she acquires the legal estate in it, and can, so far as her husband is concerned, dispose of it as a *feme sole* without his concurrence.

When husband's consent necessary to alienation by wife of the legal estate.

Where a married woman is a "bare trustee"⁹ of freehold or copyhold land she may convey or surrender the same as if she were a *feme sole*,¹⁰ that is, without the concurrence of her husband, or acknowledgment under the Fines and Recoveries Act, and she is entitled to do so even where she has a beneficial interest in the proceeds of the sale.¹¹

A doubt arose on the language of section 18 of the Married Women's Property Act, 1882, which gave a married woman trustee power to transfer certain specified descriptions of personal property without her husband's intervention as if she were a *feme sole*, whether if a married woman was neither beneficially entitled to real estate for her separate use nor a bare trustee of it, her husband's concurrence in the transfer and her acknowledgment under the Fines and Recoveries Act were still requisite. It has

¹ See *Drummond v. Tracy*, Johns. 611.

² 45 & 46 Vict. c. 75, ss. 1 (sub-s. 2), 8, and 24, which latter provides that the word contract in this Act shall include the acceptance of any trust.

³ *Ibid.* s. 18.

⁴ *Ibid.* s. 24.

⁵ (1) Deposits in the Post Office, or other savings bank, or any bank. (2) Annuities granted by the Commissioners for the Reduction of the National Debt, or any other person. (3) Investments in the public stocks and funds. (4) Investments transferable in the books of a bank. (5) Any interest in a company, corporation, or public body. (6) Any interest in any society. Sect. 18.

⁶ *Ibid.* s. 18.

⁷ *Howard v. The Bank of England*, L. R. 19 Eq. 295.

⁸ Effect of sections 6-9 of 45 & 46 Vict. c. 75.

⁹ For what is a "bare trustee" see *Christie v. Ovington*, 1 Ch. D. 279; *Lysaght v. Edwards*, 2 Ch. D. 499; *Morgan v. Swansea Urban Sanitary Authority*, 9 Ch. D. 582.

¹⁰ 56 & 57 Vict. c. 53, s. 16. See p. 375.

¹¹ *Re Docwra, Docwra v. Faith*, 29 Ch. D. 693.

now been settled that a married woman trustee of real estate with an active duty to perform in respect of the trust, such as a trust for sale, cannot convey the legal estate without her husband's concurrence and a deed acknowledged under the Fines and Recoveries Act.¹ Where, however, she is mortgagee of land conveyed to her to secure an advance made by her, she can convey the legal fee without the concurrence of her husband or going through the formalities required by the Fines and Recoveries Act,² and it makes no difference that she is mortgagee with another on a joint account.³ Under section 18 her capacity of suing or being sued as a trustee without the joinder or concurrence of her husband is not limited to actions connected with the particular classes of property mentioned in the section.⁴ The following curious anomalies are now presented. If beneficially entitled to realty she can dispose of it without her husband's concurrence, though his interests in it may be seriously modified; but if entitled to it in a representative capacity (unless as a bare trustee) she cannot transfer the legal estate without his consent or going through the cumbersome process under 3 & 4 Wm. IV. c. 74; and while she can engage in the more important task of suing in respect of her trust estate, she cannot perform the far more simple operation of conveying the legal estate without his leave; and while she is liable for her breaches of trust, her husband is exonerated from all liability in respect of them, unless he intermeddle with the trust; and lastly, she cannot transfer the legal property in personal property held in trust by her without his concurrence, except it fall within one or other of the classes specified in section 18.⁵

A married woman is now solely liable to the extent of her separate property for the breaches of trust committed by her during coverture, whether she has accepted the office of trustee before or after marriage, unless her husband has intermeddled with the trust, in which case he becomes jointly liable with her.⁵ A difference in the husband's favour is to be noticed between his liability for his wife's torts (including breaches of trust) in her representative capacity, and her torts in her personal capacity; for the former he is only liable when he has himself intermeddled and participated in them; while for torts committed by her in a non-representative capacity his common law liability is

Liability of
married
women.

¹ *Re Harkness and Allsopp's Contract*, [1896] 2 Ch. 358. The *ratio decidendi* of this case was that the Legislature in section 18 specifically limited the power of a married woman trustee to transfer property as a *feme sole* to the particular species of property enumerated in it. See, however, Kekewich, J., in *Re Brooke and Frenlin's Contract*, [1898] 1 Ch. 647.

² *Re Brooke and Frenlin's Contract* (*ubi sup.*); *Re Howgate and Osborn's Contract*, [1902] 1 Ch. 451.

³ *Re West and Hardy's Contract*, [1904] 1 Ch. 145.

⁴ Per North, J., in *Harkness and Allsopp's Contract* (*ubi sup.*).

⁵ Sect. 24.

untouched by the Act.¹ On the death of the married woman her separate estate will continue to be responsible for her breaches of trust.

(5) *To be Executrix or Administratrix.*—It has been long recognized that a married woman had the capacity to be appointed and to take upon herself the office of executrix or administratrix. It was, however, necessary for her first to obtain her husband's consent, for without it she could not take up the office of executrix by obtaining letters of probate,² because she could do no act which might prove prejudicial to the husband without his consent; neither could she take out letters of administration to her intestate next of kin, because the husband was alone capable of entering into the administration bond, though the grant of the letters was to herself alone, and not to herself and husband jointly.³ But where a married woman had obtained a decree of judicial separation, or a protection order, she was entitled to letters of probate or administration without the concurrence of her husband.

As incident to his title to administer in his wife's right for his own safety, the husband had a power of disposition over the personal estate vested in his wife as executrix or administratrix;⁴ thus, he could release debts due to the estate of testator or intestate.⁵ If the husband dissented from his wife accepting the office, he was not affected by her acts;⁶ but if she assumed the office with his consent, and she wasted the goods of her testator or intestate, he was liable for the devastavit⁷ committed by her in the execution of her office. If the devastavit was committed before marriage his liability was coterminous with the coverture; if committed during marriage, he remained liable though he survived his wife, for his assent to her tort was presumed.⁸ The assets received, but not disposed of, by the wife became the husband's, though he held them as trustee for the persons (if any) for whose benefit they were intended.⁹

It has been seen that the assent of the husband was necessary to validate the gifts and grants of a *feme covert* executrix or administratrix, for they might have tended to his prejudice, and

¹ *Seroka v. Kattenberg*, 17 Q. B. D. 177; *Earle v. Kingscote*, [1900] 2 Ch. 585.

² *Clerke v. Clerke*, 6 P. D. 10.

³ *Ibid.* 834; *In The Goods of Warren*, L. R. 1 P. & D. 538.

⁴ *Arnold v. Bidgood*, Cro. Jac. 318; *Thrustout v. Coppin*, 3 Wils. 377.

⁵ 1 Rep. H. & W. 188.

⁶ *Pemberton v. Chapman*, 7 El. & B. 210; *S. C.* in error El. Bl. & El. 1056. Probate granted without his assent might have been revoked with his consent, *Re Joanna Wilkinson, deceased*, 3 Phill. 96.

⁷ A "devastavit" has been defined as a mismanagement of the estate and effects of the deceased, in squandering and misapplying the assets contrary to the duty imposed on them, for which executors or administrators shall answer out of their own pockets, as far as they had, or might have had, assets of the deceased. Bac. Abr. Exors. L. 1.

⁸ *Adair v. Shaw*, 1 Sch. & Lef. 243.

⁹ *Hodsdon v. Lloyd*, 2 Bro. C. C. 534.

To be executrix or administratrix.

Husband's consent formerly necessary to letters of probate or administration taken out by her;

otherwise, where she had been judicially separated or had obtained a protection order. Powers of the husband.

Liabilities of the husband.

Powers of the executrix, &c.

without his assent her disposition of the goods of the deceased was void.¹ She might have made a will of the outstanding personal property to which she was entitled in her representative capacity without the consent of her husband, for he had no beneficial interest in such assets of his wife.² As the rules of the civil law prevailed in the old ecclesiastical courts, a married woman could maintain or defend a suit without her husband's assent, and she could even raise an action against him.³ But as a matter of practice the husband was required to be joined with his wife in executing the proxy in order that there might be some security for costs.⁴ The husband could not compel his wife to take up the office, and if he administered in her right against her consent, though she was bound during his lifetime, and could not avoid the trust, yet after his death she might refuse, if she had not intermeddled with the administration.⁵ It is now clearly settled law that the responsibility of a *feme covert* executrix or administratrix does not terminate on her husband's death, but that she will be liable to creditors, legatees, or next of kin for devastavits committed by her during coverture.⁶

Liabilities of
the executrix,
&c.

A considerable alteration in this branch of the law has been introduced by the Married Women's Property Act, 1882. Section 1, sub-section 2, enacts that "a married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any *contract*, and of suing and being sued, either in contract, or in tort, or otherwise, in all respects as if she were a *feme sole*." Section 18: "A married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person . . . may sue or be sued, and may transfer or join in transferring" the various classes of property mentioned in the section as if she were a *feme sole*. Section 24: "The word 'contract' in this Act shall include the acceptance of . . . the office of executrix or administratrix, and the provisions of this Act as to liabilities of married women shall extend to all liabilities by reason of any devastavit committed by any married woman being . . . executrix or administratrix either before or after her marriage, and her husband shall not be liable to such liabilities unless he has acted or intermeddled in the . . .

Alteration
effected by
M.W.P. Act,
1882.

Contract in-
cludes accept-
ance of the
office of
executrix, &c.

¹ *Derbishire v. Home*, 5 De G. & Sm. 702, in which case an assignment by an administratrix who was married to an infant was held a nullity; and in *Pemberton v. Chapman* (*ubi sup.*) it was held that payment by a debtor of a testator and delivery to a *feme covert* executrix were valid against her co-executor, where the payment and delivery were made *bonâ fide* at the request of the executrix, without knowledge by the party paying and delivering of the dissent of the husband, though with knowledge that she was a *feme covert*.

² *Scammell v. Wilkinson*, 2 East, 552; *S. C. Stevens v. Bagwell*, 15 Ves. 139.

³ *Preston v. Preston*, Milw. 608.

⁴ *Arbery v. Ashe*, 1 Hag. Eccl. Rep. 214.

⁵ *Wankford v. Wankford*, 1 Salk. 306.

⁶ *Soatty v. Turnbull*, L. R. 1 Ch. App. 494.

Wife can
accept office
without hus-
band's consent.

administration." The joint effect of these sections is to enable a married woman to accept the office of executrix or administratrix without the consent of her husband; she can now by herself (that is, apart from her husband) take out letters of probate, obtain a grant of letters of administration, and execute the administration bond.¹ Her husband need not be joined with her in any suit, nor will she be required to give security for costs in a suit to which she is party. The husband has no longer the right of withholding his consent to his wife's accepting the office, or of practically compelling her to assume it, or of interfering with the administration of the effects of the deceased person whom she represents. Thus, if she refuse to take upon herself the office, her husband will not be permitted to take out letters of administration in her stead,² or accept the office in her name. The wife is in the position of a single woman so far as concerns the administration of the deceased's effects, and is no wise affected by her coverture. In return for being deprived of the control of his wife's administration, he is freed from liability for her devastavit, whether committed before or during coverture; her acts in the matter are to him as the acts of a stranger; but if he interfere his liability will be proportionate to his interference. The joint and several liability of husband and wife for their devastavit has been discussed elsewhere.³

Husband free
from liability
for ante-
nuptial and
post-nuptial
devastavit
unless he
intermeddle.

To sue and be
sued alone.

(6) *To sue and be sued alone*.—In this section the capacities and incapacities of married women to sue and be sued in contract and in tort will be but shortly noticed; the practice is treated of in a separate chapter.⁴

In contract.
At common
law.
Incapacity to
sue or be sued.

At common law a married woman's capacity to sue or be sued in contract was commensurate with her capacity to contract; and in *Marshall v. Rutton*,⁵ it was expressly decided that she could neither sue nor be sued at law. She was, however, liable to arrest under a *capias ad satisfaciendum*; but if she had no property of her own she was entitled to her discharge.⁶ The exigencies of society required exceptions to be made to this hard-and-fast rule of incapacity; she was therefore permitted, as has been seen, to sue or be sued on contracts made by her when her husband was a convicted felon, undergoing a sentence of punishment, or was an alien enemy and abroad; she could also sue or be sued by the custom of London, when, as the wife of a freeman of the City, she was carrying on a separate trade within the City.⁷

Exceptions.

In equity a married woman could sue in respect of her

¹ In *The Goods of Ayres*, 8 P. D. 168.

² See *Haynes v. Matthews*, 34 L. T. (O.S.) 60.

³ *Ante*, chap. xiii. pp. 280 *et seq.*

⁶ *Ivens v. Butler*, 26 L. J. Q. B. 145.

⁴ *Post*, chap. xvi.

⁵ 8 T. R. 547.

⁷ See *ante*, p. 286.

separate property as though she were a *feme sole*, and she could even sue her husband in respect of it; so, too, she could be sued, but not so as to render herself personally liable.¹ It was her separate property that was rendered liable for her contracts² by a judgment or order of the court binding it.³

Under certain statutes a married woman's powers in this respect have been enlarged. By the Divorce Acts⁴ she was enabled to sue and be sued as a *feme sole* when she and her husband were judicially separated;⁵ or where she has obtained an order protecting her earnings;⁶ or has obtained an order that she should no longer cohabit with her husband after he has been convicted of an aggravated assault upon her, or has been guilty of persistent cruelty to her, or wilful neglect to provide reasonable maintenance for her or her infant children, whom he is legally liable to maintain, and by such cruelty or neglect has caused her to leave and live separately and apart from him.⁷ Under the Debtors' Act⁸ a married woman is liable to imprisonment for an ante-nuptial debt, if, having the means, she refuses to pay the judgment debt.⁹

Under the Married Women's Property Act, 1870,¹⁰ section 11, "a married woman may maintain an action in her own name for the recovery of any wages, earnings, money, and property by this Act declared to be separate property, or of any property belonging to her before marriage, and which her husband shall, by writing under his hand, have agreed with her shall belong to her after marriage as her separate property; and she shall have in her own name the same remedies, both civil and criminal, against all persons whomsoever for the protection and security of such wages, earnings, money, and property, and of any chattels or other property purchased or obtained by means thereof for her own use as if such wages, earnings, moneys, chattels, and property belonged to her as an unmarried woman; and in any indictment or other proceeding it shall be sufficient to allege such wages, earnings, moneys, chattels, and property to be her property." Under section 12 she could be sued for her ante-nuptial debts.¹¹ By section 40 of the Conveyancing and Law of Property Act, 1881,¹² a married woman may, whether infant or adult, as if she were a *feme sole*, by deed appoint an attorney on her behalf for the

Statutory powers.

M.W.P. Act, 1870. Married woman may maintain action in her own name for the recovery of her statutory separate property.

Appointment of an attorney to sue on her behalf.

¹ *Atwood v. Chichester*, 3 Q. B. D. 722; *Davies v. Ballenden*, 46 L. T. 797.

² *Johnson v. Gallagher*, 30 L. J. Ch. 298.

³ *Barber v. Gregson*, 49 L. J. Ex. 531; *Robinson v. Pickering*, 16 Ch. D. 660.

⁴ 20 & 21 Vict. c. 85, ss. 21-26; 21 & 22 Vict. c. 108, ss. 6-10.

⁵ *Norman v. Villars*, 2 Ex. D. 359. This was under 20 & 21 Vict. c. 85, ss. 21 and 26.

⁶ Under 21 & 22 Vict. c. 108, ss. 6-9.

⁷ 58 & 59 Vict. c. 39, s. 4, repealing 41 Vict. c. 19, s. 4.

⁸ 32 & 33 Vict. c. 62, s. 5.

⁹ *Dillon v. Cunningham*, L. R. 8 Ex. 23.

¹⁰ 33 & 34 Vict. c. 93.

¹¹ Per Hall, V.C., in *Re Poole's Estate*, 6 Ch. D. 739.

¹² 44 & 45 Vict. c. 41.

purpose of executing any deed or doing any other act which she may herself execute or do ; and on any contract entered into on her behalf by her attorney she can solely sue. She can thus receive by attorney the income of her separate property which she is restrained from anticipating.¹ Except in the foregoing instances, unless the married woman obtained under the Judicature Act, 1875,² the special leave of the court or a judge, she could not sue without her husband, or a next friend, without giving such security for costs (if any) as the court or judge might require.³ Where she had obtained leave to defend separately without a next friend she was not required to give security for costs.⁴

Under the Married Women's Property Act, 1882,⁵ she has complete powers of contracting both in her personal and representative capacity, as trustee, executrix, or administratrix.⁶ Under section 1, sub-section 2, she may sue or be sued in contract in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff, or be made a party to any action or other legal proceeding brought by her ; and whether the cause of action arose before or after the Act came into operation, she need not sue by next friend, or give security for costs, or obtain the leave of the court to sue by herself alone.⁷ Though if she desires to appeal, but has no free separate property, then she must give security for the costs of the appeal.⁸

A married woman is now under no disability arising from coverture in respect of her contracts, consequently the Statute of Limitations will run in her favour as in favour of any other defendant, and against her as against any other plaintiff from the time when the cause of action arose.⁹ Where a married woman whose property is subject to a restraint upon anticipation by her next friend, brings an action not under the Married Women's Property Act, 1882, which is found to be an improper one, and costs are given against the next friend, she cannot be ordered to pay the costs out of property which is subject to the restraint, including the arrears of income which have accrued due before the order for payment, but after the commencement of the proceedings.¹⁰ But where she commences a suit under the Act of 1882, without a next friend, and is condemned in costs, payment of these can be enforced against any separate property to which she is entitled, free from restraint

¹ *Stewart v. Fletcher*, 38 Ch. D. 627.

² Order XVI. r. 8.

³ *Noel v. Noel*, 13 Ch. D. 510. Such order is altogether in the discretion of the court, and where she appeals against an order for attachment, it seems that the order for security will not be made. See *Hood Barrs v. Heriot*, [1896] 2 Q. B. 375.

⁴ *Martano v. Mann*, 14 Ch. D. 419 ; see also *Kingsman v. Kingsman*, 6 Q. B. D. 122. ⁵ 45 & 46 Vict. c. 75. ⁶ Sect. 24.

⁷ See *Severance v. The Civil Service Supply Association*, 48 L. T. 485.

⁸ *Whittaker v. Kershaw*, 44 Ch. D. 296.

⁹ See *post*, p. 439.

¹⁰ *Re Glanvill, Ellis v. Johnson*, 31 Ch. D. 532.

Practice under
Judicature
Act.

M.W.P. Act,
1882.
Full capacity
to sue or be
sued alone.

Next friend or
security for
costs not
required.

Statute of
Limitations
runs for and
against her.

When married
woman not
liable for next
friend's costs.

When liable
under M.W.P.
Act, 1882.

or anticipation at the time when the order to pay them is made, and not only against separate property to which she is so entitled at the time when she commences the proceedings.¹ An important alteration has been made by the Married Women's Property Act, 1893,² in connection with this liability, for when a married woman either by herself or by next friend institutes an action or proceeding and is condemned in costs, the court before which such action or proceeding is pending may from time to time order payment of the costs of the opposite party out of her property which is subject to a restraint on anticipation. This includes an appeal by her as plaintiff.³ This provision, however, has been held not to apply to a petition,⁴ or to an appeal or other motion or step instituted by her in an action in which she is defendant;⁵ though her act has been the cause of instituting proceedings, such as the entry of a *caveat* by her against the grant of probate of a will.⁶ But the obtaining leave to intervene in a probate suit, and the delivery of pleadings in which the married woman intervener adopts the pleadings of the plaintiff, amounts to the institution of proceedings by her and renders her liable to costs incurred since her intervention if unsuccessful.⁷ Again, it does not give the court jurisdiction to alter the effect of an order made before this Act came into operation.⁸ But a counter-claim in an action against her is a "proceeding instituted" by her, within the meaning of this Act;⁹ so is a claim to goods whereby interpleader proceedings are commenced.¹⁰ The court can enforce payment of the costs of such proceedings unsuccessfully instituted by her by the appointment of a receiver.¹¹

Alteration effected by M.W.P. Act, 1893, as to effect of restraint on anticipation on her liability for costs.

The capacity of a married woman to sue or be sued alone in tort depended on like conditions as in contract. At common law, and up to quite recently, the wife had in an action in tort for damages to prove special damage to herself; and the husband was joined merely for conformity, though he alone recovered the damages assessed.¹² Both she and her husband also were jointly liable for ante-nuptial or post-nuptial wrongs committed by her, on the principle that "for any wrong committed by her she is liable, and her husband cannot be sued without her; neither can she be sued without her husband."¹³ Strictly speaking, a married woman could not commit a tort, which was that of her husband,

In tort.

At common law.

Married woman's tort that of her husband.

¹ *Cox v. Bennett*, [1891] 1 Ch. 617.

² 56 & 57 Vict. c. 63, s. 2.

³ *Paget v. Paget*, [1898] 1 Ch. 477.

⁴ *Hood Barrs v. Cathcart*, [1894] 3 Ch. 376.

⁵ *Hollington v. Dear*, [1896] W. N. 35.

⁶ *Moran v. Place*, [1896] P. 214. The decision in this case seems quite contrary to the spirit of this Act.

⁷ *Crickitt v. Crickitt*, [1902] P. 177.

⁸ *Re Lumley, Ex parte Hood Barrs*, [1894] 3 Ch. 135. See *post*, next chapter.

⁹ *Hood Barrs v. Cathcart*, [1895] 1 Q. B. 873.

¹⁰ *Nunn v. Tyson (Tyson claimant)*, [1901] 2 K. B. 487.

¹¹ *Hood Barrs v. Cathcart*, [1895] 1 Q. B. 873.

¹² *Dengate v. Gardiner*, 4 M. & W. 5.

¹³ Per Erle, C.J., in *Capel v. Powell*, 34 L. J. C. P. 168.

and therefore could not be sued alone for it; but the husband was liable to those injured by it.¹ She could sue or be sued in tort at common law in like cases as in contract, *e.g.*, where her husband was *civilitur mortuus*, or an alien enemy. In equity, if she were guilty of a tort in connection with her separate estate, such as a breach of trust, she was not personally amenable, but her separate property could be rendered liable.² By statute law under the Divorce Acts, she could sue in tort as a single woman during a decree of judicial separation obtained by her;³ or during the continuance of an order protecting her goods and earnings obtained on the desertion of her husband.⁴ Under the Married Women's Property Act, 1870,⁵ she could compel the proper fulfilment of her rights arising out of that Act.⁶

Under the Married Women's Property Act, 1882, she can now sue or be sued in tort not only in her personal but her representative capacity as trustee, executrix, or administratrix;⁷ and by section 1, sub-section 2, she may sue or be sued in tort in all respects as if she were a *feme sole*, and neither husband nor next friend need be joined as a party, nor need she give security for costs, nor obtain leave of the court to sue alone;⁸ and she may sue in respect of a cause of action that arose before the Act came into force.⁹ She is affected by the provisions of the Statute of Limitations, and so must bring her action for any trespass, false imprisonment, assault or battery within four years of the time when the right of action accrued, for the Married Women's Property Act, 1882, has made her "discover" for the purpose of bringing actions within the meaning of 21 Jac. I. c. 16.¹⁰

The effect of the legislation of recent years is to enable a married woman, either in her personal or representative capacity, to sue or be sued without her husband or next friend, as if she were a *feme sole*, whether the form of the action be in contract or in tort, whether the contract arose before or after the marriage, or before or after the Act came into operation, or the wrong done was done by or to her, and before or during the marriage, or before or after the Act came into operation. Her position for the purposes of suing and being sued is the same as that of a man, and she can sue *in forma pauperis*, and will not be required to give security for costs except in those instances in which a man possessed of a like amount of property would be required to give it.

¹ *Head v. Briscoe*, 5 C. & P. 484.

² *Wainford v. Heyl*, L. R. 20 Eq. 321

³ 20 & 21 Vict. c. 85, s. 25.

⁴ *Ibid.* s. 21. *Ramsden v. Brearley*, L. R. 10 Q. B. 147.

⁵ 33 & 34 Vict. c. 93.

⁶ *Reg. v. Carnatic Railway Co.*, L. R. 8 Q. B. 299.

⁷ Sect. 24.

⁸ *Severance v. The Civil Service Supply Association*, 48 L. T. 485; *James v. Barraud*, 49 L. T. 300.

⁹ *Weldon v. Winslow*, 13 Q. B. D. 784.

¹⁰ *Lowe v. Fox*, 15 Q. B. D. 667.

Capacity in equity.

Statutory powers.

M.W.P. Act, 1882. Married woman may sue or be sued alone in tort, in personal as well as representative capacity.

Statute of Limitations.

Summary.

SECTION 5.

Liability of Married Women in respect of their Contracts.

It now remains to be discussed of what nature is the liability of married women on their contracts. Is the liability personal or proprietary, that is, one solely confined to such separate property as she has full control over? It has been authoritatively decided that the liability of a married woman is not personal but proprietary.¹ In equity it was only her free separate estate that could be reached to satisfy her creditor's claim.² "Proprietary liability . . . is only a short and compendious way of stating the proposition that a judgment obtained against a married woman must be executed against her property and not against her person. Such a judgment cannot make her liable to penal consequences, nor can it subject her to the operation of the bankruptcy laws, unless, indeed, she be carrying on a trade separately from her husband and be possessed of separate property; nor can any order to send her to prison be made upon it."³

Liability of
married
woman pro-
prietary and
not personal.

Under the Married Women's Property Act, 1882, which materially increased her liability for her contracts and engagements in respect of her separate property, her liability is yet limited to the extent of her free separate estate;⁴ that is to say, neither in equity was she deemed, nor under present statutory provisions is she deemed, to put herself forward as personally liable, but only her separate property. From the above state of the law flow the following results. A married woman cannot be committed to prison on a judgment summons under section 5 of the Debtor's Act, 1869, for default in paying a sum of money for which judgment has been recovered against her, both in cases where her separate property is subject to a restraint upon anticipation,⁵ and in cases where it is not subject to that fetter.⁶ She

M.W.P. Act,
1882.

¹ *Scott v. Morley*, 20 Q. B. D. 120. In this case the Court of Appeal settled the form of the judgment which ought to be used in the case of a married woman. "It is adjudged that the plaintiff do recover £ and costs (to be taxed) against the defendant (the married woman), such sum and costs to be payable out of her separate property, as hereinafter mentioned, and not otherwise. And it is ordered that execution hereon be limited to the separate property of the defendant (the married woman), not subject to any restriction against anticipation, unless by reason of section 19 of the Married Women's Property Act, 1882. The property shall be liable to execution, notwithstanding such restriction." This is still the proper form of judgment to be used in an action against a widow upon a contract entered into by her during coverture after the passing of the Married Women's Property Act, 1882, and before the passing of the Married Women's Property Act, 1893. *Softlaw v. Welch*, [1899] 2 Q. B. 419.

² *Aylett v. Ashton*, 1 My. & Cr. 105; *Atwood v. Chichester*, 3 Q. B. D. 722.

³ Per Esher, M.R., in *Holby v. Hodgson*, 24 Q. B. D. 105.

⁴ Sect. 1, sub-s. 2; sect. 15.

⁵ *Meager v. Pellew*, 14 Q. B. D. 793; *Draycott v. Harrison*, 17 Q. B. D. 147.

⁶ *Scott v. Morley* (*ubi sup.*).

cannot be made bankrupt in respect of her liabilities unless she happens to be carrying on a trade separately from her husband.¹ But a bankruptcy notice under section 4, sub-section 1 (g) of the Bankruptcy Act, 1883, cannot be issued against her if she is not carrying on a trade apart from her husband;² nor can a receiving order be made against her though a separate trader carrying on a business in a firm's name on the ground of non-compliance with a bankruptcy notice founded on a judgment obtained against her in the firm's name;³ for section 152 of that Act safeguards the provisions of the Married Women's Property Act, 1882; and even where she is carrying on a trade apart from her husband, such bankruptcy notice cannot be issued against her, on the same principle that the judgment which is the basis of the notice is not against her personally but against her separate property.⁴

If, however, she carries on a separate business from her husband, and leaves her place of business without paying her creditors or notifying her change of address, she commits an act of bankruptcy within section 4, sub-section 1 (d) of the Bankruptcy Act, 1883; though she has so left at her husband's request in order to live with him;⁵ and she does become a "debtor" for some purposes when a judgment has been recovered against her; thus, a judgment on a valid contract obtained against her will entitle the successful party to an order for her examination as to her separate estate under Order xxv. r. 71, of the County Court Rules, 1903,⁶ and Order XLII. r. 32, of the Rules of the Supreme Court, and may be enforced by a garnishee order attaching a debt due to her from a third person.⁷

The Married Women's Property Act, 1893,⁸ which renders the existence of free separate property at the time of a married woman entering into a contract or incurring a liability no longer necessary, has not altered the law in this respect, for the wording of section 1 is to the effect that "every contract hereafter entered into by a married woman . . . shall be deemed to be a contract entered into by her with respect to and to bind her separate property, whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters

¹ 45 & 46 Vict. c. 75, s. 1, sub-s. 5; *Re Hewett, Ex parte Levene*, [1895] 1 Q. B. 328; and see *Re Lynes, Ex parte Lester*, [1893] 2 Q. B. 113.

² *Re Gardiner, Ex parte Coulson*, 20 Q. B. D. 249. This case was decided on the narrow ground that the expression "final judgment" in a bankruptcy notice implied a personal liability on the part of the debtor, which result is not brought about by a judgment against a married woman.

³ *Re Handford (Frances) & Co.*, [1899] 1 Q. B. 566.

⁴ *Re Lynes, Ex parte Lester (ubi sup.)*.

⁵ *Re Worsley*, [1901] 1 Q. B. 309.

⁶ *Countess of Aylesford v. Great Western Railway Co.*, [1892] 2 Q. B. 626.

⁷ *Holby v. Hodgson, Bateson (Garnishee)*, 24 Q. B. D. 103.

⁸ 56 & 57 Vict. c. 63.

into such contract." Further, there is a proviso which preserves the well-established effect of the restraint upon anticipation. The principles of the above decisions will still hold good as to the liability of a married woman on her debts and contracts effected after December 5, 1893.¹

The distinction between the liability of a married woman for her ante-nuptial and post-nuptial debts is that the former is a personal liability in its fullest sense—that is, she was liable to be taken in execution for it, and is now liable to a debtors' summons in respect of it;² while the latter is a proprietary one only—that is, confined to such separate estate as she may possess.³

Distinction between liability of married woman for ante-nuptial and post-nuptial debts.

¹ The date of the coming into operation of the Act.

² See *Dillon v. Cunningham*, L. R. 8 Ex. 23, and *Robinson v. Lynes*, [1894] 2 Q. B. 577.

³ See *Re Hewett, Ex parte Levene*, [1895] 1 Q. B. 328. There was a question at first among the annotators of the Married Women's Property Act, 1882, whether its effect was to make a married woman *personally* liable to satisfy her contracts and debts. It seemed at first that full and unfettered contractual capacity had been conferred upon her, but a closer examination of the Act showed that under its provisions as in equity the separate estate and not the married woman herself was to be held ultimately liable to make good the claims of her creditors. The expression "personal liability" is clearly derived from the fact that in former days and in most early systems of jurisprudence the body of the debtor was liable to be taken in execution to satisfy the creditors' claims. One result of this personal liability was that all the property of the debtor could be taken in execution. Now it is well-established law, as has been set forth above, that since the courts administering equity permitted a married woman to enter into contracts which were held binding, the body of a married woman could not be taken in execution for her post-nuptial debt. In equity she herself was not personally liable, it was her separate estate which had to answer for her engagements (*Aylett v. Ashton*, 1 My. & Cr. 105; *Atwood v. Chichester*, 3 Q. B. D. 722). This arose from the position of the married woman during coverture. Equity recognized the *jus mariti* and the common law disability of the married women to contract, and invented its creature, the separate estate, to obviate the injustice of a woman losing all her personal property simply by marrying; but in a short time after the establishment of the doctrine by the courts, the corresponding liability for her engagements in respect of it was recognized. But even then equity recognized the personal incapacity and irresponsibility of the married woman, and only allowed her property to be rendered chargeable through the fiction that when she contracted she put forward her separate property as the real debtor, who would satisfy any claims that might arise on the part of the other contracting party. It is true that at common law a married woman might have been taken under a *ca. sa.* in personal execution of a debt contracted by her before marriage, whether her husband was also taken in execution or not; and the court did not as a rule order her discharge where she had separate property and could satisfy it (*Edwards v. Martyn*, 21 L. J. Q. B. 86; *Ivens v. Butler*, 26 L. J. Q. B. 145); and a final judgment for such ante-nuptial debt with all its consequences may still be signed against her (*Robinson v. Lynes* (*ubi sup.*)). This liability was a personal one in the fullest sense of the word, and shows that the separate existence of the married woman, was recognized but only for a limited class of liabilities. But in equity *all* her property was not liable, but only that separate property over which she had free and unfettered power of disposition. The preservation of the effect of the restraint upon anticipation in the Act of 1882 proved very clearly that the full personal liability of a married woman could not have been intended; because such liability would have depended altogether upon the existence or non-existence of the fetter; that is, there would have been a different legal liability for different women, though in nearly all respects they were under the same legal conditions, a state of affairs the Legislature could hardly be deemed to have intended. Section 15 of the Act casts some light on this point; it renders husband and wife jointly suable for the latter's ante-nuptial liabilities, and provides for a joint judgment against them both, if the husband's liability shall appear. It then goes on to say, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment *against the husband personally*, and against the wife *as to her separate property*; and as to the residue, if any, of such debt and damages, the judgment shall be a separate judgment against the wife *as to her separate property only*." Here a substantial distinction was contemplated between the *personal* or *general* liability of the husband and the limited liability of the wife, that is, one con-

Formerly it was the usual practice to declare the separate property of the married woman vested in her or her trustees chargeable with the satisfaction of her liability, and to charge it with that amount, and that an inquiry should be made of what the separate property consisted, at the time of making the contract, and in whom it was vested.¹ Such inquiry, as has been seen, is as necessary now as heretofore, in order to ascertain whether her property is subject to a restraint upon anticipation, for in such case it is not liable to make good her creditor's claim. Under the present state of the law nothing, it would seem, can prevent her from disposing of her separate property before judgment; and the court would not on the part of a creditor restrain her from dealing with her property.²

Joinder of
trustees.

It is not necessary to join her trustees (if any) in order to get a mere charge upon her property;³ but where payment out of the property is sought (which is the effect of such a judgment under Order XIV. r. 1), and not a mere charge, then they should be joined,⁴ but their joinder is not a condition precedent to judgment against the married woman.⁵ So where an order is obtained, appointing a receiver of the separate estate for the purpose of satisfying the claims of her creditors, the trustees need not be made parties to the application, though they must hand over to the receiver whatever property is capable of satisfying the debts of the married woman. The trustees are not superseded by the receiver, but he is appointed over the head of the married woman.⁶ Where a married woman whose property is subject to a restraint upon anticipation incurs a liability, and becomes a widow, a creditor who obtains judgment against her separate estate not subject to such restraint cannot enforce it by the appointment of a receiver or otherwise.⁷

Receiver.

Capacity to
contract should
be regulated
by *lex loci*
contractus.

The capacity of a married woman to effect valid contracts should be regulated by the law of the place where the contract is made, and not necessarily the law of her domicile. In the large majority of instances the persons to whom she might hold

financed to her property. Soon after the passing of the Act of 1882, it was held that final judgment under Order XIV. r. 1, which in a sense is a personal judgment, might be signed against a married woman who has separate estate (*Gunston v. Maynard*, 75 L. T. Jour. 102), or on default of appearance (*Perks v. Mylrea*, W. N. [1884] 64), in which case a receiver may be appointed of her free separate property (*Ibid.*). But unconditional judgment cannot be signed under Order XIV. r. 1, against her, and execution on a judgment under that Order must be limited to the separate property over which she has full control (*Moore v. Mulligan*, W. N. [1884] 34; *Perks v. Mylrea* (*ubi sup.*)); *Bursill v. Tanner*, 13 Q. B. D. 691, which on this point is a correct decision).

¹ See *Picard v. Hine*, L. R. 5 Ch. App. 274; *Pike v. Fitzgibbon*, 17 Ch. D. 454; *Gloucestershire Banking Co. v. Phillips* (*Creagh, Third Party*), 12 Q. B. D. 533.

² *Robinson v. Pickering*, 16 Ch. D. 660.

³ *Picard v. Hine* (*ubi sup.*); *Collett v. Dickenson*, 11 Ch. D. 687.

⁴ *Atwood v. Chichester*, 3 Q. B. D. 722; *Collett v. Dickenson* (*ubi sup.*).

⁵ *Perks v. Mylrea*, W. N. [1884] 64.

⁶ *Re Peace and Waller*, 24 Ch. D. 405.

⁷ *Pelton (Brothers) v. Harrison*, [1891] 2 Q. B. 422.

herself out as having the capacity to contract would be ignorant of any disability attaching to her by the law of her domicile. To ask a small English or French tradesman to know the law of any State of the American Union would be to reduce justice to a farce. If she has made a valid contract according to the *lex loci contractus*, her creditors should be allowed to sue her in the forum of her domicile if it became necessary to do so.¹

How a married woman may proceed to vindicate her rights arising out of her contracts, and in what manner a creditor may enforce his remedy against her, that is, what property may be taken in execution, will be discussed in a subsequent chapter.²

¹ See Dicey, Dom. 193.

² See *post*, chap. xv. pp. 403 *et seq.*

CHAPTER XV.

SEPARATE ESTATE.

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THE important topic of the Separate Estate of married women forms the subject-matter of this chapter. Separate estate may be defined to be that property which a married woman is entitled to hold and dispose of unaffected by any marital rights or engagements during the period of coverture. The expression was formerly used to describe that kind of property which was unaffected by the marital right in contradistinction to that property over which the husband's ordinary legal rights prevailed.

But now by legislative enactment all kinds and descriptions of property belonging to a woman married after January 1, 1883, are her separate property, and, under certain conditions, property belonging to her who was married before that date. In the case of those married after that date there is no differentiating mark between property expressly clothed with the attributes of separate estate and property without them. Previously to the Married Women's Property Act, 1882,¹ separate property was created by the express act and determination of those who called it into existence, or by the force of legislative authority, which stamped certain but limited classes of property with the incidents of ownership unaffected by coverture. Under the former state of the law considerable difference existed between what was known as equitable separate estate and statutory separate estate; but since the passing of the above Act the difference between them, so far as regards women married after it came into force, has been practically abrogated. Equitable separate property was that property which equity through the medium of trusts, and carrying out the intention of the parties, treated as property free from the marital control during coverture. But now all property belonging to a married woman (not affected by a settlement), whether vested in trustees (in which case it would be still equitable) or not, is property which comes under the operation of the Act, and so is in a sense statutory. Equity,

Definition of separate estate.

All property now coming to a married woman her separate estate.

Now no practical distinction between equitable and statutory separate estate.

¹ 45 & 46 Vict. c. 75.

however, will preserve its jurisdiction over purely equitable separate property, as where the legal estate is vested in trustees; and their functions will be necessary where it is desired to restrain a woman from dealing with the property during coverture. But since the law existing anterior to the passing of this Act still affects a large number of married women, it will be necessary to treat it as though unaffected by any change or modification; and the actual recent changes will be discussed as part only of the general subject. This chapter will be divided into the following sections:—

SECTION 1. Creation and Growth of the Separate Estate.

SECTION 2. Statutory Extension of the Separate Estate.

SECTION 3. Power of disposition over the Separate Estate:
(a) *Inter vivos*; (b) By Will; (c) By Power of Appointment.

SECTION 4. Restraint upon Anticipation.

SECTION 5. Separate Property in Respect of which Liability Exists.

SECTION 6. Questions between Husband and Wife as to their Property.

SECTION 7. Remedies of Married Women in Respect of their Separate Estate.

SECTION 8. Pin-money and Paraphernalia.

SECTION 1.

Creation and Growth of the Separate Estate.

At common law, as has already been seen, the *jus maritale* prevailed over all property of the wife belonging to the wife at the time of marriage, and subsequently coming to her, as to personal property absolutely, as to realty by giving the husband an interest in it for the period of coverture, or for his life. But equity, under the guidance of a succession of eminent Chancellors, tempered the harshness of this common law doctrine with the juster principles of the separate use. The doctrine of the separate use is bound up with and involved in the doctrine of trusts. When trusts became an integral portion of the law, then is the separate property of married women recognized and approved. At first it appears in a modest guise; then in time it takes a more prominent place in the ranks of legal principles, and claims to have all the incidents of dominion attached to it. It is very probable that as soon as the Court of Chancery placed the doctrine of trusts upon a firm and secure basis, notwithstanding the interpretation put upon the Statute of Uses by the common law

Creation and growth of the separate estate.

Separate use involved in the doctrine of trusts.

judges (who held that a use upon a use was not executed by the statute),¹ the creation of separate estate through the medium of trusts in favour of married women was approved and fostered by the equity courts.² Equity was the inventress of the whole doctrine.³ Synchronously with this struggle between the two branches of the law, wealth in the shape of personalty was largely increasing in this country and becoming of great importance; and females on their marriage or during coverture brought with them or acquired fortunes of considerable extent; thus, it became a conviction that it was expedient, for "the interests of society, that means should exist by which, upon marriage, either the parties themselves by contract, or those who intended to give bounty to a family, might secure property for the benefit of the wife and children, without that property being subject to the control of the husband."⁴ This doctrine was, no doubt, a serious inroad into the theory of the unity of the spouses, and even into that of the subordination of the wife during coverture, but was founded on the clearest principles of justice that what was given to one should not be taken by another and diverted from the purposes for which it was originally intended; for that which might have been given to the wife to support her and her children when left a widow might be taken by a spendthrift husband and squandered, or claimed by his creditors to satisfy debts from which she had reaped no advantage. It is the essence of the separate use that the wife's property shall be independent of and free from the control and interference of her husband.

An invention of equity.

Equity doctrine an inroad into the common law theory of coverture.

There are traces of this doctrine in the reign of Queen Elizabeth;⁵ thus, in *Doyley v. Persull*,⁶ Lord Keeper Finch declared that since Queen Elizabeth's time it had been the constant course of their court to set aside and frustrate all incumbrances and acts of the husband upon the *trust* in the wife's term; and that he should neither charge nor grant it away. By the time of Lord Hardwicke the doctrine was well established; and in that of Lord Thurlow it was placed on such a firm basis that nothing short of legislative interference could have annulled it. The common law courts recognized its existence.⁷

Traces of doctrine in time of Queen Elizabeth.

¹ See *Nevil v. Saunders*, Vern. 415.

² Hayes, Conv. 500.

³ See *Doyley v. Persull*, 2 Ch. Cas. 225.

⁴ Per Lord Cottenham in *Rennie v. Ritchie*, 12 Cl. & Fin. 234.

⁵ See *Sankey v. Goldine*, 21 & 22 Eliz. *Feme covert* joined with *baron* in sale of part of her inheritance: quarrels and separation. £100 from sale allotted to wife for maintenance, and placed in hands of a trustee for *feme*. *Feme* sues administrator of trustee, who demurs that her husband is not joined. Demurrer overruled, and defendant made to answer. See also *Gorges v. Chaney*, cited in *Pridgeon's Case*, 2 Ch. Cas. 117.

⁶ *Ubi sup.* In this case the wife had assigned her term in trust for herself before marriage; a mortgage by the husband of the term was held bad.

⁷ *Davison v. Atkinson*, 5 T. R. 434.

Lord Langdale
in *Tullett v.*
Armstrong.

This doctrine has been summed up as follows: "In this court a married woman has, for more than a century,¹ been considered as capable of possessing property to her own use independently of her husband; such property is called her separate estate, and, in respect of it, she is considered as a *feme sole* enjoying, and capable of exercising, her rights as such. The property may be acquired either by contract with the husband before the marriage, or by gift from him, or from any stranger wholly independent of such contract; so far as his legal rights as husband may interfere, the court will treat him as a trustee; and property held by or for the wife to her separate use, if unaccompanied by any restraint, is subject to her power of alienation, and the other incidents of property held by men or single women. . . . Property given to a woman for her separate use, independent of any husband, may, under the authority of this court, be enjoyed by her during her coverture, as her separate estate although the property originally, or at any subsequent period or periods of time, became vested in her when discovered. In respect of such separate estate, she is by this court considered as a *feme sole*, although covert. Her faculties as such, and the nature and extent of them, are to be collected from the terms in which the gift is made to her, and will be supported by this court for her protection. The words 'independent of a husband,' whether express or implied in the terms of the gift, mean no more than that this court will not permit the marital power of the husband to be used in contravention of the enjoyment of the property, according to the terms of the gift. If the gift be made for her sole and separate use, without more, she has during the coverture an alienable estate independent of her husband. If the gift be made for her sole and separate use, without power to alienate, she has during the coverture the present enjoyment of an unalienable estate, independent of her husband. In either of these cases she has, when discovered, a power of alienation; the restraint is annexed to the separate estate only, and the separate estate has its existence only during coverture; whilst the woman is discovered, the separate estate, whether modified by restraint or not, is suspended, and has no operation, though it is capable of arising upon the happening of a marriage."²

How separate
estate created.

By appoint-
ment of
trustees.

To constitute separate estate, with its consequences, the intervention of trustees was usual in order to obviate the influence of the husband over the wife, and to render her property more secure from his control; but the appointment of trustees was not actually essential,³ and where necessary the husband himself (in

¹ The date of this judgment was 1838.

² Per Lord Langdale, M.R., in *Tullett v. Armstrong*, 1 Beav. 21, 22, and 32, 33.

³ But as late as 1710 it was doubted by Lord Chancellor Cowper whether a bequest or personal property to a married woman for her separate use without trustees did not

cases where the legal estate vested in him) was treated as a trustee, on the well-established equity principle that a trust shall never fail for want of a trustee,¹ and where property was given to the husband for his wife's separate use, he was held to be her trustee;² or when he wrongfully acquires possession of her separate property.³ By the Married Women's Property Act, 1882,⁴ the intervention of trustees to constitute separate property is expressly dispensed with; and the effect of that provision is, if followed, that now the legal estate vests absolutely in the married woman herself who possesses property not held in trust for her. But as a measure of precaution, and to insure that her interests are fully secured, it will be as requisite now as heretofore to appoint trustees; for though the law may increase the powers and privileges of married women, it is incapable of controlling the influence of husbands; and the more unfettered the wife is, the greater the opportunity the husband will possess of making his power and influence felt; and so the very intent and aim of the law will be defeated.

Trustee no longer necessary.

The separate use applies as much to real as to personal property; and where realty is settled or directed to be held to a married woman's separate use, the husband is not entitled to the rents and profits.

Separate estate may be created in various ways. (a) It may be created by gift *inter vivos*, or by legacy of a stranger, or by gift from the husband, with words sufficient to constitute a separate interest in the wife. Such a gift may be made to a woman when covert, or discovet, but to take effect on her coverture; so that, on becoming covert, she will hold it as separate estate free from marital control. This gift may be made to a woman in anticipation of a marriage generally, or of a particular marriage; or not in contemplation of any marriage, but with the intention that if the donee marry, any husband shall not exercise his marital control over it.⁵ The intention to create separate estate, and the sufficiency or insufficiency of the words to be used, are discussed in after-pages.

By gift of stranger or husband.

(b) The separate use may be created by ante-nuptial agreement on the part of the husband that his wife shall be entitled to her personal property for her separate use;⁶ and this arrangement is usually carried out by a marriage settlement executed between the parties. If the property is not actually so settled, and the

By ante-nuptial agreement.

pass to her husband; however, in *Rolfe v. Budden*, Bunb. 187, and *Bennet v. Davis*, 2 P. Wms. 316, where property was settled to the separate use of a married woman without trustees, her husband was made a trustee.

¹ *Bennet v. Davis* (*ubi sup.*). *Ex parte Sibeth*, 14 Q. B. D. 417.

² *Darley v. Darley*, 3 Atk. 399.

³ *Wassell v. Leggatt*, [1896] 1 Ch. 554.

⁴ 45 & 46 Vict. c. 75, s. 1, sub-s. 1.

⁵ *Walrond v. Goodman*, 16 Q. B. D. 121.

⁶ *Tullett v. Armstrong* (*ubi sup.*).

legal title vests in the husband, he will be held a trustee of the property for his wife's separate use.¹ This agreement must be in writing; if not, the Statute of Frauds² will prevent its enforcement, unless the husband has been guilty of fraud, in which case equity will relieve. It has also been suggested that if such parol agreement has been acted upon, as by handing over the agreed property to trustees of the settlement, it would be binding upon the husband.³ Though there might have been a total renunciation of the marital right, yet if the woman did not sign the agreement, her property did not become her separate estate so as to enable her to dispose of it by will during coverture.⁴

(c) If the husband after marriage agrees that certain property belonging to the wife shall continue to belong to her, such property will be to her separate use, and freed from his control and engagements. So, too, where the husband acquiesces in his wife carrying on a business or trade separately, the profits of the business or trade will be her separate property; thus, where the husband allowed his wife for her separate use to make profit of certain farm produce, the money she made out of the business was held to be her separate property; and she was allowed to prove against his estate in respect of a loan she made to him out of it;⁵ and where he allowed her to carry on a trade pursued by her as a single woman, and did not in any way interfere with it, the stock-in-trade and profits of the business were held to be her separate property.⁶ One effect of the Married Women's Property Act, 1882, is that there is no longer any need for a specific agreement between husband and wife that property coming to her during marriage shall be her separate property; for the characteristics and attributes of separate estate are at once stamped upon any property coming to a married woman, in respect of which it may be said she has a statutory settlement to her separate use.

The marital interest in the wife's property being clear and undisputed, the intention to limit that interest and create a separate use for the wife must have been clear, though it was not absolutely necessary in the instrument affecting the gift, whether will or deed, to use technical expressions.⁷ Sometimes it happened that the expressions used were ambiguous, in which case recourse was had to the context and surrounding circumstances for the purpose of gathering what was intended; as, for instance,

¹ *Tyrrell v. Hope*, 2 Atk. 558.

² 29 Car. II. c. 3.

³ Per Wigram, V.C., in *Simmons v. Simmons*, 6 Ha. 352.

⁴ *Dye v. Dye*, 13 Q. B. D. 147.

⁵ *Slanning v. Style*, 3 P. Wms. 334.

⁶ *Ashworth v. Outram*, 6 Ch. D. 923; *Re Dearmer, James v. Dearmer*, 53 L. T.

905.

⁷ *Stanton v. Hall*, 2 R. & Myl. 180; *Darley v. Darley*, 3 Atk. 399; *Re Peacock's Trusts*, 10 Ch. D. 490.

a mere direction that the property shall be at a wife's own disposal;¹ or that her receipt shall be a sufficient discharge.² As such questions may still arise in the case of persons married before January 1, 1883,³ it has been deemed expedient to set forth shortly what expressions have been held sufficient and what insufficient to create a separate interest in the wife. But as regards persons married after that date, this is a matter of antiquarian rather than practical interest, because by the wide and sweeping effect of the Act of 1882, all property, of whatsoever description, and however derived, belonging to a woman at the date of her marriage or acquired afterwards by her, is her separate property, free from marital control unless the husband has stipulated for any interest in it, and no question as to the intention of the donor or settlor can possibly arise.

The following expressions have been held sufficient to constitute a separate interest in the woman:⁴ "For her full and sole use and benefit";⁵ "for her own sole use and benefit";⁶ "for her sole use";⁷ "for her sole and separate use and benefit";⁸ "for her sole and separate use";⁹ "for her sole use and benefit";¹⁰ "for her own sole use, benefit, and disposition";¹¹ "for her sole and absolute use";¹² "for her own use, and at her own disposal";¹³ "to be at her disposal and to do therewith as she shall think fit";¹⁴ "solely and entirely for her own use and benefit";¹⁵ "for her own use independent of any husband";¹⁶ "not subjected to the control of her husband";¹⁷ "for her own use and benefit independent of any other person";¹⁸ "for her livelihood";¹⁹ "the interests and profits to be paid to her, and the principal to her or to her order by note or writing under hand";²⁰ "that she should enjoy and receive the issues and profits of the estate";²¹ so, too, a direction that certain property should be delivered up to a married woman "whenever she should demand or require the same."²² So, also, a similar construction has been applied to the words "to be laid out in what she shall think fit";²³ "for her separate use";²⁴ "free of control of any present husband or

What words
sufficient.

¹ *Prichard v. Ames*, Turn. & Russ. 222.

² *Lee v. Prieaux*, 3 Bro. C. C. 381.

³ Date of coming into operation of the Act.

⁴ Collected in Peach. Sett. 280, 281.

⁵ *Arthur v. Arthur*, 11 Ir. Eq. Rep. 511.

⁶ *Ex parte Killick*, 3 M. D. & De G. 480.

⁷ *Lindsell v. Thacker*, 12 Sim. 178.

⁸ *Archer v. Rorke*, 7 Ir. Eq. Rep. 478.

⁹ *Parker v. Brooke*, 9 Ves. 583; *Adamson v. Armitage*, 19 Ves. 415.

¹⁰ — v. *Lyne*, Younge, 562.

¹¹ *Ex parte Ray*, 1 Madd. 199.

¹² *Davis v. Prout*, 7 Beav. 288.

¹³ *Prichard v. Ames* (*ubi sup.*).

¹⁴ *Kirk v. Paulin*, 9 Vin. Abr. 96, pl. 43.

¹⁵ *Inglefield v. Coghlan*, 2 Coll. 247.

¹⁷ *Bain v. Lescher*, 11 Sim. 397.

¹⁹ *Darley v. Darley* (*ubi sup.*).

²⁰ *Hulme v. Tenant*, 1 Bro. C. C. 16.

²¹ *Tyrrell v. Hope*, 2 Atk. 558.

²² *Dixon v. Olmuis*, 2 Cox, Eq. Cas. 414.

²³ *Atcherley v. Vernon*, 10 Mod. 518.

²⁴ *Massy v. Rowen*, L. R. 4 H. L. 288.

husband to come";¹ a direction to trustees to pay, apply, and dispose of annual proceeds for any widow whom he (the testator's son) shall leave for her life;² or "that the husband is to have no control";³ and "sole use and disposal."⁴

What words
insufficient.

The following expressions have, on the contrary, been held insufficient: "To pay to a married woman and her assigns";⁵ or a gift "to her use";⁶ "to her own use and benefit";⁷ "to her absolute use"⁸ (unless "absolute" can be construed to be equivalent to "separate"⁹); payment directed to be made "into her own proper hands to and for her own use and benefit";¹⁰ or to "be under her sole control";¹¹ or in a devise without the intervention of trustees "for her sole use and benefit";¹² or "a direction to transfer to her own use and benefit";¹³ so a bequest to a woman and her assigns for her life, "for her and their own absolute use and benefit";¹⁴ so, too, a bequest to the testator's wife for life of the income of property "to be expended by her as she might think fit and proper, and agreeable to her free will and pleasure."¹⁵ A gift to the separate use was not implied from the mere existence of the restraint upon anticipation.¹⁶ A gift of the produce of a fund is under ordinary circumstances a gift of the produce in perpetuity, and therefore operates as a gift of the fund itself, unless a contrary intention appears. Thus, where there was a bequest to a woman of a fund with the interest to be vested in trustees, such income to be for her sole use and benefit, the capital was deemed vested for her separate use;¹⁷ and where a testator simply directed his trustees to convert the fund for the benefit of a married woman independently of the control of her husband, the married woman was held entitled to the whole fund to her separate use.¹⁸

Gift of income
vests the
capital of
personalty.

Separate
interest in
accumulations,
savings, and
arrears of
separate
property.

Where a fund is settled to the separate use of a married woman, the income or produce of that fund is also affected by the separate use of the *corpus*; so, too, savings out of her separate income by a married woman are also her separate estate; for "as she had a power over the principal, she con-

¹ *Anderson v. Anderson*, 2 Myl. & K. 427.

² *Austin v. Austin*, 4 Ch. D. 233.

³ *Edwards v. Jones*, 14 W. R. 815.

⁴ *Bland v. Daves*, 17 Ch. D. 794; see *Fox v. Hawks*, 13 Ch. D. 822.

⁵ *Dakins v. Beresford*, 1 Ch. Cas. 194.

⁶ *Jacobs v. Amyatt*, 1 Madd. 376 n.

⁷ *Johnes v. Lockhart*, cited 3 Bro. C. C. 383 n.

⁸ *Ex parte Abbott*, 1 Deac. 338.

⁹ *Sheiwell v. Dwarries*, Johns. 172.

¹⁰ *Massey v. Parker*, 2 Myl. & K. 174.

¹¹ *Gilbert v. Lewis*, 1 De G. J. & Sm. 38; *Massey v. Rowen*, L. R. 4 H. L. 288.

¹² *Darcy v. Croft*, 9 Ir. Ch. Rep. 19.

¹³ *Rycroft v. Christie*, 3 Beav. 238.

¹⁴ *Re Graham's Trusts*, 20 W. R. 289.

¹⁵ *Baggett v. Meuw*, 1 Coll. 138; *Stogdon v. Lee*, [1891] 1 Q. B. 661.

¹⁶ *Adamson v. Armitage*, 19 Ves. 416.

¹⁷ *Simons v. Howard*, 1 Keen, 7; 2. See also *Elton v. Shepherd*, 1 Bro. C. C. 552.

¹⁰ *Tyler v. Lake*, 4 Sim. 144.

sequently had it over the produce of it, for the sprout is to savour of the root, and to go the same way."¹ This power need not be one which the married woman could exercise during the coverture, for she may be restrained from anticipating the capital; but the savings of the produce of the principal would be separate estate. The savings of her separate estate will be liable to all the incidents of separate estate,² except that the savings in the hands of trustees of a married woman who is restrained from anticipating will not be liable to the restraint unless it can be proved that she transferred such savings to be held on like trusts and conditions as the capital.³ Where a husband lives apart from his wife, and remits money to her for her support and maintenance, it will be considered as her separate estate; and he cannot bring an action against his wife to recover the savings.⁴ Arrears of separate estate in the hands of trustees, due at the time of a second marriage, will be considered as retaining their original character.⁵ But the dividends of separate estate, and railway stocks representing part of her separate property sold *after his death*, are not separate estate.⁶

Money remitted by husband for maintenance of wife.

The separate use does and can only exist during coverture, for when discoverd there is no person from whom she can hold her property separately and apart. Where property is limited to the separate use of a single woman, who afterwards marries, and does not renounce her rights over her property, the separate use springs into existence at the moment of marriage.⁷ When the coverture is terminated, the surviving wife takes and holds her separate property freed from all equitable restraints and conditions, and can deal with it as though she had always been a single woman. A question directly proceeding from the foregoing proposition has been the subject of much litigation in the courts. It is whether, if property be settled upon a married woman to her separate use in contemplation of marriage, and she marries, and becomes discoverd, and marries again, the separate use revives on her second marriage. This question has been answered in the affirmative, but not until after some struggle and conflicting decisions of the courts.⁸ The ambulatory nature of the separate use was finally decided by Lord Langdale, M.R., and Lord Cottenham, L.C., in the case of *Tullet v. Armstrong*,⁹ in which it was clearly laid down that the separate

Duration of the separate estate.

Cesser on termination of marriage.

Ambulatory nature of the separate use.

¹ Per Lord Keeper Sir Nathan Wright in *Gore v. Knight*, 2 Vern. 535.

² *Butler v. Cumpston*, L. R. 7 Eq. 16.

³ *Ibid.*

⁴ *Brooke v. Brooke*, 25 Beav. 342; but see *Messenger v. Clarke*, 19 L. J. Ex. 3c6.

⁵ *Ashton v. M'Dougall*, 5 Beav. 56; but see *Spicer v. Dawson*, 5 W. R. 431.

⁶ *Mayd v. Field*, 3 Ch. D. 587.

⁷ *Anderson v. Anderson*, 2 Myl. & K. 427.

⁸ See *Hayes*, Conv. 500-541.

⁹ 1 Beav. 1.

use, though it ceased on the married woman becoming discover, revived on her subsequent marriage.¹ If the trust for the separate use is limited by precise words to a particular coverture, and the married woman becomes discover, on the termination of that coverture the separate use is gone altogether; and if she marry again, without having disposed of the *corpus* in the meantime, and without a settlement, her second husband's rights will exist over it.²

A woman on marriage could renounce separate use.

A woman could on marriage renounce her separate use, but the evidence must have been clear that she voluntarily gave up such an important right; and the court did not readily assume that she intended to give it up.³ Thus, it would never allow a female infant on marriage to renounce the separate use in property belonging to her.⁴

Whether woman on marriage could now renounce her separate use.

This question of the ambulatory nature of the separate use cannot arise in the case of marriages taking place after the Married Women's Property Act, 1882, came into force, for by the operation of that statute a separate interest in her own property existing, or to come into existence, is created at the moment of marriage;⁵ and a limitation of the separate use to a particular coverture would not on the termination of that coverture, and the woman's subsequent marriage, prevent the statutory separate use attaching to her property. There is, however, nothing in this act, it is submitted, to prevent a single woman on marriage, or a married woman during coverture, making a valid contract with her husband to renounce the separate use; and the property which belonged to her at the date of marriage, or was afterwards acquired by her, and was capable of being disposed of by her, would in such a case come under the marital control. This power would seem to be exercisable equally over the property settled by the act of the parties as over that settled by the operation of the law, which she was not restrained from alienating or anticipating. Of course her ante-nuptial creditors could follow it in her husband's hands, but her legal personal representatives, or her heirs, could lay no valid claim to it; indeed, her capacity for so disposing of her property is increased rather than diminished under the Act. The adultery of the wife was never held to affect her rights over property settled to her separate use,⁶ and *à fortiori* since the Act cannot affect them.

¹ See *Hawkes v. Hubback*, L. R. 4 Eq. 5.

² *Moore v. Morris*, 4 Dr. 33; *Benson v. Benson*, 6 Sim. 126.

³ Macq. H. & W. 343.

⁴ *Johnson v. Johnson*, 1 Ke. 648.

⁵ Sect. 1, sub-s. 1; ss. 2 and 5. Doubt has been cast upon the accuracy of this proposition, and the Court of Chancery has recognized a difference between the separate use created by a settlement and that created by the statute. See *Stevens v. Trevor-Garrick* [1893], 2 Ch. 307; and *Buckland v. Buckland* [1900], 2 Ch. 534.

⁶ *Seagrave v. Seagrave*, 13 Ves. 443.

SECTION 2.

Statutory Extension of the Separate Estate.

Before proceeding further to discuss the nature and incidents of separate estate, its extension by various statutes will be noticed. The growth of statutory separate property is of very recent date in this country, and is contained in six statutes, viz., the three Acts of 1857, 1858, and 1895, dealing with proceedings for judicial separation, and the Married Women's Property Acts of 1870, 1882, and 1893. The contents of these statutes will here be shortly summarized.

(a) By the Act to amend the law relating to divorce and matrimonial causes,¹ a wife who was deserted by her husband might, at any time after such desertion, apply to the proper persons² for an order to protect her money or property acquired by her own lawful industry. If she obtained such protection order, she was, and was deemed to be, during the continuance thereof, in the like position in all respects, with regard to property and contracts and suing and being sued, as if she had obtained, under the Act, a decree of judicial separation.³ Judicial separation under this Act constituted the woman (as long as it lasted) a *feme sole* with respect to property of every description acquired by or devolving upon her,⁴ also for the purposes of contract, and in respect of wrongs and injuries,⁵ and of suing and being sued in any civil proceeding.⁶ If a wife was possessed of choses in action or reversionary interests, which were not reduced into possession by her husband, and she obtained an order for protection, such property became hers absolutely, and her husband's interest in it was gone;⁷ and any dealings with it on his part, whether by way of sale or mortgage, were ineffectual to give any title to his assignees;⁸ and resumption of cohabitation, apart from any agreement between the spouses, did not alter the position of the parties.⁹ This privilege was conferred in order to protect the hard-won earnings of the humbler classes who could not afford to come to the Divorce Court for a judicial separation. The

Statutory
extension of
the separate
estate.

Protection
order.
Effect of.

Married
woman judi-
cially separated
in the position
of a *feme sole*.

¹ 20 & 21 Vict. c. 85.

² If resident within the metropolitan district to a metropolitan police magistrate, if resident in the country to the justices in petty sessions; and by 21 & 22 Vict. c. 108, s. 6, in either case to the Judge Ordinary (now the President of, or a judge attached to, the Probate, Divorce, and Admiralty Division of the High Court).

³ Sect. 21.

⁴ Sect. 25.

⁵ *Ramsden v. Brearley*, L. R. 10 Q. B. 147.

⁶ Sect. 26.

⁷ *Johnson v. Lander*, L. R. 7 Eq. 228; *Re Coward and Adam's Purchase*, L. R. 20 Eq. 179; *Re Emery's Trusts*, 50 L. T. 197.

⁸ *Re Insole*, L. R. 1 Eq. 470; *Re Emery's Trusts* (*ubi sup.*).

⁹ *Re Emery's Trusts* (*ubi sup.*).

Property
protected must
be acquired by
lawful in-
dustry of wife.
Order retro-
spective.

desertion on the part of the husband must be unlawful, unjustifiable, and permanent; but the property of the married woman, to be protected, must be acquired by her lawful industry; thus, her gains by living in adultery, or by keeping a brothel, will not be protected.¹ The protection order has a retrospective effect, extending back to the commencement of the desertion,² but does not affect property acquired by the married woman before the desertion;³ and any restraint imposed on such property by a pre-existing settlement must have effect given to it.⁴ But property acquired after the date of the decree for separation and during separation is not within a covenant to settle after-acquired property during coverture.⁵ Where there is no settlement, a married woman may have money paid out of court to her;⁶ but the decree of judicial separation or protection order does not affect the validity of existing settlements. The will of a married woman so protected is capable of passing property acquired by her during the desertion which is the foundation of the order for protection.⁷ In fine, the position of a *feme sole* is conferred upon the married woman until the order is reversed or discharged,⁸ not only as regards contracts,⁹ but property.¹⁰ The husband or any of his creditors, or other person claiming under him, may move to have the order discharged;¹¹ even after the death of the wife.¹² When the wife returns to cohabitation with her husband all such property as she may be entitled to when such cohabitation shall take place shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband while separate.¹³

(b) By the Act of 1858 amending the Divorce Act of the previous year,¹⁴ the effect of a decree for judicial separation, or an order for protection, was extended to property to which the wife became, or should become, entitled as executrix or administratrix, or trustee since the sentence of separation or the commencement

¹ *Mason v. Mitchell*, 3 H. & C. 528.

² *Re The Goods of Ann Elliott*, L. R. 2 P. & D. 274.

³ *Waite v. Morland*, 38 Ch. D. 135; *Hill v. Cooper*, [1893] 2 Ch. 85.

⁴ *Waite v. Morland* (*ubi sup.*).

⁵ *Dawes v. Croyke*, 30 Ch. D. 500.

⁶ *Ewart v. Chubb*, L. R. 20 Eq. 454.

⁷ *In The Goods of Ann Elliott* (*ubi sup.*).

⁸ 20 & 21 Vict. c. 85, s. 21; 21 & 22 Vict. c. 108, s. 8.

⁹ Sect. 26.

¹⁰ See *Re Hughes, Hughes v. Brandon*, [1898] 1 Ch. 529. In this case, which arose on an originating summons for the administration of an estate, a woman had married before 1883 and obtained a protection order; she then entered into a contract, though at the time not possessing any free separate property, but subsequently became entitled to funds over which she had a general power of appointment which she exercised by will while the order was still in force; her creditor was held entitled to come in and prove in the administration.

¹¹ *Ibid.* s. 21, as amended by 27 & 28 Vict. c. 44, s. 1.

¹² *Mudge v. Adams*, 6 P. D. 54.

¹³ *Ibid.* s. 25.

¹⁴ 21 & 22 Vict. c. 108.

21 & 22 Vict.
c. 108.
Property to
which wife
entitled as
executrix,
administratrix,
or trustee.

of the desertion.¹ Persons or corporations making payment to married women under orders of protection which have been discharged, reversed, or varied, or after the cesser of the separation, are to be protected and indemnified.² Under an order a married woman may obtain payment to herself of money in court,³ or in the hands of trustees,⁴ though it is given to her separate use without power of anticipation;⁵ and as executrix she may transfer stock standing in the name of her testator in the books of the Bank of England, and receive dividends as if she were a single woman.⁶

(c) Under the Summary Jurisdiction (Married Women) Act, 1895,⁷ a married woman whose husband shall have been convicted summarily of an aggravated assault upon her or upon indictment of an assault upon her, and sentenced to pay a fine of more than £5, or to a term of imprisonment exceeding two months, or who has deserted her, or has been guilty of persistent cruelty to her, or has wilfully neglected to provide reasonable maintenance for her or her infant children, whom he is legally liable to maintain, and has by such cruelty or neglect caused her to leave and live separately and apart from him, may apply to a court of summary jurisdiction acting in the district in which the husband shall have been convicted, or the cause of complaint arisen⁸ for an order (*inter alia*) containing a provision that she be no longer bound to cohabit with him, and that he makes her a weekly allowance. This provision while in force shall have the effect in all respects of a decree of judicial separation on the ground of cruelty.⁹ The jurisdiction to grant a judicial separation against the husband for an aggravated assault would now seem to depend upon the court fining or imprisoning him.¹⁰ But the wife can obtain a like order on proof of her complaint of other matrimonial misconduct on his part.¹¹ The complaint must be brought within six months of the cause of the complaint arising. If a summons based on a complaint is withdrawn, such withdrawal has the effect of putting an end to the complaint, which cannot be made the basis of the issue of a fresh summons.¹² Where a court of summary jurisdiction refuses the application of a married woman under the Act, and makes

Summary
Jurisdiction
(Married
Women) Act,
1895.
Conviction of
husband of
aggravated
assault on
wife, &c.

¹ Sect. 7. For what is desertion, see *post* pp. 465 *et seq.*

² Sect. 10.

³ *Re Kingsley's Trusts*, 26 Beav. 84; *Re Rainsdon's Trusts*, 4 Dr. 446.

⁴ *Cooke v. Fuller*, 26 Beav. 99.

⁵ *Ibid.*

⁶ *Bathe v. Bank of England*, 4 K. & J. 564.

⁷ 58 & 59 Vict. c. 39, repealing 41 Vict. c. 16, s. 4; and 49 & 50 Vict. c. 52.

⁸ Sect. 4. See note 1, p. 465. If the husband is convicted on indictment, the court before whom he is convicted becomes, for the purposes of this Act, a court of summary jurisdiction. *Ibid.*, proviso.

⁹ Sect. 5 (*a* and *c*).

¹⁰ Sect. 4. *Woods v. Woods*, 10 P. D. 172, overruled.

¹¹ Sect. 4.

¹² *Pickavance v. Pickavance*, [1901] P. 60.

no order as to costs, she cannot indirectly recover them against her husband, as by her solicitor suing him for them.¹

Since the Married Women's Property Act, 1882, there is no necessity for the granting of protection orders for the safeguarding of a married woman's property; and the only real ground for preserving them is to exclude the marital interest in the wife's property on her death intestate; for it is to be noticed that the position of a married woman judicially separated is that of a *feme sole*, and her interest in and powers over her property are not the same as those conferred upon her by the Court of Chancery; for the equitable separate estate ceases on her death, and if she die without having disposed of it, her husband's right over it arises, and he takes it either *jure mariti*, or after taking out letters of administration to her estate; but in the case of a woman judicially separated dying intestate, administration will not be granted to her husband but to her next of kin.²

M.W.P. Act,
1870.

(d) In 1870 the Act known as the Married Women's Property Act³ was passed. It was an important piece of legislation; but it was more important as containing the germ of the more recent Act than for the large changes it wrought in the law. It was passed with a desire to amend the law of property and contract with respect to married women. It largely extended their "statutory separate property," that is, certain classes of property stamped by the Legislature with the attributes and incidents of separate estate, which, but for that interference, would not have been so impressed, because equity was unable to intervene and modify the common law rights of the husband over them.

Effect of the
Act on various
classes of
property.

Its effect was as follows: it created a separate use in the wages and earnings of married women acquired by them in any employment, occupation, or trade in which they were engaged separately from their husbands, and in money or property acquired by them through the exercise of any literary, artistic, or scientific skill, and all investments of such wages or earnings;⁴ also in their deposits in savings banks,⁵ their property in the funds,⁶ or in joint-stock companies to the holding of which no liability attached,⁷ shares, &c., in certain benefit societies to which they might be entitled before their marriage.⁸ But in regard to the four last classes of property provisions were inserted protecting the rights of husbands and their creditors under certain circumstances.⁹ It also created a separate use in personal property

¹ *Cule v. James*, [1897] 1 Q. B. 418.

² *In The Goods of Worman*, 29 L. J. P. M. & A. 164.

³ 33 & 34 Vict. c. 93. ⁴ Sect. 1. ⁵ Sect. 2.

⁶ Sect. 3. ⁷ Sect. 4. ⁸ Sect. 5.

⁹ See preceding sections, and section 6.

without restriction as to nature or value devolving *ab intestato* on a woman married after the passing of the Act, and in sums of money not exceeding £200 to which she might become entitled under any deed or will;¹ also in the rents and profits of any freehold, copyhold, or customary freehold descending upon her as heiress or co-heiress,² but this interest does not enable her to dispose of the fee simple without a deed acknowledged;³ also in policies of insurance effected by them on their own lives or the lives of their husbands for their separate use.⁴ This Act also conferred new remedies at law for the protection of her separate property, not only as regards third persons, but also her husband; thus it enabled a married woman to maintain actions, that is, actions at law, in her own name for the recovery of wages, earnings, money, and property declared by the Act to be her separate property, or property belonging to her before marriage, which her husband shall by writing have agreed with her shall belong to her after marriage as her separate property.⁵ It also confers upon her the like remedies, civil and criminal, for the protection of her property which she would have possessed if unmarried.⁶ In return for these increased rights, a married woman was rendered liable for her ante-nuptial debts;⁷ even where she took land as devisee of a testator which was liable for his unpaid debts, and which land may have been settled on her marriage without a restraint upon anticipation;⁸ and her husband was exonerated from all liability in respect of them, and remained only liable for her ante-nuptial torts.⁹ She was also rendered liable, if she had separate property, to support her husband,¹⁰ and her children,¹¹ who had become chargeable to the parish, though in the case of the latter the primary liability of the father to maintain them was not affected. The general effect of this act was summed up by the late Sir George Jessel in the case of *Howard v. Bank of England*.¹² "It does appear to me that the present Act gives no power to contract to a married woman which she did not possess before. It does make certain property property to her separate use, to that extent carrying with it a power to contract in respect of that property which every married woman previously possessed in a court of equity, and it superadds to that certain remedies in a court of law which it is considered desirable to give to the

¹ Sect. 7. If under the same instrument but by different titles she derives several sums of money, each of them less than £200, though in the aggregate exceeding that amount, as between herself and her husband, she will be deemed to have acquired the separate use in each of such sums. *Re Davies, Harrison v. Davies*, [1897] 2 Ch. 204.

² Sect. 8.

³ *Johnson v. Johnson*, 35 Ch. D. 345.

⁴ Sect. 10.

⁵ Sect. 11. *Summers v. City Bank*, L. R. 9 C. P. 580.

⁶ *Ibid.* *Sanger v. Sanger*, L. R. 11 Eq. 470; *London and Provincial Bank v. Bogle*, 7 Ch. D. 773.

⁷ Sect. 12. *Azford v. Reid*, 22 Q. B. D. 548.

⁸ *Re Hedgely, Small v. Hedgely*, 34 Ch. D. 379.

⁹ Effect of section 12.

¹⁰ Sect. 13.

¹¹ *Ibid.*

¹² L. R. 19 Eq. 295, 301.

married woman in respect of these small sums (that is, sums under £200), but beyond that I think the Act makes no alteration in the position of the married woman."

The amending Act of 1874¹ was passed to render husbands liable for their wives' ante-nuptial torts, breaches of contracts, and debts to the extent of the property or assets acquired by them *jure mariti*; but to limit their liability to the extent of the assets so acquired by them.² The assets in respect of which they were to be liable are set forth in section 5. This Act was passed on the principle that the husband ought not to receive property in his marital right which should in strict justice be devoted to the satisfying the claims of his wife's ante-nuptial creditors; and that his liability for her ante-nuptial torts should be placed on the same footing as his liability for her ante-nuptial debts. His responsibility is exactly proportioned to the amount of his wife's property received by him; and if on marriage he does not receive anything in right of her, he is not liable for the debts incurred or torts committed by her before marriage.³

(e) The legal relations of a married woman to her property are now defined and settled by the Married Women's Property Act, 1882,⁴ which was an Act to amend and consolidate the Acts of 1870 and 1874, which are repealed by it, save so far as rights and liabilities accrued under them are preserved. Its provisions affect England and Ireland, but not Scotland. Its effect is wider and more sweeping than that of the Act of 1870. The Act was in many ways a new departure.

A married woman is now capable, in accordance with the provisions of the Act, of acquiring, holding, and disposing, by will or otherwise, of any real or personal property, as if she were a *feme sole*, without the intervention of a trustee.⁵ Now no words are necessary to create the separate estate, as the statute itself creates the separate use.⁶ All real and personal property belonging to her at the time of marriage, or acquired by or devolving upon her after marriage, including damages recovered by her in an action founded on contract or tort,⁷ shall be the separate property of every woman married after December 31, 1882.⁸ All real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, accrues on or after January 1, 1883, to a woman married before

M.W.P. Act,
Amendment
Act, 1874.
Partial lia-
bility of hus-
band for wife's
ante-nuptial
liabilities.

M.W.P. Act,
1882.

General scope
and effect.

Married
woman capable
of holding
property and
contracting as
a *feme sole*.

Act in part
retrospective.

¹ 37 & 38 Vict. c. 50.

² Sects. 1-4. See *Downe v. Fletcher*, 21 Q. B. D. 11.

³ Sect. 3.

⁴ 45 & 46 Vict. c. 75. See *post*, Appendix, p. 432.

⁵ Sect. 1, sub-s. 1.

⁶ See *Re Lumley, Ex parte Hood Barrs v. Cathcart*, [1896] 2 Ch. 690. In the Law Journal report of this case (65 L. J. Ch. 837) the earlier case of *Hood Barrs v. Cathcart* (July 23, 1894), in which this point was decided, is fully cited.

⁷ *Beasley v. Roney*, [1891] 1 Q. B. 509.

⁸ Sect. 2. See *Re Onslow, Plowden v. Gayford*, 39 Ch. D. 622.

that date, shall be her separate property, and at her disposal.¹ If she had testamentary capacity and separate estate before the Act came into force, and made a will before that date and died in her husband's lifetime, her will was efficacious to pass all separate property she might acquire under the Act.² But she can only dispose of it by will in accordance with the provisions of the Act; and property acquired by her before the Act came into force cannot pass by her will, unless it is republished after her husband's death.³ Though this section is in some respects retrospective, it applies only to property of a married woman whose title to which accrues for the first time after the commencement of the Act.⁴ The words in this section, "whether vested or contingent, and whether in possession, reversion, or remainder," do not refer to five different kinds of accruer, but to the different kinds of title which, when it accrues after the commencement of the Act, are affected by the section.⁵ A mere *spes successionis* is not a title to property recognized by English law, and a woman who was married before the Act, who has a mere *spes successionis* to property, as one of a class of possible next of kin, has not a contingent title within the meaning of this section.⁶

Her deposits in the Post Office or other savings bank, or in any other bank, annuities, government, or otherwise, sums forming part of the public stocks or funds, and all shares, stocks, debentures, debenture stock, or other interest of or in any corporation, company, or public body, municipal, commercial, or otherwise, or of or in any industrial, provident, friendly, benefit, building, or loan society, which were standing in a married woman's name on January 1, 1883, shall be presumed, until the contrary be shown, to be her separate property;⁷ and the same presumption holds good with reference to deposits, &c., transferred to her after marriage;⁸ and also to investments⁹ and stock,¹⁰ &c., standing in the joint names of a married woman and others, except her husband. If a married woman has made a fraudulent investment with money belonging to her husband, he can reclaim his property.¹¹

A married woman may enter and render herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued in contract or in tort, as if

Liability of married woman on her contracts.

¹ Sect. 5.² *Re Bowen, James v. James*, [1892] 2 Ch. 291.³ *Re Cuno, Mansfield v. Mansfield*, 43 Ch. D. 12.⁴ *Re Tucker, Emmanuel v. Parfit*, 54 L. J. Ch. 874; *Re Adames' Trust*, 54 L. J. Ch. 878; *Re Hobson, Webster v. Richards*, 55 L. J. Ch. 300; *Reid v. Reid*, 31 Ch. D. 402. The following cases on this point have been overruled and are no longer law: *Baynton v. Collins*, 27 Ch. D. 604; *Re Thompson and Curzon*, 29 Ch. D. 177; *Re Hughes' Trusts*, W. N. [1885] p. 62; *Re Dixon, Dixon v. Smith*, 54 L. J. Ch. 964.⁵ *Reid v. Reid*, (ubi sup.).⁶ *Re Parsons, Stockley v. Parsons*, 45 L. J. Ch. 51.⁷ Sect. 6.⁸ Sect. 7.⁹ Sect. 8.¹⁰ Sect. 9.¹¹ Sect. 10.

Married woman's contract, *primâ facie*, is one in respect of her separate property.

Civil and criminal remedies against husband and strangers.

Settlement of disputes between husband and wife as to property.

she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant.¹ A contract entered into by a married woman shall now, *primâ facie*, be deemed to be entered into in respect of her separate property;² and shall bind not only the property she has at the date of the contract, but that which she may subsequently acquire.³ The Act is not retrospective as to her contracts and engagements;⁴ and any judgment against a married woman on a contract made before the Act could only be enforced against such property as she possessed at the date of the contract and judgment.⁵ If she carry on a trade apart from her husband, she becomes subject to the bankruptcy laws.⁶ If she make a loan to her husband of her property, she will be postponed till his other creditors for valuable consideration have been paid in full.⁷ A married woman may effect a policy of assurance on her own life, or the life of her husband, for her separate use.⁸ A married woman as executrix or administratrix, alone or jointly, or as trustee alone or jointly, may sue or be sued, or transfer property belonging to her in her representative capacity without her husband, as if she were a *feme sole*.⁹ She has civil and criminal remedies (which she can bring alone) against strangers, for the security and protection of her property;¹⁰ she had also civil remedies against her husband, and can sue him for a tort done to her separate property; and can even prosecute him criminally for an act which amounts to a larceny of her property when deserting or about to desert her;¹¹ and she is correspondingly liable to criminal proceedings where she commits an act amounting to larceny of her husband's property when leaving or about to leave him.¹² A woman after marriage continues liable for her ante-nuptial liabilities in contract or tort;¹³ and her husband is liable for the same to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through her;¹⁴ and husband and wife may be jointly sued in respect of any such ante-nuptial liability; and judgment may be given against the husband to the extent of the assets received by him in right of his wife.¹⁵ Any debts or liabilities incurred by her may now be barred by the force of the Statute of Limitations.¹⁶ Any questions between husband and wife as to property are to be settled

¹ Sect. 1, sub-s. 2. See *Cox v. Bennett*, [1891] 1 Ch. 617.

² Sect. 1, sub-s. 3; repealed by Married Women's Property Act, 1893. See *post*, p. 372.

³ *Ibid*, sub-s. 4; repealed by Married Women's Property Act, 1893. See *post*, p. 372. ⁴ *Daries v. Stanford*, 61 L. T. 234.

⁵ *Turnbull v. Forman*, 15 Q. B. D. 234; *Daries v. Stanford* (*ubi sup.*).

⁶ *Ibid*, sub-s. 5. ⁷ Sect. 3. ⁸ Sect. 11. ⁹ Sect. 18.

¹⁰ *Weldon v. De Bathe*, 14 Q. B. D. 339.

¹¹ Sect. 12.

¹² Sect. 16.

¹³ Sect. 13.

¹⁴ Sect. 14.

¹⁵ Sect. 15.

¹⁶ *Re Hastings, Hallett v. Hastings*, 35 Ch. D. 94.

in a summary way, by application to a judge of the High Court of Justice in England or in Ireland, or to a county court judge in England, or chairman of the civil bill court in Ireland.¹ Existing settlements between husbands and wives are preserved, and the power to make future settlements is expressly reserved; restraint upon anticipation is preserved, except that a woman on marriage cannot deprive herself of the right to alienate her property so as to defeat her ante-nuptial creditors.² A married woman is now liable, if she have separate property, for the maintenance of her husband, if he becomes chargeable to the parish;³ and for the maintenance of her children and grandchildren.⁴ The legal personal representative of a married woman shall, in respect of her separate estate, have the same rights and liabilities, and be subject to the same jurisdiction as she would be if she were living.⁵

Liability of married woman for maintenance of husband, &c.

The general result of the law on this subject now is that a married woman is absolutely independent of her husband in regard to her property; she can deal with it and dispose of it as she pleases, and can even exclude and restrain him, at least by interim injunction pending divorce proceedings, from entering into a house belonging to her in which she is living.⁶ The Act does not take away from a husband who was married to his wife previously to its commencement any property which may, under the old law, have come to him *jure mariti*, but only prevents his rights from attaching and being exercised over property of his wife, whose title to it shall accrue after the date of its operation. It also prevents, in the case of spouses married after it came into force, the marital right attaching in the future to any property acquired by married women. The full benefit of the Act will not in all cases be experienced by women married before its commencement in respect of property which accrues to them after its commencement. Thus, where on their marriage they have covenanted to bring into settlement property above a certain amount *and not settled to their separate use*, and after the commencement of the Act property above the specified amount comes to them by deed or will, without any direction that it should be to their separate use, they are bound by their covenant to bring it into settlement, and their trustees are entitled to claim it, because though the fifth section of the Act attaches to such property the statutory separate use, yet section 19, which preserves existing settlements, overrides the effect of the earlier section.⁷

¹ Sect. 17. See *Phillips v. Phillips*, 13 P. D. 228.

² Sect. 19. See *Jay v. Robinson*, 25 Q. B. D. 467.

³ Sect. 20; see *ante*, p. 264.

⁴ Sect. 21; see *ante*, p. 265.

⁵ Sect. 23.

⁶ *Symonds v. Hallett*, 24 Ch. D. 346.

⁷ *Re Stonor's Trusts*, 24 Ch. D. 195.

How far status
of married
woman altered.

Difference in
position of
married woman
judicially
separated, and
under the Act.

Effect of
M.W.P. Act,
1882, limited
to coverture.

Wife's matri-
monial status
not effected.

At a rough glance this Act would seem to render a married woman perfectly free and independent of her husband, and to clothe her in every respect with all the powers and freedom of a single woman. But on closer inspection this will be found not to be the case, but that she has by the statute a power exercisable by her over all kinds of property, which formerly could only be exercised by her in respect of property which was recognized by equity to be her separate property, or in respect of limited classes of property made separate estate by the legislation of 1870; in return for these extended powers her liabilities are considerably enlarged. Its effect is not so far-reaching as that of the Divorce Act of 1857 in constituting the married woman who is judicially separated a *feme sole*. That Act¹ goes to the length of providing that on the death of a married woman who is judicially separated, her property shall, in case she die intestate, go as it would have gone *if her husband had been then dead*—that is, his marital rights were abrogated *in toto*; and neither during her life nor after her death had they any existence. The reason of this is not far to seek; the misconduct of the husband has caused the wife to separate from him; and on the judicial separation the matrimonial tie becomes in abeyance; neither spouse has any enforceable claim to the society of the other during its continuance; outside any specific contract between the parties the one has not any pecuniary claim on the other; each is irresponsible for the acts and liabilities of the other—and where the husband was at fault it was thought only just that, on the death of the wife intestate, he should not be allowed to exercise his common law rights over her property, which during her life he could not claim as his own. There is no such provision in the present Act, and that would well warrant the inference that its effect was intended to be limited to the coverture or lifetime of the spouses; and that on the decease of the wife intestate, the husband's marital rights, as heretofore, will arise (with a modification elsewhere noticed²) over his wife's undisposed-of property; but should she at the time of her death be judicially separated, his rights over such property would be taken away by force of the above provision of the Divorce Act of 1857. Again, the change effected by this Act is limited to a married woman's proprietary rights, and to those alone; her matrimonial status is not affected—the common law right of the husband to her society and comfort remains; he is still the head of the family, and he it is who chooses and can change the matrimonial domicile. She is just as much bound to render him respect and regard as he is bound to support and protect her. It

¹ Sect. 25. See *ante*, p. 236.

² See *ante*, p. 237.

is when the question of property is touched that the interests of the two diverge. His marital rights are in abeyance during coverture. She can acquire and hold property without a trustee, and apart from him, as though she were single. As regards her contractual powers, she might enter on any contract, provided she possessed free separate property at the date of its inception ;¹ but property subject to a restraint against anticipation is not property in respect of which she can make a valid contract.² She may sue or be sued either in contract or in tort, or otherwise, as though she were single, and her husband need not be joined with her as plaintiff or defendant—but the reason for this is plain, indeed follows in the same section after the conferring of her new capacity ; it is that the result of the action in which she alone is concerned, whether as plaintiff or defendant, affects her property—if she succeed, what she recovers is her separate property ; if she is cast, her separate property is to make good the damages or costs ; thus, either way the husband has no interest in the proceedings. She has certainly increased liabilities thrown upon her, but these are all connected with the enlarged powers over property possessed by her ; she may be made a bankrupt in respect of her separate trading ; she is liable under certain circumstances to support her husband and family. There is one important matter which shows that the Act stops short of putting her completely in the position of a single woman. Section 19 permits restraint upon anticipation or alienation to be validly imposed upon her in the future as in the past. Now, if it had been intended to confer upon a married woman absolute right and power over her property at all times and under all circumstances, this restraint would have been omitted from the Act as being inconsistent with its scope and intention. This restraint cannot be annexed to an absolute gift to a man, or a single woman (except to spring into existence on her marriage) and would be futile if it were ; for on the property coming into possession he or she could at once exercise complete dominion over it.³ But now, as formerly in the case of a married woman, it is permitted to last during the accustomed period, viz., coverture. From this fact it may well be argued that it was not intended to constitute a married woman a *feme sole* to all intents and purposes. The intention of the legislature was no doubt to increase the rights of a married woman to her property as against her husband, and at the same time to protect the interests of the

Capacity for
suing and
being sued
alone.

Restraint upon
anticipation
still exists dur-
ing coverture.

¹ *King v. Lucas*, 23 Ch. D. 112 ; *Palliser v. Gurney*, 19 Q. B. D. 519 ; *Re Shakspear, Deakin v. Lukin*, 30 Ch. D. 169.

² *Harrison v. Harrison*, 13 P. D. 180 ; *Leake v. Driffield*, 24 Q. B. D. 98 ; *Braunstein v. Lewis*, 65 L. T. 449.

³ See *Re Rosher*, 26 Ch. D. 801. The nearest approach to such a limitation of ownership would be by the constitution of a trust and a shifting use.

creditors with whom she might have dealings, enabling them to get at property which otherwise they could not touch. But it is possible that both these ends may not be fully attained; for if she is not restrained from anticipating her property, she is absolute mistress of it, and the husband may by his influence induce her to surrender it up to him; if she is restrained from anticipating it, it is safe from her husband; but, though she is nominally possessed of separate property, her post-nuptial creditors will be precluded from attaching or charging it in satisfaction of their debts or claims.¹

M.W.P. Act,
1893.
Existence of
free separate
property not
necessary to
validity of
contract.

(f) Under the Married Women's Property Act, 1893,² her contractual powers are still further increased, and the liability of her separate property to make good her engagements is also increased. Unless she is acting as an agent her contract is deemed to be made in respect to and to bind her separate estate, though she may not possess any at the time of the contract.³ These alterations in the law do in effect, and by direct provision, repeal subsections 3 & 4 of section 1 of the Married Women's Property Act, 1882.⁴ A contract on her part will bind both her present and future property,⁵ and will be enforceable by process of law against property she may be possessed of while discovert, as well as that owned by her during coverture;⁶ that is to say, property coming to her as a widow may be taken to satisfy a liability contracted by her during marriage.

The efficacy of the restraint against anticipation with the qualification imposed upon it by section 19 of the Act of 1882 is preserved;⁷ save that where she institutes an action or proceeding unsuccessfully, the court seised of her case may order the payment out of her estate, subject to the restraint, the costs of the opposite party, and may enforce it by the appointment of a receiver or in such other way as may be just.⁸

Will of married
woman need
not be re-
published
while
discovert.

Another important alteration has been effected by this Act, for now under its provisions a will of a married woman speaks from her death. Formerly a will made by a married woman during coverture who survived her husband carried only such separate property as she had testamentary disposition over at the time of making it, but not property which she acquired while discovert, unless she republished her will after her husband's death;⁹ but now the will of a married woman made by her during coverture, whether at the time of making it she is or is not possessed of any separate property, will not require to be republished after her husband's death to carry subsequently acquired property.¹⁰

¹ See *post*, pp. 389 *et seq.*

² 56 & 57 Vict. c. 63. See *post*, Appendix, p. 431.

³ Sect. 1 (a).

⁴ Sect. 4.

⁵ Sect. 1 (b).

⁶ Sect. 1 (c).

⁷ Sect. 1, *proviso*. See *Re Lumley, Ex parte Hood Barrs v. Cathcart*, [1896]

² Ch. 690.

⁸ Sect. 2. See *ante*, p. 343.

⁹ *Willock v. Noble*, L. R. 7 H. L. Cas. 580.

¹⁰ Sect. 3. See *post*, pp. 380 *et seq.*

SECTION 3.

Power of Disposition over the Separate Estate.

The power of a married woman to dispose of her separate estate is that of a single woman, or a person *sui juris*, unless she happen to have a restraint upon alienation imposed upon her; and it must be borne in mind that this restraint has the same efficacy now as it formerly had.¹ When equity gave a married woman an interest in her property, unaffected by any marital right or control, it conferred upon her the *jus disponendi* in respect of that property;² and it has been a long-established rule that a *feme covert*, acting with respect to her separate property, is competent to act in all respects as a *feme sole*.³ A married woman, then, unless the intention that she shall not alienate is evident (and such intention must be clearly expressed), is entitled to deal with such property as she pleases, by acts, *inter vivos* or by will.⁴

Power of disposition over separate estate.

This section will thus be divided: (a) Disposition *inter vivos*—(i) as to real estate; (ii) as to personal estate. (b) Disposition by will—(i) as to real estate; (ii) as to personal estate. (c) Powers of appointment.

Division of subject.

(a) *Disposition inter vivos.* (i) *Real estate.*—A married woman has long possessed the power of alienating the equitable interest in her estates in fee so as to bind her heirs, and to defeat her husband's interests, without his consent and the necessity of having recourse to the process of levying a fine or suffering a recovery, or a deed acknowledged under 3 & 4 Wm. IV. c. 74, and without an express power of appointment; and unless she was restrained from anticipating she might dispose of and deal with her property without the concurrence of her trustees.⁵ This was so laid down in the case of *Taylor v. Meads*,⁶ in which a testator had devised real estate in fee to trustees upon trust for a married woman for her separate use. Lord Westbury there held that she had the power to dispose of it as a *feme sole*, apart from the control and interference of her husband; and that if his consent or concurrence in the act or instrument of disposition were required, the wife would be subjected to his control and interference, a proposition which would be contrary to the essence of the separate use. In the course of his judgment his lordship remarked: "With regard to the question, upon which there has

Disposition *inter vivos.*
Real estate.
Unfettered power to dispose of a equitable fee.

¹ See *post*, pp. 389 *et seq.* Except where it would defeat the claims of her antenuptial creditors, or in the limited circumstances provided for by section 3 of the Married Women's Property Act, 1893.

² *Fettiplace v. Gorges*, 1 Ves. 48.

³ *Peacock v. Monk*, 2 Ves. Sen. 191 (decided 1750); *Hulme v. Tenant*, 1 Bro. C. C. 16 (decided 1778).

⁴ *Rich v. Cockell*, 9 Ves. 369.

⁵ *Griffith v. Cox*, 1 Ves. Sen. 517.

⁶ 34 L. J. Ch. 203.

been no decision in the court below, namely, whether in a case where real estates are conveyed or devised to trustees in fee; upon trust for the sole and separate use of a married woman and her heirs, she has the same power of disposition by deed or will over the equitable fee as she would have if she were a *feme sole*. Can she convey the equitable fee without the necessity for the instrument being acknowledged in the manner required by the Statute for the Abolition of Fines and Recoveries? and can she during coverture devise the equitable estate by a will executed in conformity with the statute? There is no difficulty as to the principle. When the courts of equity established the doctrine of the separate use of a married woman, and applied it both to real and personal estate, it became necessary to give the married woman, with respect to such separate property, an independent personal status, and make her in equity a *feme sole*. It is of the essence of the separate use that the married woman shall be independent of and free from the control and interference of her husband. With respect to separate property, the *feme covert* is, by the form of trust, released and freed from the fetters and disability of coverture, and invested with the rights and powers of a person who is *sui juris*. To every estate and interest held by a person who is *sui juris* the common law attaches a right of alienation; and accordingly the right of a *feme covert* to dispose of her separate estate was recognized and admitted from the beginning until Lord Thurlow devised the clause against anticipation.¹ But it would be contrary to the whole principle of the doctrine of the separate use to require the consent or the concurrence of the husband in the act or instrument by which the wife's separate estate is dealt with or disposed of. That would be to make her subject to his control and interference." This was followed by Lord Hatherley in *Pride v. Bubb*,² where real estate had been vested in trustees for the separate use of a married woman under the provisions of a deed of separation. The effect of her conveyance operated as a direction to her trustees to convey or hold the estate according to the new trust which is created by her direction.³

The power of a married woman over the legal fee settled to her separate use is the same as that over the equitable, and she may dispose of it as though she were a single woman,⁴ and she need not have recourse to the provisions of the statute for the Abolition of Fines and Recoveries as amended by the Conveyancing and Law of Property Act, 1882.⁵ Real property acquired by a

¹ See *Parkes v. White*, 11 Ves. 209, 221.

² L. R. 7 Ch. App. 64.

³ *Taylor v. Meads*, 34 L. J. Ch. 203.

⁴ *Hall v. Waterhouse*, 13 W. R. 633

⁵ 45 & 46 Vict. c. 39, s. 7. See *Re Drummond and Davie's Contract*, 1891] 1 Ch. 524.

married woman under the Married Women's Property Act, 1870, is only in the nature of equitable separate estate, so that if she desire to dispose of her legal estate in it *inter vivos* she must conform to the legal method of procedure. By the Trustee Act, 1893,¹ she is enabled to convey or surrender any freehold or copyhold hereditament vested in her as a bare trustee, as if she were a *feme sole*; but not where she has any active duty to perform as a trustee, in which case her husband's concurrence is necessary as well as a deed acknowledged by her under the Fines and Recoveries Act.² But where she conveys as mortgagee her husband's concurrence is not necessary, nor need she go through the formalities of the Fines and Recoveries Act;³ and the fact that she is mortgagee jointly with another makes no difference.⁴

There has been some conflict of opinion as to whether a married woman was formerly able to dispose of a contingent interest in her real property. In one case she was held capable of disposing of it, at any rate in equity, where value had been given. But in an Irish case it was decided that where property was limited to the separate use of a married woman upon a contingency, she could not dispose of her realty until the contingency happened.⁵ Her disposing power over her contingent or reversionary property is now complete, unless she is restrained from dealing with it.

By the Married Women's Property Act, 1882, section 1, sub-section 1, and section 2, a woman married after January 1, 1883, who acquires any real property, is rendered capable of holding and disposing of it as her separate property as if she were a *feme sole*, without the intervention of any trustee; and if she takes the property without a trustee, both the legal and equitable estate will be vested in her. The law is the same with regard to women married before that date, but who subsequently become entitled to real estate, whether vested or contingent, or in possession, reversion, or remainder.⁶ The joint effect of these sections is to give married women ample and full power of disposition over real property that accrues to them. Any valid contract entered into by her in respect of her separate real estate will be specifically enforced against her separate estate.⁷ But she will be protected against fraud, and any contract into which she has been induced to enter by misrepresentation will be set aside as against her.⁸

Contingent interests.

Full power of disposition over real estate under M.W.P. Act, 1882.

¹ 56 & 57 Vict. c. 53, s. 16.

² See *Re Harkness and Allsopp's Contract*, [1896] 2 Ch. 358.

³ *Re Brooke and Fremlin's Contract*, [1898] 1 Ch. 647; *Re Howgate and Osborn's Contract*, [1902] 1 Ch. 451. See *ante*, p. 337.

⁴ *Re West and Hardy's Contract*, [1904] 1 Ch. 145.

⁵ *Bestall v. Bunbury*, 13 Ir. Ch. Rep. 318, 549.

⁶ Sect. 5.

⁷ *Gaston v. Frankum*, 2 De G. & Sm. 561; *Picard v. Hine*, L. R. 5 Ch. App. 274.

⁸ *Knight v. Knight*, 11 Jur. (N.S.) 617.

Conversion of
property by
married
woman.

Where a woman has been married and acquired real property before the commencement of the Married Women's Property Act, 1882, and has died without electing to treat such property as converted into personalty, or having done any act to effect her equity to a reconversion under the Settled Estates Act, she will be deemed to have left it as real estate.¹ But if under the Partition Act, 1876,² an order of the court is made for the sale of a married woman's share in realty with her consent, or at her request, it will operate as a conversion.³ The ordinary principles governing the conversion of property, whether real or personal, belonging to a man will now apply to that of a woman who has been married since the Married Women's Property Act, 1882, came into force; and she would not require to be separately examined; and in an action under the Partition Act her appearance by counsel would be a sufficient request within section 6 of that Act.⁴

Life estate.

A married woman has always had the same power over her life interest in real estate settled to her separate use as a single woman; and a contract by her to sell or mortgage her interest has always been enforced against her separate estate.⁵ The method of disposing of her estate and interest has been already discussed.⁶

Personal
estate.

Reversionary
or contingent
interest.

(ii) *Personal Estate*.—The married woman's power of disposition over her separate property has been long recognized in equity. She may dispose of it as a *feme sole* to the full extent of her interest; and she may make a gift in any way and to any person of the property which she has in possession,⁷ or in reversion.⁸ Her non-separate property of a future or reversionary nature she could not dispose of until Malins' Act,⁹ which enabled her to dispose of every future or reversionary interest, whether vested or contingent, in any personal estate to which she or her husband in her right might become entitled under any instrument made after December 31, 1857, except her marriage settlement, or release a power over such personal estate by an acknowledged deed, in which her husband concurred. In an Irish case¹⁰ it was held that where property was limited to the separate use of a married woman upon a contingency which had not happened, she could not, pending the contingency, dispose of her interest in the property. The law in this case would probably not have been followed in England, and has been abrogated by the effect of the Married Women's Property

¹ *Mildmay v. Quicke*, 6 Ch. D. 553.

² *Wallace v. Greenwood*, 16 Ch. D. 362.

³ See *Grange v. White*, 18 Ch. D. 612.

⁴ *Stead v. Nelson*, 2 Beav. 245.

⁵ *Fettiplace v. Gorges*, 1 Ves. 48.

⁶ 20 & 21 Vict. c. 57.

² 39 & 40 Vict. c. 17, s. 6.

⁶ See *ante*, chap. x.

⁸ *Sturgis v. Corp*, 13 Ves. 190.

¹⁰ *Mara v. Manning*, 8 Ir. Eq. 218.

Act, 1882.¹ She has full power over it, unless restrained from anticipating it, and may charge it by way of mortgage or pledge,² or assign it.³ Unless the instrument creating the separate estate expressly provides for the interposition of her trustees in any dealings with it by her, a married woman may exercise her disposing power over it without their intervention.⁴ If a married woman, possessing this absolute power of disposition, concurs in a breach of trust by her trustees which results in a loss, she cannot, unless restrained from anticipating the fund,⁵ call upon them to replace it.⁶ An apparent exception to the full power of a married woman to dispose of her personal property is the case of a sum ordered by the Divorce Court on dissolution of marriage⁷ to be paid by the husband for the maintenance of his wife; such sum is a mere personal allowance and is not separate estate which can be alienated or released by her as long as the order exists.⁸ Such money is different from the gross sum or annual sum secured to the wife under section 32 of 20 & 21 Vict. c. 85, which is in the nature of separate property and alienable by her.⁹

Full power over it under M.W.P. Act, 1882.

Exception.

She is entitled to recover the arrears of her separate income where she has neither assented to nor acquiesced in the receipt of them by her husband. In the case of separate estate she is entitled to recover the arrears of it, but if she consents to her husband receiving her income, and they have lived together, then she is not entitled to any account of it, either as against the trustee, who may pay it to the husband, or against the husband himself. The whole of that depends upon her consent.¹⁰ This assent or acquiescence will not be presumed where she was ignorant of his having received the income.¹¹ As this assent or acquiescence is the ground for disentitling the wife to recover arrears of dividends, should she become lunatic or incapable of exercising any powers of assent, her husband will be liable to account for any dividends he may have received.¹² Unless the married woman has been under mental disability she will not be able to recover more than six years of arrears.¹³

Arrears of separate income.

(b) *Disposition by Will.* (i) *Real Estate.*—At common law a married woman had no power to make a will of lands. By the Act 32 Hen. VIII. c. 1, she was seemingly permitted to do so; but by the Act passed two years later,¹⁴ she was expressly debarred

Disposition by will.
Real estate.
Common law and statutory disability.

¹ Sect. 1, sub-s. 1, sects. 2, 5.

² *Pybus v. Smith*, 1 Ves. 189.

⁴ *Essex v. Atkins*, 14 Ves. 542.

⁶ *Crosby v. Church*, 3 Beav. 485.

⁸ *Watkins v. Watkins*, [1896] P. 222.

⁹ *Harrison v. Harrison*, 13 P. D. 180.

¹⁰ *Dixon v. Dixon*, 9 Ch. D. 587.

¹² *Att.-Gen. v. Parther*, 4 Bro. Ch. C. 409.

¹³ See *Re Hallett, Hastings v. Hallett*, 35 Ch. D. 94.

³ *Wagstaff v. Smith*, 9 Ves. 520.

⁵ *Davies v. Hodgson*, 27 L. J. Ch. 449.

⁷ Under 29 & 30 Vict. c. 32, s. 1.

¹¹ *Ibid.*

¹⁴ 34 Hen. VIII. c. 5.

Wills Act,
1837.

M.W.P. Act,
1882.

Disposition of
legal estate.

Personal
estate.
Common law
disability.

from making a valid will of realty. The Wills Act, 1837,¹ did not remove her disability, because it prevented her from making a will of lands of which her husband was seised in her right;² and this disability applied to lands in which she had merely an equitable interest. Women married after the Married Women's Property Act, 1882, came into force, may make a valid will of the legal estate of their lands,³ and if married before the Act, in respect of the legal estate of lands acquired by them since that date.⁴ The effect of this is inconsistent with, and so by implication repeals, section 14 of 34 & 35 Hen. VIII. c. 5, in so far as it disabled a *feme covert* from making a will of lands; section 8 of 1 Vict. c. 26 is also affected by it. The most usual method by which she was enabled to execute a will valid at common law, was to give her a power of appointment by will over the property to be affected, which she could effectively exercise by way of testamentary disposition.⁵ But if there was no such express power of appointment reserved to her, she could not during coverture dispose by will of the legal estate so as to defeat her heir to whom it descended, subject to the curtesy right (if any) of her husband. The equity courts, however, refused to apply this common law doctrine and the statutory disabilities of a married woman to the real estate settled to her separate use, and recognized her full right to dispose of it by will. It is now settled doctrine that a married woman can dispose of her real estate held by her to her separate use, and that her trustees must hold the legal estate in trust for her devisees.⁶ Her testamentary capacity extends to the legal estate vested in her to her separate use.⁷ But where real estate has been given to a married woman before the coming into operation of the Married Women's Property Act, 1882, and the gift thereof to her separate use extends only to her life interest and not to the *corpus* of the estate, she cannot validly devise the fee.⁸ Such a gift cannot now well be made since January 1, 1883, the date of the passing of that Act.

Her will, where it deals only with realty, but appoints executors, is entitled to probate, where a portion of the estate consists of personalty vested in her by virtue of the Married Women's Property Act, 1882.⁹

(ii) *Personal Estate*.—A married woman was under no statutory disability of making a will of her personalty; but she could not make a valid testamentary disposition, "not merely because marriage was a gift of her personalty to her husband, but because in the eye of the law the wife had no existence separate from her

¹ 1 Vict. c. 26.

² Sect. 8.

³ Sect. 1, sub-s. 1, and sect. 2.

⁴ Sect. 5.

⁵ See *post*, p. 383.

⁶ *Taylor v. Meads*, 34 L. J. Ch. 203.

⁷ *Hall v. Waterhouse*, 13 W. R. 633.

⁸ *Troutbeck v. Boughey*, L. R. 2 Eq. 534.

⁹ *In the Goods of Cubbon*, 11 P. D. 169.

husband, and no separate or contracting power. On this general rule some modifications were engrafted. A married woman who was an executrix had, as such, power to make a will and appoint an executor for the purpose of continuing the representation to the original testator; a married woman might make a will with the consent of her husband; a married woman might make a will in the exercise of a power; and a married woman might make a will disposing of her separate estate or its savings."¹ These modifications or exceptions to the above rule still hold good in the case of married women whose testamentary capacity is not affected by the Married Women's Property Act, 1882. Thus, a married woman could make a will of property to which she was entitled *en autre droit*, as executrix; her husband's consent to such will was unnecessary, because he took no beneficial interest in the property.²

Modifications
and excep-
tions.

In equity a married woman had, as incident to her ownership over it, full testamentary power over personalty settled to her separate use (or which assumed in any way the character of separate estate),³ whether in possession,⁴ or in reversion,⁵ or vested or contingent.⁶ A wife could defeat her husband's interest in her separate personal property by a testamentary disposition; thus, if she made a will of her separate property, and appointed executors who died in her lifetime, the administration with the will annexed was not given to the husband, but to her residuary legatee.⁷

Testamentary
power over
separate
estate.

A married woman acquired under certain statutes the capacity to make a will. Thus, under the Divorce Acts⁸ a protection order obtained by her put her in all respects as regards her property as though she had obtained a decree of judicial separation, which during the continuance of the separation gave her power to dispose (as well by testament as gift *inter vivos*) of her property acquired since the date of the decree or order, as if a *feme sole*; and if she died intestate, her husband was treated as though dead.⁹ The operation of such order was retrospective, and when made related back to the date of desertion.¹⁰ So, too, a married woman acquired the right to dispose by will of statutory separate property under the Married Women's Property Act, 1870.¹¹

Statutory
powers.

Under the Married Women's Property Act, 1882, she has full

Under M.W.P.
Act, 1882.

¹ Per Cairns, L.C., in *Willock v. Noble*, L. R. 7 H. L. 580, 589.

² *Scammell v. Wilkinson*, 2 East, 552; *S. C. Stevens v. Bagwell*, 15 Ves. 139.

³ *Haddon v. Fladgate*, 27 L. J. P. M. & A. 21.

⁴ *Fettiplace v. Gorges*, 1 Ves. 48.

⁵ *Sturgis v. Corp*, 13 Ves. 190.

⁶ See *Lechmere v. Brotheridge*, 32 L. J. Ch. 577.

⁷ *Re The Goods of Hine*, L. R. 1 P. & D. 388.

⁸ 20 & 21 Vict. c. 85, s. 21; and 21 & 22 Vict. c. 108, ss. 6-10.

⁹ 20 & 21 Vict. c. 85, s. 25.

¹⁰ *In the Goods of Elliott*, L. R. 2 P. & M. 274.

¹¹ 33 & 34 Vict. c. 93, s. 1.

disposing power over property acquired by her under the Act as though she were a single woman,¹ and her trustee (if any) will, as in the case of her realty, hold the property in trust to carry out her directions. A will made by a married woman during coverture, disposing of separate property over which she has full testamentary control, will no longer need the assent of her husband to its probate if he survive, nor re-execution on her part if made during coverture and before the Act came into force in order to pass separate property acquired by her under the provisions of the Act; and her death in her husband's lifetime is immaterial.² It seems also that she is able to dispose of the legal estate of her real property.

Testamentary
capacity of
married
woman
limited to
separate
property.

The testamentary capacity of a married woman was limited to her separate property, and whatever was not separate property did not pass; therefore property acquired by a married woman after she became discoverd did not pass unless she republished her will made during coverture, notwithstanding the provisions of section 24 of the Wills Act, 1837.³ So, too, section 1, sub-section 1, of the Married Women's Property Act, 1882, gave a married woman power to dispose by will only of property of which she was possessed while under coverture; her will, therefore, unless it was re-executed or republished after she became discoverd, was ineffectual to pass property acquired by her after coverture had come to an end; and section 24 of the Wills Act did not apply to a will made by her under the Act of 1882.⁴ But the Act of 1882 has not conferred upon her the power of disposing within the Mortmain Act of 1803⁵ of five acres of land and £500 personalty for church-building purposes without her husband's consent.⁶ But a complete alteration in this branch of the law has been effected by the Married Women's Property Act, 1893,⁷ by which section 24 of the Wills Act, 1837, is made to apply to the will of a married woman made during coverture, whether she is or is not possessed of or entitled to any separate property at the time of making it; and her will will not require to be re-executed or republished after the death of her husband. Her will in the future will speak as from her death, and will not require any validation by republication or re-execution on the cessation of her coverture to pass non-separate property, that is, property acquired by her while discoverd. This alteration of the

Under M.W.P.
Act, 1893.

¹ Sect. 1, sub-s. 1, and sect. 5.

² *Re Bowen, James v. James*, [1892] 2 Ch. 291.

³ *Willock v. Noble*, L. R. 7 H. L. 580.

⁴ *Re Price, Stafford v. Stafford*, 28 Ch. D. 709; *Re Young, Trye v. Sullivan*, 28 Ch. D. 705; *Re Cuno, Mansfield v. Mansfield*, 43 Ch. D. 12; *Re Smith, Bilke v. Roper*, 45 Ch. D. 632.

⁵ 43 Geo. III. c. 108.

⁶ *Re Smith's Estate, Clements v. Ward*, 35 Ch. D. 589.

⁷ 56 & 57 Vict. c. 63, s. 3.

law affects the will of every married woman who has died since this Act came into force.¹

The Court of Probate formerly required some evidence of the possession of separate estate in order to found testamentary capacity on the part of the woman.² The presumption existing before the Act of 1882, that a married woman possessed no separate property, seems now to be done away with, and the contrary presumption that she does possess it will now hold good in the case of the will of a married woman as in that of a *feme sole* or a man.³ Whether the court will take upon itself to decide of what the separate property consists seems doubtful. In one case⁴ the late Sir George Jessel was of opinion that if all the interested parties were before the court, the latter might take upon itself to decide the question; but in a later case,⁵ Butt, J., held that the Court of Chancery was the proper court for the decision of that question. It was the former practice of the court to direct a limited grant of letters of probate of a married woman's will to such property as the testatrix had a right to dispose of; and her husband had the right to have a grant of administration *ceterorum*;⁶ but since the Married Women's Property Act, 1882, it is the practice to make the grant "general," that is, to such property as she has disposed of by her will.⁷ The effect of the general probate is only to enable the executor to get in all the assets of the wife, whether she had the power to dispose of them by will or not; and it does not affect the husband's beneficial title to the wife's choses in action, but the executor is a trustee for the husband, who is entitled to have them transferred to him, subject, however, to any deductions in respect of debts and other liabilities contracted by the wife.⁸ A grant to a husband of probate of his wife's will since the new rules of practice came into force does not operate as an assent by him to the will as a disposition of property which was not her separate property, and over which she had no power of appointment.⁹ But it seems still the practice that, where a woman has been married before the Married Women's Property Act, 1882, came into force, who before her marriage became possessed of a mortgage debt which has not been reduced into possession by

Limited grant made to married women's property before M.W.P. Act, 1882. Since the Act grant is "general."

¹ *Re Wylie, Wylie v. Moffatt*, [1895] 2 Ch. 116.

² See *Barnes v. Vincent*, 5 Moo. P. C. 201; *Haddon v. Fladgate*, 27 L. J. P. M. & A. 21.

³ *Harding v. Sutton*, 59 L. T. 838.

⁴ *Re The Goods of Tharp*, 3 P. D. 76.

⁵ *Harding v. Sutton (ubi sup.)*.

⁶ *Brenchley v. Lynn*, 2 Rob. 441.

⁷ *In the Goods of Price*, 12 P. D. 137; *In the Goods of Homfray*, 12 P. D. 138; *In the Goods of Williams*, 67 L. T. 502. See the New Rules of Practice, 15 and 18.

⁸ *Smart v. Tranter*, 43 Ch. D. 587.

⁹ *Re Atkinson, Waller v. Atkinson*, [1899] 2 Ch. 1. Rules 15 and 18 of Probate Rules (Non-contentious Business); and see *Elliot v. North*, [1901] 1 Ch. 424.

her husband, and has made a will purporting to dispose (*inter alia*) of this particular chose in action, the court will still make a grant of limited administration to the husband of such property as his wife had no power to dispose of by will.¹ It would seem that where a married woman's will amounts to no more than an exercise of a power of appointment, the court will grant to the appointee as administrator with the will annexed only a limited administration, unless her husband's consent is obtained.²

If a married woman leave a will and make bequests, the usual course of administration will be observed. Thus, in the payment of her debts, the undisposed-of interest will be first applied, then general legacies, and if there be still a deficiency, the specific legacies. General legacies will, it is presumed, as in the ordinary case, carry interest, not from the death of the testator, but from the expiration of one year after the death.

(c) *Powers of Appointment*.—Another mode by which married women could exercise a disposing power over their property was the execution of powers of appointment conferred upon them by the instrument creating their interest in the property. A power over the income of property extends as a rule over the capital.³ This power of appointing gave them large control over their property; thus, if it was intended that a married woman by exercising a power should take property out of settlement, she was enabled to do so.⁴

Powers of
appointment.

Common law
powers.

Equitable.

Under Statute
of Uses.

General.
Special or
limited.

Collateral,

Powers are either common law powers, or equitable powers, or powers which derive their efficacy from the Statute of Uses. A common law power enables the donee to pass the legal estate, and it is the execution, not the creation of the power, which affects the transmutation of the estate. An equitable power is that which is enforceable only in equity, that is, where the legal interest is vested in one person, but the power of disposing of the beneficial interest is in another. A power under the Statute of Uses is a power of revoking existing, or declaring future uses vested in some person named for that purpose in the deed by which the uses to be affected by the operation of the power are created.⁵

Powers are also general or limited. A general power is one where no limit is placed on the donee's choice of objects. A limited or special power is one the objects of which are specified persons or classes.⁶

A power, too, may be either collateral, which is nothing more

¹ *In the Goods of Leman*, [1898] P. 215; and see *In the Goods of Donoran*, 78 L. T. 567.

² *In the Goods of Ireford*, [1899] P. 247.

³ See *Re L'Herminier, Mounsey v. Buxton*, [1894] 1 Ch. 675.

⁴ *Re Pinède's Settlement*, 12 Ch. D. 667.

⁵ Farw. 1-3.

⁶ *Ibid.* 7.

than a bare authority given to a stranger to deal with an estate, no interest in which is vested in the donee of the power; or it may be coupled with an interest, that is, a power to deal with an estate in which the donee is beneficially entitled.¹ It may also be in gross,² or appendant.³

or coupled
with an
interest.
In gross, or
appendant.

A power of appointment may be exercised over both real and personal property, either by deed or will,⁴ and in her own favour;⁵ or in that of her husband;⁶ or in favour jointly of herself and husband.⁷ If the power is exercised by will the property affected by it is properly receivable, as the case may be, either by her executor,⁸ or her administrator with the will annexed.⁹

A married woman as donee could exercise any of these powers without the consent or concurrence of her husband, and she could validly appoint to him as to a stranger, though in the latter case the court regarded the appointment with some jealousy.¹⁰ She may execute a power, whether appendant, in gross, or simply collateral, and over copyhold as well as freehold property.¹¹

As an infant a married woman cannot exercise a power by will, but by deed she can, if the instrument of donation expressly confers upon her the right and capacity to exercise it during minority; and there is no distinction drawn in this respect between realty and personalty, and between powers collateral and powers coupled with an interest.¹² No precise form of words is necessary to create a power if the intention to do so is clear.¹³

Infant married
woman cannot
exercise power
by will, but
may by deed,
if capacity
conferred upon
her.

Where the power of appointment was exercisable by will, it enabled a married woman to dispose of property which she could not otherwise have disposed of, as, for instance, realty, which she could not dispose of by will, but only by levying a fine, or by deed acknowledged under the Fines and Recoveries Act, 1834.

A married woman may release her power of appointment over property; if over realty which was acquired by her before the coming into force of the Married Women's Property Act, 1882, she must release it according to the form prescribed by the Act

Release of
power.
Real estate.
Fines and Re-
coveries Act.

¹ See *Dickenson v. Teesdale*, 1 De G. J. & S. 60.

² *Re D'Angibau*, 15 Ch. D. 232.

³ *Ibid*.

⁴ Farw. pp. 116 *et seq.* See *Willoughby Osborne v. Holyoake*, 22 Ch. D. 238.

⁵ See *Brownrigg v. Pike*, 7 P. D. 61.

⁶ See *Re Hernando, Hernando v. Sawtell*, 27 Ch. D. 284.

⁷ *Wood v. Wood*, L. R. 10 Eq. 220.

⁸ *Re Hoskin's Trust*, 6 Ch. D. 281

⁹ *Re Peacock's Settlement, Kelcey v. Harrison*, [1902] 1 Ch. 552.

¹⁰ Farw. 8.

¹¹ Sugd. Pow. 153, 154.

¹² *Re Cardross's Settlement*, 7 Ch. D. 728. In this case Jessel, M.R., laid it down that the comment of Mr. Preston on the judgment of Lord Hardwicke in *Hearle v. Greenbank* (3 Atk. 695), to the effect that an infant may execute a power even though coupled with an interest, if from the nature of the power it be evident that it was in the contemplation of the author of the power that it should be exercised during minority, is good law. See also *Re D'Angibau (ubi sup.)*.

¹³ *Berchtold v. Hertford*, 7 Beav. 172.

Personal
estate.

Malins' Act,
1857.

Limitation
to married
woman
operating as an
absolute gift.

Effect of
execution of a
general power
by will.

for the Abolition of Fines and Recoveries (section 77), as modified by section 7 of the Conveyancing Act, 1882; but if acquired since the passing of the Act of 1882, she will be able to release it by an ordinary deed without acknowledgment. If it is a power over personal estate of a future or reversionary interest which has accrued to her before the passing of the above Act of 1882, she must release it by deed according to the provisions of Malins' Act, 1857;¹ but if it has accrued since the passing of the Act of 1882, she may release it as though she were a *feme sole*. She may also release, or contract to release, a power over personalty vested in possession under the Conveyancing and Law of Property Act, 1881, and may release it by deed without going through the ordinary formalities.² Where a bequest of income was made before the Married Women's Property Act came into force to a woman for her life for her separate use, and of the capital for such persons as she should appoint, and in default of appointment for her executors, administrators, or assigns, and she married after the Act came into force, her life interest and reversionary interest were held to be alike limited to her separate use, and so on releasing her power she became absolutely entitled to the fund.³ A limitation of an estate or fund to the separate use of a married woman for her life, with remainder as she shall, notwithstanding her coverture, by deed or will appoint (that is, by execution of a general power of appointment), and in default of appointment, to her executors and administrators, operates as an absolute gift of the *corpus* to her sole and separate use;⁴ and the absolute interest in the property is conferred upon her alike in cases where the power precedes as where it succeeds the life estate.⁵

The execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act.⁶ Where a married woman possesses property over which she has a general testamentary power of appointment, and she directs the executors of her will to pay the debts, such debts are a charge upon the property.⁷ Property appointed by her by will under a general testamentary power becomes on her death liable for her debts and other liabilities, even though she may have had no separate estate at

¹ 20 & 21 Vict. c. 57.

² 44 & 45 Vict. c. 41, s. 52, sub-s. 1. *Re Chisholm's Settlement; Re Hemphill's Settlement, Hemphill v. Hemphill*, [1901] 2 Ch. 82.

³ *Re Davenport, Turner v. King*, [1895] 1 Ch. 361. In this case the decision in *Whittle v. Henning* (2 Ph. 731) on a similar point was held applicable. See *Re Onslow, Plowden v. Gayford*, 39 Ch. D. 622.

⁴ *London and Chartered Bank of Australia v. Lemprière*, L. R. 4 P. C. 572.

⁵ *Mayd v. Field*, 3 Ch. D. 587.

⁶ 45 & 46 Vict. c. 75, s. 4.

⁷ *Re De Burgh Lawson, De Burgh Lawson v. De Burgh Lawson*, 41 Ch. D. 568.

the time she contracted them.¹ The effect of the exercise of a general testamentary power becomes operative on her death, and not from the date of the instrument conferring the power upon her.²

SECTION 4.

Restraint upon Anticipation.

Restraint upon anticipation, which is a modification of the separate estate, prevents a married woman from alienating or disposing of her property during coverture.³ It is applicable both to real and personal estate.⁴ The restraint is as much a violation of the principles of the law that an independent person (and a married woman is so far as concerns her separate property *sui juris*) may dispose of property belonging to him, as the doctrine of the separate estate is a violation of the common law theory that the property of the wife belongs to the husband, whether during coverture or for his life, or absolutely.⁵ Equity created the separate estate, and was entitled to mould and shape its own production; and it claimed full power to limit and control the effect of that new interest which it had called into being. The doctrine of the separate use gave a married woman complete dominion over her separate property; she might give it all to her husband, or squander it in contracting unprofitable liabilities. In order to obviate these disadvantages this provision of a restraint upon anticipation was devised by Lord Thurlow in the marriage settlement of a Miss Watson, for whom he was a trustee.⁶ This fetter upon alienation was imposed upon the wife as a protection against her husband, because if she were not debarred from anticipating the proceeds of her separate estate, she might, where the husband was not actuated by proper motives, be induced to divest herself of the property, and place it at his disposal.⁷ The validity of this restraint was not at first

Restraint upon anticipation.

Restraint upon anticipation a creation of equity.

¹ *Re Ann, Wilson v. Ann*, [1894] 1 Ch. 549. See *Re Hughes, Brandon v. Hughes*, [1898] 1 Ch. 529.

² *Rous v. Jackson*, 29 Ch. D. 521.

³ *Re Ellis' Trusts*, L. R. 17 Eq. 409.

⁴ *Baggett v. Meux*, 7 L. T. (O.S.) 41; *Re Sykes' Trusts*, 6 L. T. 350.

⁵ *Tullett v. Armstrong*, 4 Myl. & Cr. 390, 405.

⁶ See *Pybus v. Smith*, 1 Ves. 189; *Wagstaff v. Smith*, 9 Ves. 520; and *Parkes v. White*, 11 Ves. 221.

⁷ A point may arise under the law as brought about by the Married Women's Property Act, 1882. Property is given or bequeathed to a married woman with a restraint upon anticipation, but no trustees are appointed to hold it. Without trustees there is no valid check upon the wife's power of dealing with the property at once, notwithstanding the restraint. Now, will the court constructively deem the husband under the new order of things to be a trustee on behalf of his wife, so that if he participate in her dealings with the property, he or his estate will be held liable to make good what loss has resulted from the constructive breach of trust; or will it hold that if the donor has not chosen to protect his gift from the full control of the married woman over it, he must be deemed to have intended her to have that full and unfettered control notwithstanding the restraint?

readily admitted, but its advantage was felt to be real, and it became firmly established; and for many years it has been the practice of conveyancers to insert in wills and settlements a clause (whenever desired) restraining a married woman from dealing by way of anticipation with property settled to her separate use.¹ It is, however, becoming a serious question whether this advantage in favour of married women should be allowed to continue to such wide extent as formerly, and even as at the present day, considering the very broad contractual powers possessed by them. This restraint is more likely to be used nowadays as a cloak to fraud rather than a real protection to the woman.

Creation of the
restraint.

It is usual in settlements by deed or will to employ words after the gift of the separate estate to a woman which are directed to prevent her from disposing or depriving herself of the gift by way of anticipation; and where there is a plain direction that the married woman shall be without the power of anticipating or alienating her property, she will be restrained from dealing with it.² No particular form of words is necessary to create this restraint; and if the intention to restrain anticipation can be clearly collected from the tenour of the instrument it will be sufficient,³ whether it is intended to apply generally or to a particular coverture.⁴ But unless the intention to restrain appears the power of anticipation exists.

No particular
form of words
required.

What words
will restrain
anticipation.

The following have been held sufficient to create the restraint: A direction to pay the income to such person as the wife shall by writing, and as the same becomes due, but not by way of assignment, charge, or other anticipation, appoint;⁵ or to pay the income to such persons as the married woman shall, *after it has become due*, appoint;⁶ or for her sole, separate, and *inalienable* use;⁷ or a gift of income to her sole and separate use *not to be sold or mortgaged*;⁸ or "receipt by the married woman alone shall be a good discharge;"⁹ or, "the receipt of her (the married woman) for the income be given *after the same shall become due* shall be a good and effectual discharge."¹⁰ Where there is an executory trust for the creation of separate estate in the event of a woman marrying, to the effect that she shall enjoy the income during her life for her separate use, the court can insert a clause

¹ See Hay. Conv. 500-504; Peach. Sett. 284.

² See *Pybus v. Smith*, 1 Ves. 189; *Parkes v. White*, 11 Ves. 221.

³ *Re Ross's Trust*, 1 Sim. (N.S.) 190; *Harrop v. Howard*, 3 Ha. 624.

⁴ *Re Gaffee*, 19 L. J. Ch. 179; *Hawkes v. Hubback*, L. R. 11 Eq. 5.

⁵ *Brown v. Bamford*, 1 Ph. 620.

⁶ *Field v. Evans*, 15 Sim. 375.

⁷ *D'Oechsner v. Scott*, 24 Beav. 239; *Spring v. Pride*, 16 Jur. 876.

⁸ *Steedman v. Poole*, 6 Ha. 193; see also *Baggett v. Meur*, 7 L. T. (O.S.) 41; *Pybus v. Smith* (*ubi sup.*).

⁹ *Baker v. Bradley*, 7 De G. M. & G. 597.

¹⁰ *Re Smith, Chapman v. Wood*, 51 L. T. 501.

against anticipation.¹ A limitation merely to her sole and separate use, or a direction to pay from time to time upon her receipt under her own proper hand,² or according to her appointment from time to time;³ or upon her personal appearance,⁴ will not restrain a married woman from disposing of her property in the fullest possible manner, or in a will by some such words of the testator after a gift or devise as "it is my *will and request* that she (the married woman) shall not sell or dispose of any part of the property so given or devised."⁵ A bequest of a fund in trust to be paid to a married woman for her separate use without power of anticipation will be treated as an unfettered gift, if there be no other evidence than the above words that the income only is to be paid to her during coverture.⁶ It depends upon the intention of the donor whether or not restraint upon anticipation attaches to his gift.⁷

What words will not.

The restraint on anticipation is inseparable from and has no independent existence apart from separate estate. "The separate estate may, and often does, exist without the restriction, but the restriction has no independent existence; when found it is as a modification of the separate estate, and inseparable from it;⁸ thus, the restraint upon the alienation of income is of no avail unless the income is given to the woman for her separate use.⁹ It is really an anomaly, and a violation of the rule that absolute ownership is inconsistent with restrictions upon it; and equity only permits it because of its limitation to the period of coverture. It accordingly does not affect the right of an unmarried woman to alienate property over which it is created;¹⁰ thus, where property was settled to the separate use of a woman while unmarried without power of anticipation, it was held that she was, while single, entitled to deal with it, notwithstanding the restraint.¹¹ But if she marry, it springs up into effect at once, lapses again into abeyance on her discovery, whether by death of her husband, or by judicial separation,¹² or on her obtaining a protection order against her husband,¹³ so far as regards property acquired by her after the decree of separation or order for the protection of her property,¹⁴ and revives once more on a second marriage,¹⁵ unless in the interval she has altered the form of

Ambulatory operation of the restraint.

Restraint inoperative over property in the hands of a single woman.

¹ *Re Durnell's Trusts*, Ir. Rep. 6 Eq. 322.

² *Ellis v. Atkinson*, 3 Bro. C. C. 565; *Sturgis v. Corp.*, 13 Ves. 190.

³ *Witts v. Dawkins*, 12 Ves. 501.

⁴ *Re Ross's Trust (ubi sup.)*.

⁵ *Hutchins v. Burt*, 59 L. T. 490.

⁶ *Re Fearon, Hotchkin v. Mayor*, 45 W. R. 232.

⁷ *Baggett v. Meux (ubi sup.)*; *Re Bown, O'Halloran v. King*, 27 Ch. D. 411.

⁸ Per Lord Langdale in *Tullett v. Armstrong*, 1 Beav. 1.

⁹ *Stogdon v. Lee*, [1891] 1 Q. B. 661.

¹⁰ *Re Young's Settlement*, 16 Beav. 199.

¹¹ *Woodmeston v. Walker*, 2 Russ. and Myl. 197.

¹² *Munt v. Glynes*, 41 L. J. Ch. 639.

¹³ *Cooke v. Fuller*, 26 Beav. 99.

¹⁴ *Waite v. Morland*, 38 Ch. D. 135; *Munt v. Glynes (ubi sup.)*.

¹⁵ *Tullett v. Armstrong (ubi sup.)*.

investment affected by the original trust, which she is at liberty to do,¹ or the trust is confined to a particular coverture."² In the latter case, on a second marriage, it would be necessary for her to stipulate to deprive herself of the power of alienation.³ The restraint is limited only to coverture, and does not prevent the married woman from dealing by will with the property subject to it; for her will cannot take effect until coverture has ceased.⁴

On what property restraint can take effect.

Intention of donor to prevail.

The restraint is applicable to real as well as personal estate,⁵ and may be annexed to a life estate.⁶ As regards personal estate, there has been some difference of judicial opinion under what circumstances the restraint shall operate.⁷ It has been laid down as a rule or test that where the fund is income-bearing, then the restraint operates; but where it is not income-bearing, as a mere sum of cash, the restraint does not take effect; but the married woman is entitled to have the money paid to her notwithstanding her coverture. But the real question is what was the intention of the settlor or testator; and whether the restraint on anticipation is effectual or not does not depend upon the question whether the gift is of an income-bearing fund or of a sum of cash, but whether the settlor or testator has shown an intention that the trustees should keep the investment and pay the income to the married woman.⁸ In other words, it is really a question of construction, and where the donor means the fund to be paid over to the woman whether single or under coverture, any expression fettering her absolute power over it will be ineffectual.⁹ Where a testator having a general power of appointment over a settled fund appointed that a sum of £1500 should be raised and paid to his daughter, a married woman, absolutely for her separate use *without power of anticipation*, and appointed one-fourth of the residue of the fund to be held on trust for her, absolutely for her separate use *without power of anticipation*, it was not contended that the married woman was not entitled to the immediate payment of

¹ *Wright v. Wright*, 2 J. & H. 647; see also converse case of *Newlands v. Paynter*, 4 Myl. & Cr. 408.

² *Moore v. Morris*, 4 Dr. 33.

³ See 45 & 46 Vict. c. 75, s. 19, and *ante*, chap. viii., Marriage Settlements, p. 136.

⁴ See *Re Hernando, Hernando v. Sauctell*, 27 Ch. D. 284.

⁵ *Baggett v. Meux*, 7 L. T. (O.S.) 41; *Re Sykes' Trusts*, 6 L. T. 350.

⁶ *Re Lumley, Ex parte Hood Barrs*, [1896] 2 Ch. 690. See *Re Williams, Williams v. Grant*, 76 L. T. 150.

⁷ *Re Sykes' Trusts* (*ubi sup.*); *Re Ellis' Trusts*, L. R. 17 Eq. 409; *Re Croughton's Trusts*, 8 Ch. D. 460; *Re Benton, Smith v. Smith*, 19 Ch. D. 277; *Re Clarke's Trusts*, 21 Ch. D. 748; *Re Taber's Estate, Arnold v. Kayess*, 46 L. T. 305; *Re Coombes, Coombes v. Parfitt*, W. N. 1883, p. 169.

⁸ *Re Bown, O'Halloran v. King*, 27 Ch. D. 411. In this case the Court of Appeal approved of *Re Ellis' Trusts*, L. R. 17 Eq. 409, and *Re Croughton's Trusts*, 8 Ch. D. 460, and disapproved of part of the decision of Fry, J., in *Re Clarke's Trusts*, 21 Ch. D. 748.

⁹ *Re Holmes, Hallows v. Holmes*, 67 L. T. 335; *Re Bown, O'Halloran v. King* (*ubi sup.*).

the £1500, but she was held not entitled to payment out of the capital of her fourth share of the residue.¹ Where a fund subject to a particular estate is given absolutely to a married woman with a restraint upon anticipation, the restraint will not, in the absence of any other ground, be confined to the continuance of that particular estate.² So, too, where a testator directed surplus income of real and personal estate to be accumulated during the life of his wife, and after her death gave the capital to his children, directing that the shares of his daughters should be for their separate use, without power of alienation or anticipation during his wife's life, the married daughters were held during their mother's lifetime entitled to receive only the income of invested income.³ A settlement of property to the use of a married woman without impeachment of waste is not inconsistent with a restraint upon anticipation.⁴ Where a married woman has real estate settled on her with a restraint upon anticipation of the income only, she has control over the *corpus*, so far as such control or disposition does not deprive her of the income.⁵

The restraint upon anticipation is preserved as a necessary protection of the interests of the wife by section 19 of the Married Women's Property Act, 1882, which enacts that "nothing in this Act . . . shall interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument." But the section goes on to provide that "no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors."⁶ This places a married

Restraint
preserved by
M.W.P. Act,
1882.

¹ *Re Grey's Settlements*, *Acason v. Greenwood*, 34 Ch. D. 712.

² *Re Tippet's and Newbould's Contract*, 37 Ch. D. 444.

³ *Re Spencer*, *Thomas v. Spencer*, 30 Ch. 183.

⁴ *Re Lumley*, *Ex parte Hood Barrs*, [1896] 2 Ch. 690.

⁵ *Cooper v. Macdonald*, 7 Ch. D. 288.

⁶ See form of judgment against a married woman in *Scott v. Morley*, 20 Q. B. D. 120. "The restraint on anticipation is an anomaly introduced by the Court of Chancery for the protection of the married woman against her own act and her own weakness. She cannot override it by any engagement entered into by her, however solemn, or however much to her particular advantage in the circumstances of the case; and, on the other hand, it has been frequently held that the court cannot make her separate income restrained from anticipation liable to redress a fraud committed by her, however gross. . . . So far from modifying the effect of the restraint as it existed before the Act (Married Women's Property Act, 1882), it appears to us that the Act carefully preserves it to the same extent as it existed previously." Per Davey, L.J.,

woman on an equal footing with a man or an unmarried woman in respect of settlements that may be impeached under 13 Eliz. c. 5, or set aside under the Bankruptcy law, if she is a sole trader. Thus, a married woman who contracts a debt then becomes discovert and marries again, cannot make a valid settlement of her property on the second marriage as against her creditor by restraining herself against anticipation. Such creditor is deemed to be an ante-nuptial one; and the effect of this section is to prevent the restraint having any efficacy as against the ante-nuptial debt.¹ But if she has contracted a debt and has subsequently married settling her own property on herself with a restraint against anticipation, such restraint will have effect given to it, if at the date of the settlement she had no intention to defeat or delay creditors.² The words "interfere with or affect" mean invalidate or render inoperative;³ thus, where a married woman who carried on a trade separately from her husband and became bankrupt had executed a marriage settlement by which she conveyed certain real property to a trustee in trust for herself for life for her separate use without restriction on anticipation with certain remainders, it was held that her trustee in bankruptcy in claiming her life estate was not interfering with or affecting the settlement within the meaning of this section, but rather was claiming under and in affirmance of its provisions.⁴

Where the restraint is imposed by a stranger on his gift, it will be as valid now as heretofore, and the property so restricted will be out of the reach of the married woman's creditors, ante-nuptial as well as post-nuptial.⁵ But where a woman settles her own property on herself in view of marriage, any restriction on anticipation in any settlement or agreement for a settlement will not prevent her property from being taken to satisfy her ante-nuptial debts or liabilities, or in respect of her ante-nuptial torts.⁶

The effect of this restraint is also preserved by the recent Married Women's Property Act, 1893,⁷ which provides that nothing shall render available to satisfy any liability or obligation

in *Hood Barrs v. Cathcart*, [1894] 2 Q. B. 566. See *Softlaw v. Welch*, [1899] 2 Q. B. 419.

¹ *Jay v. Robinson*, 25 Q. B. D. 467.

² See *Hemingway v. Braithwaite*, 61 L. T. 224. See *ante*, p. 159.

³ *Re Armstrong, Ex parte Boyd*, 21 Q. B. D. 264; *Re Whitaker, Christian v. Whitaker*, 34 Ch. D. 224; *Hancock v. Hancock*, 38 Ch. D. 78.

⁴ *Re Armstrong Ex parte Boyd* (*ubi sup.*).

⁵ Under the Married Women's Property Act, 1870, section 12, it has been held that a married woman's property, though subject to the restraint, was liable to satisfy her ante-nuptial debts. *Axford v. Reid*, 22 Q. B. D. 548; *Re Hedgley, Small v. Hedgley*, 34 Ch. D. 379. The effect of these cases would be limited to women married during the period the Act was in force.

⁶ This is a legislative sanction of the decision in *Sanger v. Sanger*, L. R. 11 Eq. 470.
⁷ 56 & 57 Vict. c. 63, s. 1, proviso.

Restraint
imposed by
stranger still
valid.

Restraint
preserved by
M.W.P. Act,
1893.

arising out of contract any separate property which at the time of entering into the contract or afterwards a married woman is restrained from anticipating.

Where a married woman whose property is subject to a restraint upon anticipation by her next friend brings an action not under the Married Women's Property Act, 1882, which is found to be an improper one, and costs are given against the next friend, who cannot pay them, she cannot be ordered to pay the costs out of such property, though it includes arrears of income accrued due before the order for payment, but after the commencement of the proceedings.¹ In *Cox v. Bennett*² (which was a suit under the Married Women's Property Act, 1882) a married woman's trustees, against whom she brought an unsuccessful suit without a next friend, were held by the Court of Appeal entitled to retain the costs of the suit out of a balance of income, which was in their hands at the time when the order to pay costs was made, though it was not in hand at the time when she commenced the proceedings, on the ground that the restraint on anticipation had ceased as to any sums that formed part of the income as soon as they came into the hands of the trustees. But the correctness of that decision was not wholly acquiesced in by a differently constituted Court of Appeal in *Hood Barrs v. Cathcart*,³ which laid down that where a married woman has separate estate restrained from anticipation, the Married Women's Property Act, 1882, does not enable a judgment to be enforced against arrears of income to which the restraint applies, accruing due after the date of the judgment, either by the appointment of a receiver, by sequestration, by a charging order, or by any kind of process, even where such income is in her own hands;⁴ and, the court will refuse to enforce a judgment against arrears of separate income which have not come into the married woman's hands.⁵

The Married Women's Property Act, 1893,⁶ has effected an alteration in this respect by enabling the court before which any action or proceeding instituted by a woman [*sic*], or by a next friend on her behalf, is pending, may order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation; and such payment may be enforced by the appointment of a receiver and the sale of the property or otherwise.⁷ This provision, however, does not give the court

M.W.P. Act,
1893.
Restraint
removable in
order to pay
costs of action
unsuccessfully
instituted by a
married
woman.

¹ *Re Glanville, Ellis v. Johnson*, 31 Ch. D. 532.

² [1891] 1 Ch. 617.

³ [1894] 2 Q. B. 559, 563.

⁴ See also *Re Lumley, Ex parte Hood Barrs*, [1894] 3 Ch. 135.

⁵ *Leftus v. Heriot*, [1895] 2 Q. B. 212. The right of retainer of a trustee in such a case as *Cox v. Bennett* (*ubi sup.*) is of a different nature to that of a judgment creditor; for the principle of the restraint is directed against the latter and not against the former.

⁶ 56 & 57 Vict. c. 63, s. 2.

⁷ This gives legislative sanction to the principle of the decision in *Re Andrews*,

jurisdiction to make an order for the payment of costs of a suit begun before the Act came into force;¹ nor does it apply to the costs of a petition,² or an appeal instituted by a married woman without a next friend in a suit in which she was the original defendant;³ or to any proceedings in which she is defendant, though her act has been the cause of their institution, such as the entry of a *caveat* by her against the grant of probate of a will.⁴ But it does apply to an unsuccessful application for a new trial (an appeal) of an action originally instituted by her;⁵ also to a counter-claim set up by her in an action brought against her; for such is a "proceeding instituted" by her within the meaning of this Act,⁶ and to an intervention on her part in a probate suit in which she adopts the pleadings of the plaintiff;⁷ and to an unsuccessful joint action by her and her husband in which she was the real plaintiff;⁸ and to a claim to goods whereby interpleader proceedings are commenced.⁹ The court can enforce payment of such proceedings unsuccessfully instituted by her by the appointment of a receiver.¹⁰ Whether this order against a married woman is one as of course or no seems to be doubtful; but if it is made, the *onus* is on her to show cause why it should not be enforced.¹¹

Effect of the
restraint upon
anticipation.

The restraint upon anticipation is an effectual barrier against the married woman dealing with the property affected by it. She may neither sell it nor encumber it.¹² A married woman who is restrained from alienating her property is not entitled to have such property paid out to her if a fund in court,¹³ or to have a fund in the hands of those whose duty it is to pay it over to the trustees of her settlement paid over to her.¹⁴ Her separate estate is not bound, where she is restrained from anticipating, by her laches or acquiescence, or even for her breaches of trust,¹⁵ or for her torts, such as her own fraudulent acts,¹⁶ or for her contracts made during

Edwards v. Dewar, 30 Ch. D. 159, in which Pearson, J., held that when a married woman, entitled to income which she was restrained from anticipating, instituted proceedings without a next friend against her trustees in which she took out a summons that was dismissed, her trustees were entitled to retain their costs out of her income.

¹ *Re Lunley, Ex parte Hood Barrs*, [1894] 3 Ch.D. 135.

² *Hollington v. Dear*, W. N. [1896] 35.

³ *Hood Barrs v. Catheart*, [1894] 3 Ch. 376; *Hood Barrs v. Heriot*, [1897] A. C. 177.

⁴ *Moran v. Place*, [1896] P. 214. See *ante* p. 343, note 6.

⁵ *Dresel v. Ellis*, [1905] 1 K. B. 574. In this case the Court of Appeal distinguished *Hood Barrs v. Catheart* (*ubi sup.*) and *Hood Barrs v. Heriot* (*ubi sup.*).

⁶ *Hood Barrs v. Catheart*, [1895] 1 Q. B. 873.

⁷ *Crickitt v. Crickitt*, [1902] P. 177.

⁸ *Marchioness of Huntly v. Gaskell*, [1905] 2 Ch. 656.

⁹ *Nunn v. Tyson* (*Tyson claimant*), [1901] 2 K. B. 487.

¹⁰ *Ibid.* and see *Pawley v. Pawley*, [1905] 1 Ch. 593.

¹¹ *Per Buckley, J.*, in *Pawley v. Pawley* (*ubi sup.*).

¹² *Baggett v. Meux*, 1 Coll. 138.

¹³ *Re Ellis' Trusts*, L. R. 17 Eq. 409.

¹⁴ *Re Benton, Smith v. Smith*, 19 Ch. D. 277.

¹⁵ *Clive v. Carew*, 28 L. J. Ch. 865.

¹⁶ *Jackson v. Hobhouse*, 2 Mer. 483; *Stanley v. Stanley*, 7 Ch. D. 589; 45 & 46

Vict. c. 75, s. 19.

coverture.¹ She cannot validly charge it,² or get rid of its effect by assignment, release, or admission adverse to her own interest.³ So where the property is reversionary in its nature, and the restraint exists during the reversionary period, but ceases on its falling into possession, a charge upon it made before the latter event has happened is ineffectual.⁴ If she has no more than a life interest in the income of her separate property, and she contracts debts, she will be liable for the same only to the amount of her separate interest, and her income might be capitalized and dealt with in satisfaction of her liabilities as if she were a single woman with a life interest in the property; but if she is restrained from anticipating her income, her creditors can only be satisfied by the income as it is paid into her hands, and she cannot, by suffering a judgment to go by default against her, enable them to attach the income before it is paid into her hands—otherwise the restraint would be rendered inoperative.⁵

After a considerable amount of litigation it has been clearly and finally settled by a decision of the House of Lords that a judgment recovered against a married woman whose property is subject to the restraint cannot be executed upon or enforced against arrears of income derived from the property so restrained which have accrued due after the date of the judgment.⁶ But the judgment may be enforced against income which has accrued due at or before its date, though the money has not reached her hands.⁷ The date of the judgment, then, is most material. Thus she cannot assign her current income, but only income which has become due and payable; and, on the other hand, a creditor who has obtained leave to sign final judgment cannot, by delay in signing, even with the leave of the court, as by the appointment of a receiver, obtain equitable execution of her income which was not actually in arrear at the time of obtaining leave to enter judgment.⁸ The restraint imposed by a post-nuptial settlement made by her before the Married Women's Property Act, 1882, came into force, and not with a view to defraud creditors, was held as efficacious as a restraint imposed by a stranger.⁹

Arrears of separate income not paid to her not liable for debts, &c.

But liable if accrued before.

Where, then, the property is restrained no process can issue

No process against restrained property.

¹ *Roberts v. Watkins*, 46 L. J. Q. B. 552.

² *Stanley v. Stanley (ubi sup.)*.

³ *Bateman v. Faber*, [1898] 1 Ch. 144.

⁴ Per Baggallay, L.J., in *Re Bown, O'Halloran v. King*, 27 Ch. D. 411.

⁵ *Chapman v. Biggs*, 11 Q. B. D. 27.

⁶ *Hood Barrs v. Cathcart*, [1896] 2 Q. B. 559; *Whiteley v. Edwards*, [1896] 2 Q. B. 48; *Bolitho v. Gidley and others*, [1905] A. C. 98.

⁷ *Hood Barrs v. Heriot*, [1896] A. C. 174, overruling on this point *Hood Barrs v. Cathcart*, [1894] 2 Q. B. 559; and *Pillers v. Edwards*, 71 L. T. 788. See *Harnett v. McDougall*, 8 Beav. 87; *Pemberton v. McGill*, 1 Dr. & S. 268; *Rowley v. Unwin*, 2 K. & J. 138; *Hulbert v. Cathcart* (February 1894), cited in *Hood Barrs v. Heriot*, [1896] A. C. at p. 176.

⁸ *Collyer v. Isaacs*, 77 L. T. 198.

⁹ *Beckett v. Tasker*, 19 Q. B. D. 7.

against it to enforce payment of any claims against a married woman out of arrears of income accruing due after the order of payment has been made, whether by judgment against her for default in paying,¹ charging order,² attachment,³ sequestration,⁴ bankruptcy notice;⁵ or by the appointment of a receiver.⁶ In the case of *Hood Barrs v. Cathcart*⁷ the Court of Appeal was of opinion that the Married Women's Property Act, 1882, was not intended to enable a judgment against a married woman to be enforced against arrears of her separate estate accruing due after the date of the judgment or order as to which she was restrained from anticipation either by means of a receiver, sequestration, charging order or any kind of process, for section 19 of the Act preserved the effect of the restraint, and before the Act after-acquired property could not have been reached by her creditors. Arrears that had accrued due before the judgment or the order was made, though in the hands of third persons, are attachable.⁸ This is now settled law as appears on the preceding page. Under the Married Women's Property Act, 1893,⁹ the like law is applicable to this subject.

Restraint property formerly ineffectual for contractual purposes.

For contractual purposes, then, both in equity¹⁰ and under the Married Women's Property Act, 1882,¹¹ this restraint operates as a bar to a married woman making an effective contract, for the property over which it extends is deemed non-existent both for the purpose of entering into a binding contract or liability, and for satisfying any claim arising out of such contract or liability;¹² and this privilege is extended to her when she is not sued on her post-nuptial contract until after the death of her husband.¹³ The stringent operation of the restraint is illustrated by those cases in which a married woman having only separate property, which she is restrained from anticipating, or a small amount of free separate property at the time of contracting a debt or making a contract will not reasonably be deemed to have made herself liable in respect of her restrained or free property.¹⁴ This construction is

¹ *Draycott v. Harrison*, 17 Q. B. D. 147.

² *Stanley v. Stanley*, 7 Ch. D. 589.

³ *Chapman v. Biggs*, 11 Q. B. D. 27.

⁴ See *Re Lumley, Ex parte Hood Barrs*, [1894] 3 Ch. 135. The form of sequestration is general; but any property subject to the restraint cannot be taken. *Miller v. Miller*, L. R. 2 P. & M. 54; *Hyde v. Hyde*, 13 P. D. 166.

⁵ *Re Lynes, Ex parte Lester*, [1893] 2 Q. B. 113.

⁶ *Pelton (Bros.) v. Harrison*, [1891] 2 Q. B. 422; *Hood Barrs v. Cathcart*, [1894] 2 Q. B. 559.

⁷ [1894] 2 Q. B. 559.

⁸ *Claydon v. Finch*, L. R. 15 Eq. 266; *Hyde v. Hyde (ubi sup.)*. It is not, however, certain that if this point came up for consideration again, that the court would follow the decision in *Claydon v. Finch (ubi sup.)*. See *Hood Barrs v. Cathcart*, [1894] 2 Q. B. 559; *Loftus v. Heriot*, [1895] 2 Q. B. 212. ⁹ 56 & 57 Vict. c. 63.

¹⁰ See *Pike v. Fitzgibbon*, 17 Ch. D. 454; *Stogdon v. Lee*, [1891] 1 Q. B. D. 661.

¹¹ Sect. 1, sub-s. 2, 3, and 19.

¹² *Beckett v. Tasker*, 19 Q. B. D. 7; *Palliser v. Gurney*, 19 Q. B. D. 519, approved by Court of Appeal in *Stogdon v. Lee (ubi sup.)*.

¹³ *Pelton (Bros.) v. Harrison (ubi sup.)*.

¹⁴ *Harrison v. Harrison*, 13 P. D. 180; *Leake v. Driffield*, 24 Q. B. D. 98; *Braunstein v. Lewis*, 65 L. T. 449

applicable only to contracts affected by the old law or under the Married Women's Property Act, 1882; for under the Married Women's Property Act, 1893,¹ the existence of free separate estate is not necessary to the validity of her contract. Where she has separate property part of which is free and part is subject to the fetter, and enters into a contract on which she is sued, but before judgment disposes of free separate property, execution on the judgment will not be granted against the property which she is restrained from anticipating.²

Where a married woman had only separate property which she was restrained from anticipating, she could not have made a valid contract, yet where she was sued otherwise than in contract, her liability to make good the claim against her was not affected by such fact, though possibly the relief obtained against her might be very slight because of the restraint.³

In one important particular the Married Women's Property Act, 1893, has modified the effect of the restraint in making the property affected by it practically non-existent for contractual purposes, for if a married woman enters into an engagement at a time when she is restrained from dealing with her property, and subsequently acquires property which has no such fetter upon it, her creditor will now be able to enforce his claim against the latter class of property, which formerly he was unable to do.

Important
modification
of effect of
restraint by
M.W.P. Act,
1893.

As "restraint upon anticipation" is the same as "restraint upon alienation," it has been held that a married woman is not bound by her covenant to settle after-acquired property where she is left property by will for her separate use without power of anticipation; the capital of personal estate so left is not payable to her on her separate receipt.⁴ But on the other hand it has been held that unless there is some provision in the document of title under which the married woman takes that she shall not in any event deal with the property as long as she is under coverture, the restraint lasts only while the property is in a reversionary state, and when it comes into her hands the fetter ceases to bind; and so a covenant by her to settle after-acquired property contained in an ante-nuptial settlement executed by her before the date of her title to such property is effectual to bind the property when transferred to her.⁵ Anticipating is not the same as attempting to anticipate; consequently if there is a gift over, if

Anticipating is
not the same
as attempting
to anticipate.

¹ 56 & 57 Vict. c. 63.

² *Pelton (Bros.) v. Harrison* (*ubi sup.*).

³ *Whittaker v. Kershaw*, 45 Ch. D. 320. But the decision in this case does not seem to have altogether commended itself to the Court of Appeal in *Hood Barrs v. Cathcart*, [1894] 2 Q. B. 574.

⁴ *Re Currey, Gibson v. Way*, 32 Ch. D. 361.

⁵ *Re Banks, Reynolds v. Ellis*, [1902] 2 Ch. 333. This decision was based on those in the cases of *Re Bown, O'Halloran v. King*, 27 Ch. D. 411, and *Re Holmes, Hallioux v. Holmes*, 67 L. T. 335; but it is difficult to reconcile it with *Re Currey, Gibson v. Way* (*ubi sup.*). The later decision would seem to be the more correct.

the married woman anticipate, such gift over will not take effect if she merely attempts to anticipate her interest.¹

The restraint does not prevent a married woman from being held liable to refund out of her income money which she was permitted by an erroneous order of the court to receive which is reversed on appeal, for such liability does not arise out of contract. Her liability to refund extends up to the date of the order reversing the erroneous decision; but after such date the restraint protects her from any further liability,²

This restraint on anticipation is a modification of the right of a married woman over her property which the court itself cannot dispense with,³ except her estate be subject to paramount equities, such as for raising costs of suit;⁴ and where she is a respondent in a suit for dissolution of marriage on the ground of her adultery, the Divorce Court may deal with it.⁵ It has, however, been held that the enlargement of an estate in tail to one in fee is no violation of the restraint.⁶ The restraint prevents her from dealing with any settled property subject to it, and she cannot be put to her election in respect of such property, which would result in her alienating the settled property by way of compensation for having exercised her capacity to elect.⁷ "A married woman cannot by hook or by crook—by any device, even by her own fraud (the cases go to that length)—deprive herself of the protection which the restraint on anticipation throws around her. . . . The result is that a married woman, having an estate for her separate use without power of anticipation, can play fast and loose to a greater extent than if she were a *feme sole*."⁸ Though the court is loth to enable any person to commit a fraud, yet in the case of a restraint upon anticipation it will not allow the fetter to be removed where it would be equitable for the woman to pay her just debts;⁹ and even though the woman has been guilty of gross fraud in respect of the property over which it extends; and where, in one case, she had property settled to her separate use, with restraint upon anticipation, and concurred in a fraudulent mortgage of such property, concealing the fact of the restraint, a charging order obtained by the mortgagee to charge her next accruing dividend was discharged, for in no case, and by no device, could the

Restraint
cannot be
dispensed
with.

Even in cases
of fraud by
a married
woman.

¹ *Re Wormald, Frank v. Muzzen*, 43 Ch. D. 630.

² *Re Dixon, Dixon v. Smith*, 35 Ch. D. 4.

³ *Robinson v. Wheelwright*, 21 Beav. 214; affirmed 6 De G. M. & G. 535; *Kenrick v. Wood*, L. R. 9 Eq. 333.

⁴ *Fleming v. Armstrong*, 11 L. T. 470.

⁵ *Pratt v. Jenner*, L. R. 1 Ch. App. 493.

⁶ *Cooper v. Macdonald*, 7 Ch. D. 278.

⁷ *Re Vardon's Trusts*, 31 Ch. D. 275, overruling *Re Queade's Trusts*, 54 L. J. Ch. 786, and *Willoughby v. Middleton*, 2 J. & H. 344. See *Smith v. Lucas*, 18 Ch. D. 531; *Re Wheatley*, 27 Ch. D. 606; *Cahill v. Cahill*, 8 App. Cas. 420.

⁸ Per Lindley, M.R., in *Bateman v. Faber*, [1898] 1 Ch. 149.

⁹ See *Hood Barrs v. Cathcart*, [1894] 2 Q. B. 559.

restraint be evaded;¹ and *a fortiori* there is no equity to apply income which a married woman is restrained from anticipating, to make good the consequences of her fraud, where the restraint upon anticipation appears from the instrument in respect of which relief is sought.² But where she instigates, requests, or consents in writing to a breach of trust by her trustee, the court may make an order impounding all or any part of her interest in the true estate, though it is subject to the restraint by way of indemnifying her trustee.³ In such a case, however, it is submitted, the trustee would have to prove that she acted for herself, and was fully informed of her position and liability.⁴ The mere fact of a married woman becoming a widow does not work retrospectively to remove the fetter of the restraint from her property affected by it, so as to render it liable for her contracts made during coverture.⁵

Except where breach of trust instigated by her.

Widowhood does not act retrospectively to free the fetter.

But by the Conveyancing and Law of Property Act, 1881, it is provided that "notwithstanding that a married woman is restrained from anticipation, the court may, if it thinks fit, where it appears to the court to be for her benefit, by judgment or order, with her consent, bind her interest in any property,"⁶ it will be seen that before this section can be put in force, there are two conditions precedent: first, the court must be of opinion that to remove the restraint will be for the woman's benefit;⁷ secondly, she herself must consent to have the restraint removed.

Removal under 44 & 45 Vict. c. 41, s. 39.

The power given to the court under this section of dispensing with the restraint is a discretionary one, and to be exercised with great caution, and only where a strong case is made for it, and is not necessarily to be exercised merely for the benefit of the married woman.⁸ The section confers no general power of removing the restraint.⁹ The following are some cases in which relief was granted, and in others refused by the court. In one case under the Act, where a married woman was entitled to the income of a fund for her separate use without power of anticipation, with remainder in trust for her children, and in default of issue for her appointees by will, and in default of appointment for herself absolutely, and she was childless and past the age of child-bearing, and had contracted a considerable amount of debt which she was desirous of paying off, the court made an order removing the restraint;¹⁰ and in another case the court removed

Removal in discretion of the court, if woman consents.

Relief by removal granted.

¹ *Stanley v. Stanley*, 7 Ch. D. 589. See Lindley, M.R., in *Bateman v. Faber* (*ubi sup.*).

² *Arnold v. Woodhams*, L. R. 16 Eq. 30.

³ 56 & 57 Vict. c. 53, s. 45. See *Re Holt, Holt v. Holt*, [1897] 2 Ch. 525.

⁴ See *Sawyer v. Sawyer*, 28 Ch. D. 599.

⁵ See *Softlaw v. Welch*, [1899] 2 Q. B. 419; *Brown v. Dimbleby*, [1904] 1 K. B. 28.

⁶ 44 & 45 Vict. c. 41, s. 39.

⁷ *Re Flood's Trusts*, 11 L. R. Ir. 355.

⁸ *Re Little's Will, Re Harrison*, 36 Ch. D. 701.

⁹ *Re Warren's Settlement*, 52 L. J. Ch. 928.

¹⁰ *Hodges v. Hodges*, 20 Ch. D. 749.

the restraint where it approved of the terms of a compromise, and the married woman consented to it;¹ where she had entangled herself in her husband's affairs, and was suffering in health through pecuniary embarrassments, even though she had only a life interest in the fund subject to the restraint;² where two married women were tenants in common of certain house property of which desirable leases could not be obtained because they were restrained from anticipating, and it was also for their benefit that a partition of the settled property should be made, and a settlement made in moieties;³ to enable a jointress to consent to the payment out of the purchase-money of a settled estate sold under the Settled Land Act, 1882, of mortgages upon the estate over which her jointure had priority.⁴ The relief will sometimes take the form of allowing the separate income of the married woman to be applied in paying debts or keeping down the interest on incumbrances.⁵ The Court has a discretion under the Act to let into possession of the settled land a married woman who is a tenant for life of it, and though restrained from anticipation to exercise the wide powers of a tenant for life, except the power of sale and exchange.⁶ When an order of the court is made under the Act, it is the order which binds the estate, and not what the married woman does after the restraint is removed. But though the order is silent as to the wife's equity of exoneration, if the removal is to enable her to pay her husband's debts, yet if the circumstances point to the existence of such equity she will be entitled to enforce it afterwards.⁷

Relief refused.

The court has refused to grant the relief where it would work a forfeiture of the married woman's interest in the settled fund;⁸ or where to grant the dispensation would be to give effect to a release executed by the married woman donee of a power of appointment for her own benefit.⁹ The benefit is a pecuniary benefit; and where to remove the restraint would be to diminish her income, the court will not order its removal.¹⁰ The court has no power to order the removal where the married woman has ceased to be such by a decree of dissolution of marriage;¹¹ nor will it grant the relief where the removal is sought merely for the purpose of raising money for the payment of debts

¹ *Musgrave v. Sandeman*, 48 L. J. 215.

² *Re C's Settlements*, 56 L. J. Ch. 556.

³ *Re Currey, Gibson v. Way*, 56 L. J. Ch. 389.

⁴ *Re Marquis of Ailesbury and Lord Treagyn*, [1893] 2 Ch. 345. In such a case the court must be satisfied that the amount of the jointure can be raised out of the income of the purchase-money.

⁵ *Re Milner's Settlement*, [1891] 3 Ch. 547.

⁶ *Re Bagot's Settlement, Bagot v. Kittoe*, [1894] 1 Ch. 177.

⁷ See *Paget v. Paget*, [1898] 1 Ch. 470.

⁸ *Re Jordan, Kino v. Picard*, 55 L. J. Ch. 330.

⁹ *Re Warren's Settlement*, 52 L. J. Ch. 928.

¹⁰ *Thomson v. Thomson*, [1896] P. 263.

¹¹ *Ibid.*

incurred through her own or her husband's extravagances.¹ A mere increase of income is not such a sufficient benefit as to justify the court in removing the restraint from court securities to others of a speculative nature; though the latter would have been allowed by the settlement.²

In equity a married woman (whose property was subject to the restraint) who acquiesced in a breach of trust by her trustees was debarred from obtaining relief against them and making them account for the loss sustained through their misfeasance;³ unless her acquiescence had been obtained by undue influence.⁴ Where she was herself a party to the breach of trust her trustees were to some extent protected; and where they claimed a right of retainer against her life interest to indemnify themselves against their breach of trust to which she had been a party, they must have shown that she both acted for herself in the breach of trust, and was fully informed of the state of the case.⁵ The merely allowing the husband to receive the trust funds in breach of the trust would not bar her remedy against him;⁶ but where her full consent and acquiescence in the course of conduct of her husband or her trustees can be shown, her claim would be barred.⁷ Where, then, her property is subject to the restraint, her passive concurrence or acquiescence in a breach of trust formerly did not, and does not now, bar her claim to have it remedied.⁸ But now, under the Trustee Act, 1893,⁹ where a married woman instigates, requests, or consents in writing to a breach of trust, all or any part of her property may be impounded by way of indemnity, though it is subject to the restraint.¹⁰ In such a case, however, it is submitted, the trustees would have to prove that she acted for herself and was fully informed of her position and liability.¹¹ It is the duty of the trustee to protect his *cestui que trust* who is restrained from anticipating against herself when asking him to commit a breach of trust on her behalf; and if he knowingly commit a breach of trust, the court will be slow to assist him afterwards by removing the restraint on anticipation, and give him a security for the breach of trust to which at the time he had no right to look.¹²

Concurrence or acquiescence of married woman in breach of trust.

Active concurrence in breach of trust renders property subject to restraint liable.

¹ *Re Pollard's Settlement*, [1896] 2 Ch. 552.

² *Re Blundell*, [1901] 2 Ch. 221.

³ *Hanchett v. Briscoe*, 22 Beav. 496; *Jones v. Higgins*, L. R. 2 Eq. 538.

⁴ See *Hughes v. Wells*, 9 Ha. 749.

⁵ *Ryder v. Bickerton*, cited 3 Swanst. So; *Sawyer v. Sawyer*, 28 Ch. D. 595.

⁶ *Hughes v. Wells* (*ubi sup.*).

⁷ See *Edwards v. Cheyne*, 13 App. Cas. 385; *Ha'e v. Sheltrake*, 60 L. T. 292.

⁸ *Cocker v. Quayle*, R. & M. 535; *Pemberton v. McGill*, 8 W. R. 290; *Arnold v. Woodhams*, L. R. 16 Eq. 29.

⁹ 56 & 57 Vict. c. 53, s. 45.

¹⁰ See *Re Holt, Holt v. Holt*, [1897] 2 Ch. 525.

¹¹ See *Sawyer v. Sawyer* (*ubi sup.*).

¹² *Ricketts v. Ricketts*, 64 L. T. 263; *Bolton v. Currie*, [1895] 1 Ch. 544.

Statute of
Limitations.

If a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation, brings an action for breach of trust against her trustee, the Statute of Limitations may be pleaded against her claim;¹ but there must be a breach of trust to enable the statute to run against her.²

When trustees
need not be
served.

Where the settled fund is not itself dealt with, the court will make an order binding the married woman's interest without the trustees being served with the notice.³

How married
woman's
consent given.

Whether the married woman's consent to bind her interest should be evidenced in the ordinary formal way or not seems doubtful. In *Hodges v. Hodges*,⁴ Fry, J., dispensed with it on a strong affidavit of the married woman herself; but in *Musgrave v. Sandeman*,⁵ Pollock, B., directed the married woman's separate examination before himself.

Applications under this Act must be summons only;⁶ but it has been held that the jurisdiction of the court to hear such matters by petition has not been impaired.⁷

This section does not seem to enable the court to deal with the property of a married woman who has been guilty of a deliberate fraud in respect of her separate estate, for her consent is necessary, and if she withhold it the court is powerless.⁸

Limitation of
power of
Divorce
Court.

The Divorce Court has no jurisdiction except after a final decree of nullity of marriage under the Matrimonial Causes Act, 1859,⁹ to make a settlement of a married woman's property which is subject to this restraint; consequently it has no power to order a settlement of a wife's property subject to this restraint under section 3 of the Matrimonial Causes Act, 1884,¹⁰ where she has refused to comply with a decree obtained by her husband for restitution of conjugal rights.¹¹

Under the Settled Estates Act, 1877,¹² and the Settled Land Act, 1882,¹³ restraint upon anticipation does not prevent a married woman from exercising her powers under those Acts. Though a married woman may, under section 40 of the Conveyancing Act, 1881, appoint an attorney to receive dividends and income which she is restrained from anticipating, yet such power will not be allowed to operate to get rid of the restraint.¹⁴ The order of court enabling her so to receive her income should set out on its

¹ 51 & 52 Vict. c. 59, s. 8 (b).

² *Wassell v. Leggatt*, [1896] 1 Ch. 554.

³ *Re Little's Will, Re Harrison*, 36 Ch. D. 701.

⁴ 20 Ch. D. 749.

⁵ 48 L. T. 215.

⁶ 44 & 45 Vict. c. 41, s. 69 (3). *Re Lilwall's Settlement*, 30 W. R. 243; *Latham v. Latham*, W. N. [1889] 171.

⁷ See *Re Blundell*, [1901] 2 Ch. 233, per Farwell, J.

⁸ *Thomas v. Price*, 16 L. J. Ch. 76; *Stanley v. Stanley*, 7 Ch. D. 589.

⁹ 22 & 23 Vict. c. 61, s. 5.

¹⁰ 47 & 48 Vict. c. 68.

¹¹ *Michell v. Michell*, [1891] P. 208; and see *Swift v. Swift*, [1891] P. 129.

¹² 40 & 41 Vict. c. 18.

¹³ 45 & 46 Vict. c. 38.

¹⁴ *Stewart v. Fletcher*, 38 Ch. D. 627, in which decision is set out the proper order to be drawn up in such a case.

face the restraint upon anticipation.¹ The restraint must not offend against the rule against perpetuities, otherwise it will be ineffectual and void.² It is true that in *Herbert v. Webster*,³ and *Cooper v. Laroche*,⁴ effect was given to the clause imposing the restraint, though it offended against the above rule, but the latter case was not followed by Chitty, J., in *Re Dawson, Johnston v. Hill*,⁵ and in *Re Ridley, Buckton v. Hay*,⁶ Jessel, M.R., came, no doubt, with reluctance to his decision, but the current of authority is in favour of the proposition that the restraint is void; thus it has been decided that the restraint imposed by a general clause in a will upon all the shares of daughters of the testator's children was good as to the shares of those members of the class who were born in the testator's lifetime, but void as to the shares of those born afterwards.⁷ The fact that the persons on whom the restraint would operate are *in esse* at the time of making the limitation is immaterial if the restraint offends against the rule.⁸ Where the limitation on which the restraint is to take effect does not offend against the rule but the restraint does, the former will have effect given to it though the latter will be rejected.⁹ Alimony which has been decreed to a married woman is in the nature of separate property, subject to restraint against anticipation, and cannot be assigned by her.¹⁰

Rule against perpetuities not to be offended against.

Alimony.

As an incident of her undoubted right to dispose of her separate property, a married woman was liable to be put to her election whether she would take under or against a deed by which she became entitled to property;¹¹ but she cannot be put to her election so as to affect her non-separate property; nor can she be bound (if affected by the former rules of equity or the Married Women's Property Act, 1882) in respect of property which is not in existence at the date of the election;¹² but it would seem that under the Married Women's Property Act, 1893, if not otherwise disabled from electing, she might by her election affect future property. Where it becomes a question whether a married woman should take under or reject the provisions of the same instrument, the equity doctrine of election applies to her, and she must exercise her election in the matter. The doctrine of election is based on compensation—that is, making up an

Election by married women.

Doctrine of election based on compensation.

¹ *Stewart v. Fletcher*, 38 Ch. D. 627, in which decision is set out the proper order to be drawn up in such a case.

² *Re Teague's Settlement*, L. R. 10 Eq. 564; *Re Cunningham's Settlement*, 11 Eq. 324; *Re Michael's Trusts*, 46 L. J. Ch. 651; *Re Ridley, Buckton v. Hay*, 11 Ch. D. 645.

³ 15 Ch. D. 10. ⁴ 17 Ch. D. 168. ⁵ 39 Ch. D. 155. ⁶ *Ubi sup.*

⁷ *Re Ferneley's Trusts*, [1902] 1 Ch. 543. In this case *Herbert v. Webster*, 15 Ch. D. 640, was followed; but *Re Michael's Trusts* (*ubi sup.*), and *Re Ridley, Buckton v. Hay* (*ubi sup.*), were not followed.

⁸ *Re Ridley, Buckton v. Hay* (*ubi sup.*).

⁹ *Fry v. Copper, Kay*, 163; and see *Armitage v. Coates*, 35 Beav. 1.

¹⁰ *Re Robinson*, 27 Ch. D. 160; *Linton v. Linton*, 15 Q. B. D. 239. See *ante*, p. 168.

¹¹ *Barrow v. Barrow*, 4 K. & J. 419.

¹² See *Smith v. Lucas*, 18 Ch. D. 531.

equivalent to those who are disappointed by the act of election ; and where a deed or will purports to make a general disposition of property for the benefit of a person named in it, such person cannot accept a benefit under the instrument without at the same time conforming to all its provisions, and renouncing every right inconsistent with them.¹ It is also founded on the presumption of a general intention that every part of an instrument shall take effect ; but the presumption of such general intention may be rebutted by an inconsistent particular intention apparent in the instrument.² The addition of the restraint on anticipation evinces an intention inconsistent with the application of the doctrine of election ;³ and this intention is not affected by the fact that the married woman has subsequently become discovert.⁴ This question of election in the case of a married woman usually arises where she (as an infant) has by her settlement had property settled on her, and in the same instrument she covenants to settle after-acquired property, which covenant she repudiates or disaffirms on reaching majority, or when the time comes for enforcing the covenant. But if she never was in a position to elect, she cannot be compelled to do so.⁵ This question will be discussed more fully in Part IV. chap. iv., which deals with the marriage settlements of infants.

Married
woman
subject to
restraint not
bound to elect.

A married woman who is restrained from anticipating a fund by the instrument of settlement cannot be put to her election in respect of other property acquired by her under the same instrument, for the rule of not claiming by one part of an instrument in contradiction to another part has exceptions, and the ground of exception seems to be a particular intention denoted by the instrument different from that general intention, the presumption of which is the foundation of the doctrine of election ;⁶ and the restraint against anticipation over the settled fund is, as above shown, a declaration of a particular intention inconsistent with the doctrine, and therefore excludes it.⁷ Where a married woman is tenant for life with power to appoint at her decease, the mere fact that she is restrained from anticipating does not prevent her from exercising the power by deed, and does not limit her to a testamentary exercise only.⁸

¹ Per Lord Cairns, C., in *Codrington v. Codrington*, L. R. 7 H. L. 861.

² 1 Swanst. 404. (n) ; *Re Vardon's Trusts*, 31 Ch. D. 275.

³ *Haynes v. Foster*, [1901] 1 Ch. 361.

⁴ *Ibid.*

⁵ See *Harle v. Jarman*, [1895] 2 Ch. 419.

⁶ 1 Swanst. 404. (n).

⁷ *Re Vardon's Trusts*, 31 Ch. D. 275.

⁸ *Re Waddington, Bacon v. Bacon*, W. N. [1897] 6.

SECTION 5.

Separate Property in Respect of which Liability exists.

This section deals with the property of a married woman which can be taken in execution to satisfy her liabilities.

The general engagements of a married woman could formerly only be enforced against so much of her separate estate to which she was entitled free from restraint upon anticipation at the time when the engagements were entered into, as remained at the time when the judgment was given, and not against the separate property to which she became entitled after the time of making the engagements, nor against separate property to which she was entitled at the time of making the engagements subject to a restraint on anticipation.¹ It was laid down in *King v. Lucas*² that, under the former state of the law, to have entered into a contract which could have been enforced against her, a married woman must have had some free property existing at the date of the contract. The reason for holding that only that separate property should be bound which was in existence at the time of making the contract was no doubt due to the early theory that the married woman intended to charge her separate estate specifically with the amount of her debts and engagements.

Separate property in respect of which liability exists. Formerly only property possessed at the time of entering into the engagement.

The Married Women's Property Act, 1882,³ provides that "every contract entered into by a married woman with respect to, and to bind her separate property, shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire." Section 19 of the same Act, as has been seen in the previous section, preserves the effect of the restraint upon anticipation, unless its operation is to withdraw property that ought to be taken to satisfy the claims of her creditors. The effect of these sections renders future-acquired property of a married woman without a restraint against anticipation upon it, or with a restraint that is improperly imposed on it, liable for her pre-existing debts which have been contracted since the Act came into force. But section 1, sub-section 4, is not retrospective in its operation.⁴

Property acquired after contract under M.W.P. Act, 1882.

Under this Act the married woman must have some free separate property at the date of the contract, to render it

Married woman must possess some free property at date of contract.

¹ *Pike v. Fitzgibbon*, 17 Ch. D. 454, overruling *Flower v. Buller*, 15 Ch. D. 665.

² 23 Ch. D. 712.

³ Sect. 1, sub-s. 4.

⁴ *Conolan v. Leyland*, 27 Ch. D. 632; *Turnbull v. Forman*, 15 Q. B. D. 234. *Bursill v. Tanner* (13 Q. B. D. 691), to the contrary held to be wrong.

enforceable against her;¹ if she has no free separate property at the time of entering into a contract, the future acquired property will not be bound by her previous engagement. It is not necessary that such free separate property should be of a large amount, or of any particular description, but she must reasonably be deemed to have contracted in respect of it.²

M.W.P. Act,
1893.
Existence of
separate
property not
necessary at
date of
contract.

But in respect of contracts made by a married woman after December 5, 1893,³ the existence of separate property at the time of making a contract is not necessary to its validity;⁴ and her after-acquired property is liable to be taken in execution in respect of such contract. The later Act repeals section 1, sub-section 4, of the Married Women's Property Act, 1882, and all the cases decided under that sub-section are no longer authorities as to contracts effected since the date of the coming into force of the recent Act; but the new provision is not retrospective, that is to say, the contract to bind a married woman must be altogether one made after the Act; and an acknowledgment after the Act of a contract made before the Act (though good enough for the Statute of Limitations) does not constitute a binding obligation upon her.⁵

Property
subject to a
restraint upon
anticipation
not liable.

Separate property, however, subject to a restraint against anticipation, was not liable for debts contracted by a married woman, and it was only as to property unaffected by this fetter that she was considered to be in all respects as a *feme sole*, so that all her property could be made liable to satisfy the claims of her creditors. It was not necessary under the Married Women's Property Act, 1882, at any rate so far as ante-nuptial liabilities of a married woman were concerned, to prove the existence of free separate property at the date of the judgment against her;⁶ and it cannot be now necessary since the passing of the Married Women's Property Act, 1893, in the case of both ante-nuptial and post-nuptial liabilities.

M.W.P. Act,
1882,
preserves the
effect of
restraint.

The Married Women's Property Act, 1882, does not interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument; but no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against

¹ *Pulliser v. Gurney*, 19 Q. B. D. 519; *Stogdon v. Lee*, [1891] 1 Q. B. 661. *Re Shakspear, Deakin v. Lakin*, 30 Ch. D. 169.

² *Harrison v. Harrison*, 13 P. D. 180; *Leake v. Driffield*, 24 Q. B. D. 98; *Braunstein v. Lewis*, 15 L. T. 449; *Everett v. Paxton*, 65 L. T. 383. See *ante*, chap. xiv. p. 293.

³ Date of the passing of 56 & 57 Vict. c. 63.

⁵ *Re Wheeler, Hankinson v. Hayter*, [1904] 2 Ch. 66.

⁶ *Downe v. Fletcher*, 21 Ch. D. 11.

⁴ Sect. 1 (a).

debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman, than a settlement or agreement for a settlement made or entered into by a man would have against his creditors.¹

The Married Women's Property Act, 1893,² also provides that "nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract, any separate property which at that time or thereafter she is restrained from anticipating." This proviso affects the whole of the preceding part of the section; and the words "at that time or thereafter" refer to the time of entering into the contract or to the period subsequent to the contract; therefore, any property acquired by a married woman subsequent to the making of the contract which she is restrained from anticipating is not available to satisfy any liability or obligation arising out of the contract; and this is so whether she be covert or discover when her liability is sought to be enforced.³ There is, then, no difference in the principle of the law before and after the late Acts with regard to separate property which a married woman is restrained from anticipating being rendered not liable for her engagements entered into during coverture, unless the restraint has been imposed by herself under such circumstances that the court would not give effect to it; though there is an exception to this proposition of law under the Act of 1893, in the case of an action or proceeding instituted by a married woman or a next friend on her behalf, in which the court may order the costs of the opposite party to be paid out of her property subject to such restraint.⁴ This provision is not retrospective,⁵ and does not apply to an appeal by her in an action in which she is a defendant.⁶ But the court has allowed the restraint to be removed to enable a married woman to pay the costs of an unsuccessful action instituted by her before the Act came into force.⁷ For what is and what is not an "institution" of an action or proceeding by a married woman rendering her restrained separate property liable or not liable see *ante*, p. 392.

The *corpus* of property settled to the separate use of a married woman subject to no restraint against anticipation is available to satisfy her liabilities, and may be taken in execution,⁸ and the

M.W.P. Act,
1893, also
preserves it;

except in case
of costs of an
improper
action by mar-
ried woman.

What property
may be taken.

¹ Sect. 19.

² Sect. I, proviso.

³ *Barnett v. Howard*, [1900] 2 Q. B. 784; *Brown v. Dimbleby*, [1904] 1 K. B. 28. The decision in *Barnett v. Howard*, so far as the construction of section 1 of this Act is concerned, is right; but it is submitted that it should have been to the contrary, on the ground that the property of the married woman was no longer separate property subject to the restraint as having reached her hands and so become liable to be taken in execution.

⁴ Sect. 2.

⁵ *Re Lumley, Ex parte Hood Barrs*, [1894] 3 Ch. D. 135.

⁶ *Hood Barrs v. Cathcart*, [1894] 3 Ch. 376.

⁷ *Re Godfrey, Thorne v. Godfrey*, 63 L. J. Ch. 854.

⁸ See *Norton v. Turvill*, 2 P. Wms. 144; *Picard v. Hine*, L. R. 5 Ch. App. 274.

settled separate property, equally with unsettled property, of a married woman, whether *corpus* or income, may be so taken.¹ Income or arrears arising from property subject to the restraint that have accrued due after the act that results in the liability of a married woman is free separate property, which can be attached when found in the hands of the married woman or of those holding it on her behalf.²

What not.

Income or arrears of income arising from separate estate so fettered accruing due previous to the act that constitutes her liability cannot be attached to make good that liability.³ As long as the fetter of the restraint exists her future separate income cannot be attached by the appointment of a receiver, for the appointment of such receiver is inconsistent with her disability to anticipate, or by sequestration, charging order, or any kind of process;⁴ also arrears of income that have accrued due after the date of the judgment against the married woman cannot be attached.⁵ But arrears of income which have accrued due at or before the date of the judgment (the material time), though they have not reached her hands, may be taken.⁶

Property coming to a married woman when discovert liable.

Section 1, sub-section (c), of the Married Women's Property Act, 1893,⁷ enacts: "Every contract hereafter entered into by a married woman . . . shall also be enforceable by process of law against all property which she may thereafter, while discovert, be possessed of or entitled to." The effect of this sub-section is to render property coming to a woman when discovert, which is neither strictly nor technically "separate property," liable under process of law for debts and contracts entered into by her during coverture. In equity and under the Married Women's Property Act, 1882, non-separate property was held not liable to make good her post-nuptial liabilities, and property accruing to her when discovert was not of the nature of separate estate (for the separate use implied a proprietary interest in the wife apart from that of the husband), unless she married again, and in consequence became her separate estate.⁸ In *Pelton (Bros.) v. Harrison*,⁹ Kay, L.J., held that section 1, sub-section 4, of the Married Women's Property Act, 1882, was not intended to make any property acquired by a woman when discovert or any property, though separate property, as to which during coverture she was restrained from anticipating liable to execution. A distinction is to be drawn between separate property

Distinction between former law and that under M.W.P. Act, 1893.

¹ *Re Armstrong, Ex parte Boyd*, 21 Q. B. D. 264.

² Per Cotton, L.J., in *Re Glanvill, Ellis v. Johnson*, 31 Ch. D. 532; *Hyde v. Hyde*, 13 P. D. 166.

³ *Re Glanvill, Ellis v. Johnson (ubi sup.)*.

⁴ *Hood Barrs v. Cathcart*, [1894] 2 Q. B. 559.

⁵ *Ibid.*

⁶ *Hood Barrs v. Heriot*, [1896] A. C. 174. See p. 393.

⁷ 56 & 57 Vict. c. 63.

⁸ See *Jay v. Robinson*, 25 Q. B. D. 467.

⁹ [1891] 2 Q. B. 427.

and non-separate property, and the proviso in section 1 of the later Act preserves the effect of a valid restraint upon anticipation;¹ therefore while all the separate property which under sub-section (c) of the same section is bound by her contracts must be free in its nature, the property acquired by her when discoverd cannot have this fetter laid upon it, but is free for all purposes, including the satisfaction of post-nuptial claims against her.² Thus, the general decision in the two cases of *Beckett v. Tasker*,³ and *Pelton (Bros.) v. Harrison*,⁴ to the effect that separate estate with a restraint against anticipation, belonging to the married woman when entering into a contract, whether imposed by a stranger or herself, is not property liable to satisfy a judgment in respect of such contract obtained when she is discoverd, remains the law;⁵ while the holding of Kay, L.J., in the latter case, that property acquired by a woman when discoverd is not liable to execution to satisfy contracts made by her during coverture is no longer law as regards contracts made after December 5, 1893.

There is another class of separate property which is, under certain circumstances, liable to satisfy the claims of a married woman's creditors, that is, property over which she has a general power of appointment by will or deed, or by will only. A general power of appointment by deed or will, unaccompanied by any restraint on anticipation, renders a married woman mistress of the fund over which she can exercise it, on the ground that in common sense and to common apprehension it is an absolute gift to her sole and separate use.⁶ So, too, where there is such general power of appointment with remainder on certain contingencies which are fulfilled.⁷ "The true view seems to be this, that for the purpose of giving effect to the general engagements of a married woman, if property is settled upon her for life with power to dispose of it by deed or will so as to be subject to her general engagements";⁸ and "if property is settled on her for her life, with power to dispose of it by deed or will; of course where there is no restraint on anticipation it is separate property, so as to be subject to such engagements."⁹ This rule has been applied where a particular power has been conferred upon a married woman, even where restrained from anticipating; for where a married woman tenant for life, without power of anticipation, had a special

Property subject to general power of appointment.

Particular power.

¹ See *Barnett v. Howard*, [1900] 2 Q. B. 784; *Brown v. Dimbleby*, [1904] 1 K. B. 28.

² Sub-sect. (c).

³ 19 Q. B. D. 10.

⁴ [1891] 2 Q. B. 427.

⁵ See *Softlaw v. Welch*, [1899] 2 Q. B. 419.

⁶ *London Chartered Bank of Australia v. Lemprière*, L. R. 4 P. C. 572. In this case *Shattock v. Shattock* (L. R. 2 Eq. 182) was dissented from. See *Jenney v. Andrews*, 6 Madd. 264.

⁷ *Mayd v. Field*, 3 Ch. D. 587.

⁸ Per Jessel, M.R., in *Mayd v. Field* (*ubi sup.*).

⁹ *Ibid.* 45 L. J. Ch. 704.

and particular power to direct repairs to be done and charged upon her estate, and she employed a person to execute them, she was held liable to pay the amount incurred, which was to be raised by a charge on her estate;¹ and it is immaterial whether the estate precedes the power or the power the estate.² This view is not really easy to reconcile with the principle of the decision in *Pike v. Fitzgibbon*³ before the Married Women's Property Act, 1882, and in *Palliser v. Gurney*,⁴ after that Act; viz., to render the contract of the married woman valid and binding she must possess free separate property at the time of entering into it; for, if at such a time she had no other property than that over which she possessed this general power of appointment, strictly speaking she was without any property at all, for the power over property is quite distinct from property itself.⁵

What limitations render property liable.

Property subject to the power is liable for her debts: (a) Where the limitations are to her for life for her separate use without restraint upon anticipation with remainder as she may appoint by deed or will with remainder to her heirs or assigns, or executors and administrators (as the case may be);⁶ and where the limitations are the same but are contingent on the happening of a certain event which has taken place, for such limitations amount to an absolute interest in the property;⁷ (b) where the limitations are to her for life for her separate use without restraint upon anticipation with remainder as she may appoint by deed or will, with remainder to third persons who are volunteers, and she executes the power in such a way as to make it her own separate estate, and previously to the accruing of the liabilities;⁸ (c) where the power of appointment is by will only, and the power is exercised in favour of her creditors, as by charging the property subject to the power with the payment of her debts.⁹

What limitations do not.

But the property is not subject to the payment of her debts and liabilities, where (a) there is a limitation to third persons in default of appointment and the power has not been exercised;¹⁰ (b) where the power is to be exercised by will only, and has been exercised by her but not for her creditors. The law on this subject has been quite unsettled. The cases of *Hughes v. Wells*,¹¹ *Re Harvey's Estate*, *Godfrey v. Harben*,¹² and *Hodges v. Hodges*,¹³ were

¹ *Skinner v. Todd*, 51 L. J. Ch. 198.

² *Mayd v. Field*, 3 Ch. D. 587.

³ 17 Ch. D. 454.

⁴ 19 Q. B. D. 519.

⁵ *Nail v. Punter*, 5 Sim. 555; *Re Armstrong, Ex parte Gilchrist*, 17 Q. B. D. 521.

⁶ *London Chartered Bank of Australia v. Lempière*, L. R. 4 P. C. 572.

⁷ *Mayd v. Field* (*ubi sup.*).

⁸ Farwell, on Powers (2nd edit.) 263. See *Re Roper, Doncaster v. Roper*, 39 Ch. D. 482.

⁹ *Owens v. Dickenson*, 4 Jur. 1151. *Re De Burgh Lawson, De Burgh Lawson v. De Burgh Lawson*, 41 Ch. D. 568.

¹⁰ See *Nail v. Punter* (*ubi sup.*); *Johnson v. Gallagher*, 30 L. J. Ch. 298; per Turner, L.J.

¹² 13 Ch. D. 216.

¹¹ 9 Ha. 749.

¹³ 20 Ch. D. 749.

Power of appointment by will only.

to the effect that it was liable; while *Sockett v. Wray*,¹ *Vaughan v. Vanderstegen*,² and *Shattock v. Shattock*,³ were to the opposite effect. Lastly, in *Re Roper, Doncaster v. Roper*,⁴ Kay, J., decided that a mere power is neither "property" nor "separate property," and held that the execution of a power of appointment by will over a fund by a married woman did not render it liable to satisfy her obligations incurred before the execution of the power and the date of the coming into force of the Married Women's Property Act, 1882. He also doubted whether, if such debts or obligations had been contracted after section 4 of the Act had come into force, but before the execution of the power by the married woman, the execution would have rendered the appointed property liable for debts incurred before the execution of the power because it is the execution of the power that renders the fund liable. If the married woman possessed no free separate property at the time of incurring liabilities, even assuming the appointed fund to be separate property subsequently acquired, it would not be bound because she was under no valid or effective liability.⁵ This case must be taken to have settled the law so far as cases not affected by the Married Women's Property Act, 1882.

Section 4 of that Act provides that "the execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act." These words are wide enough to make the property over which a married woman has exercised her power by will liable to satisfy her liabilities, even when, at the time of incurring them, she had no free separate property.⁶ The intention to exercise the power, though the purpose for which it was exercised fails, renders the execution effective, and the property subject to it liable for general debts.⁷

Under the Married Women's Property Act, 1893,⁸ this question is set at rest; for as under the above section of the Act of 1882 the execution of a power renders the appointed fund liable as though it were separate property, and such would be subsequently acquired property if execution followed the incurring of the liability; now, under sub-section (a) of section 1 of the Act of 1893, the existence of separate property at the time of incurring a debt or liability is not necessary to render

M.W.P. Act,
1882.

M.W.P. Act,
1893.

¹ 4 Bro. C. C. 483.

² 2 Dr. 165.

³ L. R. 2 Eq. 182.

⁴ 39 Ch. D. 482.

⁵ *Pike v. Fitzgibbon*, 17 Ch. D. 454.

⁶ *Re Ann, Wilson v. Ann*, [1894] 1 Ch. 459. It is clear that if at the time of entering into her liabilities she has free separate property, her execution of the general power of appointment by will renders the property bound.

⁷ *Re Hodgson, Darley v. Hodgson*, [1899] 1 Ch. 666.

⁸ 56 & 57 Vict. c. 63, s. 1, sub-s. (a).

subsequently acquired property liable to make good such liability, and it is immaterial whether the execution of such power precedes or not the incurring of the liability; consequently if a married woman having a general power of appointment over property by will only contracts debts and executes the power by her will, such property will become bound to satisfy her debts.

Direction to
pay debts
makes
property liable.

Where a married woman in executing the power directs that her debts shall be paid out of the appointed fund, such becomes assets for that purpose, though at the time of contracting the debts she was restrained from anticipating, and had no free separate property;¹ but even where she does not so charge the appointed fund with the payment of debts or funeral expenses, but exercises her power of appointment over it, her husband, if executor, will be entitled to charge her funeral expenses against the appointed fund.²

Appointed
fund liable for
ante-nuptial
obligations.

A fund over which a married woman possesses a general power of appointment which is executed by her, is liable to satisfy her *ante-nuptial* obligations.³ Though the court will not decree specific performance of a covenant or contract to have property by will entered into by a mere donee of a testamentary power of appointment, yet the covenantors are entitled to recover by way of damages from those in whose favour the married woman has executed the power in breach of her contract to the extent of the assets which would have come into the hands of the covenantors if the appointment had been actually made in their favour.⁴

Fund ap-
pointed by
will receivable
by executor or
adminis-
trator.

If the power is exercised by her will, the property affected by it is properly receivable, as the case may be, by her executor,⁵ or her administrator with the will annexed.⁶

SECTION 6.

Questions between Husband and Wife as to their Property.

Disputes as to
their respec-
tive property
between hus-
band and wife.

In case any dispute arise between husband and wife as to what is or is not their respective property, or between husband and wife and any bank, corporation, company, or society in whose books the property in dispute is standing, a summary method of dealing with and settling them is provided by the Act of 1882,⁷ which somewhat extends the provisions of section 9 of the Married Women's Property Act, 1870. The husband or wife, or the bank, corporation, &c., affected, "may apply by summons or

¹ *Re De Burgh Lawson, De Burgh Lawson v. De Burgh Lawson*, 41 Ch. D. 568.

² *Re McMyn, Lightbown v. McMyn*, 33 Ch. D. 575.

³ *Re Parkin, Hill v. Schwarz*, [1892] 3 Ch. 510.

⁴ *Ibid.*

⁵ *Re Hoskins' Trusts*, 6 Ch. D. 281.

⁶ *Re Peacock's Settlement, Kelcey v. Harrison*, [1902] 1 Ch. 552.

⁷ 45 & 46 Vict. c. 75, s. 17.

otherwise in a summary way, to any judge of the High Court of Justice in England, according as such property is in England or in Ireland, or (at the option of the applicant, irrespectively of the value of the property in dispute) in England to the judge of the County Court of the district, or in Ireland to the chairman of the Civil Bill Court of the division in which either party resides, and the judge of the High Court of Justice, or of the County Court, or the chairman of the Civil Bill Court (as the case may be), may make such order with respect to the property in dispute, and as to the costs of and consequent on the application, as he thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the matters in question to be made in such manner as he shall think fit.”¹ The application may be heard by the judge, &c., in his private room. The registrar of the Court of Probate has no jurisdiction to make the order;² but the claim by either spouse may be referred to him for his report by the judge of the Probate Court.³

The position of the bank, corporation &c., affected by the dispute is that of a stakeholder only.

Position of
bank, &c., that
of a stake-
holder only.

Now that all kinds of property, whether of much or little value, coming to a married woman form her separate estate, this section is likely to prove of considerable importance and application. It is intended to be applied where one of the spouses claims the title to or possession of property which is denied by the other, the one seeking to attach to it the quality of separate estate, and the other asserting that it is his property, unaffected by the rights of his wife. The questions most likely to arise are in cases where the husband, married to his wife before the Married Women's Property Act, 1882, alleges that a fraud was committed on his marital rights by his wife having withdrawn from him and settled property to which he was entitled. This is a complaint in which a husband married since January 1, 1883, can no longer indulge, for he does not possess any marital right in his wife's property. Also, in cases unaffected by the Act, where the husband reduces choses in action of the wife into possession, and she claims to be entitled to her equity to a settlement;⁴ also, such questions as whether the husband has or has not effectually reduced the wife's choses in action into possession. Also, where there have been savings by the wife, claimed by her as her own, and alleged by the husband to be the proceeds of his

¹ There are provisions in the section enabling the order of the judge, &c., to be appealed from, as in ordinary matters, and for removal by *certiorari* of the proceedings in the County Court or Civil Bill Court in the High Court of Justice in England or Ireland. See *post*, Appendix, p. 428.

² *Wood v. Wood and White*, 14 P. D. 157.

³ See *Tasker v. Tasker*, [1895] P. 1.

⁴ For the right of the wife to an equity to a settlement, see chap. x., Proprietary Rights of the Spouses in each other's Property created by Coverture, pp. 211 *et seq.*

own property, and to which his wife has no title, or where moneys have been appropriated by the wife without her husband's consent. The savings of a wife from an allowance made to her by her husband for household purposes, cannot without his consent be invested to her separate use,¹ unless she be living separate from him;² and where she is so living apart from him, he cannot recover them from her during her lifetime,³ but after her death he can claim them.⁴ So where after marriage moneys of the husband have been similarly appropriated without his consent, such moneys, and all investments thereof, will remain in equity his property.⁵ So also where a wife improperly sold chattels of her husband while he was insane and applied the proceeds to her own use his representatives recovered the value after her death from her estate.⁶ Proof by the wife that the proceeds were derived from her separate estate throws the burden of proof that they were the husband's on his representatives.⁷

Again, where separate property of the wife has come into the possession of the husband, she will be bound by her dealings in respect of it;⁸ and will obtain relief only on proof of fraud, duress, or the like, on the part of the husband.⁹ But the cause of dealing must be distinctly proved, and the intention of the wife to make over her property to her husband must be clear;¹⁰ whereas there must be corroborative evidence to establish a gift from husband to wife.¹¹ She may make a gift of her separate property to her husband for his own use, or that of the family or household,¹² but the *onus* lies upon the husband of proving that a gift was intended,¹³ and that he has not influenced her act and conduct.¹⁴ This *onus* is still likely to exist under the new law; and it may possibly be that a married woman will not be permitted to give a fund in court to her husband without having her consent first taken in court.¹⁵ There is, however, no presumption that a voluntary deed executed by a wife in favour of her husband and prepared by the husband's solicitor is invalid; and the *onus probandi* lies on the person who impugns the instrument and not on the person who supports it.¹⁶ She may expressly authorize or tacitly allow her husband to receive the income of her separate property, and if it be received for the

¹ *Barrack v. M'Culloch*, 5 W. R. 38.

² *Brooke v. Brooke*, 31 L. T. (O. S.) 244.

⁴ *Messenger v. Clarke*, 19 J. L. Ex. 306.

⁵ *Barrack v. M'Culloch* (*ubi sup.*).

⁶ *Williams v. Stretton*, 50 L. J. Ch. 495.

⁸ *Pawlet v. Delaval*, 2 Ves. 663.

¹⁰ *Rich v. Cockell*, 9 Ves. 369.

¹² *Gardner v. Gardner*, 1 Giff. 126.

¹⁴ *Hughes v. Wells*, 9 Ha. 749.

¹⁵ See *Wadsworth v. Dayrell*, 4 W. R. 689.

¹⁶ *Barrow v. Willis*, [1899] 2 Ch. 578.

³ *Ibid.*

⁷ *Ibid.*

⁹ *Essex v. Atkins*, 14 Ves. 542.

¹¹ *Grant v. Grant*, 13 W. R. 1057.

¹³ *Rich v. Cockell*, 9 Ves. at p. 375.

benefit of the family she can claim no reimbursement;¹ but where she has neither expressly nor tacitly authorized him to receive it, she will be allowed to recall it.² Ignorance of her rights is not to be taken as an assent on the part of the wife.³ Thus, where she was ignorant of an improper sale of her trust funds, her assent to her husband's receipt of subsequent dividends was not to be presumed.⁴

The husband is liable to give an account of the moneys he has with the consent of his wife received to her use;⁵ or where he has received them as her trustee and not as her husband. When husband
liable to
account for
wife's moneys. Where the wife has obtained a decree of judicial separation and claims certain property to be of her separate estate, such question may be litigated under this 17th section.⁷ Such questions as these will most frequently arise under this section, and be litigated between husband and wife. To judge by reported cases there has been but little litigation under this section.⁸

For the purposes of income tax the profits of any married woman living with her husband shall be deemed the profits of the husband, and the same shall be charged in the name of the husband, and not in her name or that of her trustee.⁹ Income tax
on wife's
profits. Where, therefore, husband and wife are in the receipt of a joint salary, the profits of the wife were rightly charged as the profits of the husband, and no deduction for the purpose of abatement or exoneration could be made, notwithstanding the Married Women's Property Act, 1882.¹⁰ Down to the present time it has been the practice of the Inland Revenue Department to treat the separate "profits" (including therein "income") of a married woman as part of the income of the husband where they were living together (whether such income was derived from business profits or investments), though to do so now is contrary to the spirit and letter of the Married Women's Property Act, 1882.¹¹ Finance Acts,
1894 and 1897. There is a partial recognition of this fact in the Finance Acts, 1894¹² and 1897;¹³ thus, under the earlier Act a separate income from some profession, employment, or vocation, or from any office or employment of profit, and the joint income of herself and her husband, whether by way of assessment or deduction, did not exceed £500, the claim of each for exemption or abatement was to be treated separately. This provision, however, allowed the revenue authorities

¹ *Powell v. Hankey*, 2 P. Wms. 82; *Caton v. Rideout*, 1 Mac. & G. 599.

² *Parker v. Brooke*, 9 Ves. 583.

³ Per Jessel, M.R., in *Dixon v. Dixon*, 9 Ch. D. 592.

⁴ *Dixon v. Dixon* (*ubi sup.*).

⁵ *Darbin v. Darbin*, 22 L. T. (O. S.) 278.

⁶ *Dixon v. Dixon* (*ubi sup.*).

⁷ *Phillips v. Phillips*, 13 P. D. 220.

⁸ See *ante* p. 253.

⁹ 5 & 6 Vict. c. 35, s. 45.

¹⁰ *Bowers v. Harding*, [1891] 1 Q. B. D. 560.

¹¹ It is true that the recent Married Women's Property Act, 1893, is silent on this point. It would no doubt be contended on behalf of the Crown that the general terms of an earlier Act are not repealed by implication by the general provisions of a later Act.

¹² 57 & 58 Vict. c. 30, s. 34 (2).

¹³ 60 & 61 Vict. c. 24, s. 5.

to treat after the abatement the several incomes as one and indivisible, and charge the tax on the joint total. But the Finance Act of 1897 (repealing section 34 (sub-section 2) of 57 & 58 Vict. c. 30) carries further the relief of a married woman, whose income jointly with that of her husband does not exceed £500; for where the total joint income of a husband and wife charged to income tax, by way either of assessment or deduction, does not exceed £500, and such income includes profits of the wife from any business¹ carried on or exercised by means of her personal labour, and the rest or part of the joint income accrues from the profits of a business carried on by the husband apart from and unconnected with his wife, such income of the wife shall be dealt with in respect of her claim for exemption or abatement, as separate from that of the husband. If, however, the husband derives an income from his wife's business, it is to be treated as part of her income. This latter provision puts husband and wife on an equality up to the £500 limit; for heretofore the wife's income from whatever source derived has been added to the husband's; now if the business is principally the wife's, his profits derived from it are to be added to and treated as hers.

Under the Finance Act of 1894,² if a husband or wife is entitled, either solely or jointly with the other, to the income of any property settled by the other under a disposition which has taken effect before the Act came into force, and on the death of one of them the survivor becomes entitled to the income of the property settled by such survivor, estate duty is not payable in respect of such property until the death of the survivor. But this exemption from the operation of the Act does not apply where husband or wife takes the *corpus* as well as the income on the death of the other spouse.³

Liability of husband and wife to pay estate duty.

SECTION 7.

Remedies of Married Women in Respect of their Property.

Married women have very full remedies given them for the protection and security of their property.⁴ They have complete civil remedies against all persons, including husbands, for injuries done to their property. This power to sue in respect of her separate property is not of novel origin, and was long recognized in the courts of equity, and extended by the Married Women's Pro-

¹ "Business" here means any profession, trade, employment or vocation, or any office or employment of profit. 60 & 61 Vict. c. 24, s. 5, sub-s. 2.

² Sect. 21, sub-s. 5.

³ *Att.-Gen. v. Strange*, [1898] 2 Q. B. 39.

⁴ 45 & 46 Vict. c. 75, s. 12.

Remedies of married women in respect of their property. Civil remedies. Full redress.

erty Act, 1870,¹ and still further enlarged by the later Act of 1882. The words "protection and security of her own separate property" have been construed to mean that a married woman may bring an action to secure her property from risk of loss, but not against its being injured or diminished by some breach of obligation or wrongful act of third parties. Thus, a married woman carrying on a separate business² has been held entitled to sue her bankers for a breach of contract for not presenting a bill of exchange drawn by her on the bankers; for not giving notice to her of a bill of exchange intrusted to them; and for dishonouring a cheque drawn by her upon them, they having at the time sufficient funds belonging to her to meet it.³ So, too, she is enabled to sue in tort, as for a libel upon her trade or business,⁴ under the provisions of sub-section 2 of section 1 of the act of 1882. A married woman will doubtless be held entitled to have specific performance of the contracts entered into by her;⁵ and to injunctions restraining injury or prospective injury to her property she is clearly entitled.⁶

Entitled to specific performance.

As it has been held that a married woman is no longer under the disability of coverture in respect of bringing actions for personal wrongs done to her,⁷ it seems more than probable that she will now be deemed to be discovert for the purpose of enforcing her claims to real property, and will no longer be excepted from the provisions of the Real Property Limitation Act, 1874⁸; but must prosecute her claim within twelve years after the right to it shall have accrued to her.

Statute of Limitations probably now runs against married woman in respect of claims to real property.

A married woman can sue both in contract and in tort connected with her property, not only strangers, but her husband, as for the return of property wrongfully detained by him⁹ but she cannot sue him for a personal tort; neither can he sue her for the like.¹⁰ She cannot sue him after divorce for a personal tort (as, for instance, assault, or libel, or slander), committed against her during marriage.¹¹ She can obtain an injunction restraining her husband from interfering with her separate business,¹² and even from entering her house, though she resides there;¹³ but if the house be the matrimonial domicile

Married woman can sue in tort strangers, and husband, where connected with property; but not husband for personal tort.

¹ Per Jessel, M.R., *Howard v. Bank of England*, L. R. 19 Eq. 295.

² Her right to sue in such a case does not now depend upon her carrying on a trade apart from her husband; but she has a general right of action to protect and secure all her property.

³ *Summers v. The City Bank*, L. R. 9 C. P. 580.

⁴ *Ramsden v. Brearley*, L. R. 10 Q. B. 147.

⁵ See Fry, Sp. Perf. 686-690, and chap. xiv. p. 289.

⁶ *Warne v. Routledge*, L. R. 18 Eq. 497.

⁷ See *Lowe v. Fox*, 15 Q. B. D. 667.

⁸ 37 & 38 Vict. c. 57, s. 3.

⁹ *Larner v. Larner*, [1905] 2 K. B. 539. See *ante*, p. 253.

¹⁰ 45 & 46 Vict. c. 75, s. 12.

¹¹ *Phillips v. Barnett*, 1 Q. B. D. 440.

¹² *Green v. Green*, 5 Ha. 400 n; *Wood v. Wood*, 19 W. R. 1047.

¹³ *Symonds v. Hallett*, 24 Ch. D. 346.

it is doubtful whether she would be able to turn her husband out of doors and keep him there; at any rate, the courts would not lend her much assistance in the matter.¹ Where she is living away from him in her own house, he cannot authorize any person to enter the house without her consent.²

Power of the Court of Chancery to exclude husband from house forming matrimonial domicil, if belonging to wife; *quere*.

It seems more than doubtful whether the Court of Chancery can exercise a jurisdiction which is tantamount to an interruption of the matrimonial tie. It is on this ground that it is submitted with all deference that the Vice Chancellor of England, in *Green v. Green*,³ went too far in putting in force the jurisdiction of the court. The question that the Court of Equity can decide is concerned with the separate property of the married woman, and its protection. But when the house, which is the matrimonial domicil, happens to be the separate property of the wife, her husband is no more a stranger to it than the wife is a stranger in her husband's house; and the common law right of the husband to live and cohabit with his wife is paramount to any mere proprietary right of the wife. The husband has no legal right to turn his wife out of doors, save for adultery, nor has the wife any equitable right to do so. It is not in the power, it is confidently urged, of the Court of Chancery to bring about a state of things which calls for redress in the Divorce Court; that is, one court may aid and assist in a wrong which another court has to set right; which is a *reductio ad absurdum*. Where the house is not the matrimonial domicil, questions of another character are involved. But the above case goes to the full length pointed out.

Criminal remedies against strangers.

A married woman has also full criminal remedies against those who bring themselves within the criminal law in dealing with her property, whether by way of larceny or otherwise. A startling innovation has been made in the law on this subject by the Act of 1882;⁴ a wife now is able to prosecute her husband, not only for personal violence, but for wrongful dealings on his part with her property, amounting to a felony or misdemeanour. There is certainly a limitation to her capacity for instituting criminal proceedings against her husband, namely, that they shall not be taken against him while they are living together as husband and wife, nor when living apart, in respect of any act done

Against husband.

¹ *Symonds v. Hallet*, 24 Ch. D. 346. See the remarks of the Lord Justices of Appeal in *Symonds v. Hallett* (*ubi sup.*). The court continued the injunction granted by Chitty, J., against the husband entering his wife's house, solely on the ground that there was a suit at her instance for a dissolution of marriage by reason of his adultery and cruelty, which if terminating in her favour would render the consideration of the mere proprietary question unnecessary.

² *Weldon v. De Bathe*, 14 Q. B. D. 339.

³ 5 Ha. 400 n. It may not be amiss to notice that this case was not regularly reported at the time the decision was given; and is only recorded by way of a note.

⁴ 45 & 46 Vict. c. 75, s. 12.

by the husband while they were living together concerning the property so claimed by her. The wrongful act must be done by the husband when leaving or deserting, or about to leave or desert his wife,¹ and it is no offence for a husband to take his wife's money while they are living together,² and to impute to him such conduct is not an actionable slander *per se*.³

In any indictment, or other proceeding taken by the wife to protect her property, it will be enough to allege such property to be her property.

As a just and necessary set-off to the liability of the husband, it is now provided that "a wife doing any act with respect to any property of her husband, which if done by the husband with respect to property of the wife, would make the husband liable to criminal proceedings by the wife under this Act, shall in like manner be liable to criminal proceedings by her husband."⁴ As ancillary to these new powers and capacities given to married persons, husband and wife are now rendered competent and compellable witnesses against each other in these criminal proceedings.⁵

Liability of wife to criminal proceedings.

Husband and wife competent witnesses against each other.

SECTION 8.

Pin-money and Paraphernalia.

Pin-money.—The law on the subject of pin-money may well be treated of under the heading of separate estate, for though not separate estate in the full legal intendment of that phrase, yet it partakes somewhat of its nature. Its importance has diminished as that of separate estate has increased, and it is now nearly altogether merged in the latter.⁶

Pin-money.

The following description and remarks show the shadowy nature of the distinction between pin-money and separate estate.

Description of pin-money.

¹ What interpretation is to be put upon the word "desert"; that applied under the poor-law statutes, or that under the Matrimonial Act, or the popular sense of the word? It is difficult to appreciate the meaning of the words "about to leave or desert," for unless the husband has left, or is in the act of leaving the wife, after wrongfully dealing with her property, they are living together, and she is debarred from instituting criminal proceedings against him. The act of the husband in removing her separate property out of the custody or possession of the wife may be tortious, but does not become sufficiently criminal till the leaving or deserting has taken place. Surely the leaving or deserting must be evidenced by some overt act on the part of the husband; it is not enough that suspicion lurks in the bosom of a jealous wife. Take as an illustration of the contention—A husband, living with his wife, improperly sends furniture (the wife's property) to a warehouse or another house, with the intention (not openly expressed) of leaving his wife at a favourable opportunity, and using the furniture himself. It is submitted, under these circumstances, the wife could not maintain criminal proceedings against the husband, for they are living together, and his mere *intention* to desert her could never be proved, even if evidence on that point would be admissible in criminal proceedings.

² *Lemon v. Simmons*, 57 L. J. Q. B. 260.

³ *Ibid*.

⁴ 45 & 46 Vict. c. 75, s. 16; 47 & 48 Vict. c. 14, s. 1.

⁵ Sect. 12; 47 & 48 Vict. c. 14, s. 1.

⁶ In America it is of little practical importance. Bish. Laws of Married Women, s. 229.

"Pin-money is with respect to the personal expense of the wife, for the dress and pocket-money of the wife; its very name implies a connection with the person; it means that which goes to deck the person of the wife; and, as I should say, upon a somewhat larger construction, to pay her ordinary expenses. It is a fund which she may be made to spend during the coverture by the intercession and advice, and at the instance of her husband."¹ "You cannot get from the books even a definition of pin-money upon which you can rely; you cannot trace the line which divides it from the separate property of the wife with any distinctness; and as to authority, either as to decisions or dicta of text-writers, or of judges, there is nothing that furnishes a clear and steady light on the subject, many cases running from pin-money into separate estate, and from separate estate into pin-money, in such a way that when a text-writer quotes a case, *Brodie v. Barry* (2 Ves. & B. 36; 2 Rop. H. & W. 133), for instance, in support of a doctrine touching pin-money, you look at the book, and find it has nothing to do with pin-money, and does not support the proposition for which it is cited."²

Distinction
between pin-
money and
separate
estate.

A rough distinction may be drawn between pin-money and separate estate on the basis of the application and destination of the property. Where the amount settled on the wife is specifically described as pin-money, or from the words used can be taken to be of the nature of pin-money, then it will be so held to be. Pin-money may be taken to be that competency settled upon a woman to be employed by her in the ornament and decoration of her person, and general expenses incidental to the position of one having considerable control over the family and household arrangement; and where the settled fund is pin-money, there seems to be a *duty* on the wife to devote it to the objects for which it was secured to her apart from her husband's control, which is otherwise with separate estate which belongs to her absolutely, while pin-money does not.³ Another distinction is observable in the matter of arrears. Where it is pin-money, the wife cannot claim for more than the arrears of one year, or a year and a fraction, preceding the husband's death, and her representatives not at all, though she may have been insane for many years, and it was secured by an ante-nuptial settlement; whereas if it be separate estate, her right of recovery and that of her representatives is not so limited.⁴ So, too, a wife is unable

¹ Per Lord Brougham, C., in *Howard v. Digby*, 2 Cl. and F. 634, 677.

² *Ibid.* 2 Cl. and F. 670.

³ *Howard v. Digby* (*ubi sup.*).

⁴ *Ibid.* Lord St. Leonards (in his Law of Property as administered in the House of Lords, pp. 166 *et seq.*) doubts the correctness of this decision. On this point he lays down the right principle to be that where the husband, bound by the terms of his settlement to allow his wife's pin-money, does not for some reason or other pay it to her, but spends it in the manner in which it would have been spent by the wife if she had had control of the money, *e.g.*, in paying her personal and

to assign or effectually dispose of her pin-money, whereas over her separate property she has a complete right of disposition, unless specifically restrained.

If the allowance given by the husband for pin-money, or Savings. separate maintenance, has been so ample as to enable the wife to accumulate savings out of it, these, with whatever she may have purchased with them, will be at her own disposal by will or otherwise.¹ But to render her claim to the savings indefeasible, the property so acquired by the wife must have been either settled on her as her separate property, or the husband must clearly have engaged to hold it as trustee for her separate use.²

The principle upon which the wife's right to arrears is limited Arrears. is, that it is a fund which the husband has agreed to provide for a specific purpose, namely, the suitable support of his wife, and if there are arrears of it, it is presumed that she has been furnished from time to time by her husband with the necessary means for providing those things which it was intended should be provided by the pin-money, and so the husband might be saddled with a double liability, for he would be liable not only to pay her debts, but also to satisfy her claims against him for pin-money; accordingly, she is prevented from claiming arrears for a longer period than a year, or a year and a fraction of a year. If her husband has provided her with dress, &c., she cannot recover at his death even a year's arrears.³ This presumption is, however, negatived where she has lived with him, and payment has been frequently demanded of him, and he has promised to satisfy her demands;⁴ or she has been dwelling apart from him, and without having any allowance made her.⁵ Under these circumstances an account will be decreed as far back as the arrears go.

Paraphernalia.—The term “paraphernalia” (*bona para-* Paraphernalia. *phernalia*) is derived from the Greek word *παράφερνα*, and signifies something reserved to the wife over and above her dotal portion. It includes the personal apparel and ornaments What is included. possessed and used by her during coverture, and which are suitable to her rank and condition in life.⁶ The question of

household expenses, in subscriptions to charities which she was in the habit of supporting, and the like, all such legitimate payments ought to be set off against any claim by the wife for arrears. His lordship adds that the refusal of the House of Lords to entertain the claim of the wife's representatives, at any rate for the arrears of a year, was not supported by the principles of equity, or of the decided cases, for what the wife could rightly claim her representative was empowered to demand.

¹ *Sir Paul Neal's Case*, Prec. Ch. 45.

² *M'Lean v. Longlands*, 5 Ves. 79.

³ *Fowler v. Fowler*, 3 P. Wms. 355; see also *Howard v. Digby* (*ubi sup.*).

⁴ *Aston v. Aston*, 1 Ves. 267.

⁵ *Ridout v. Lewis*, 1 Atk. 269.

⁶ 2 Bl. Com. 435.

paraphernalia can only arise on the death of the husband; and herein lies a marked distinction between what is paraphernalia and what is separate property. As to personal ornaments, the husband's possession of them makes no difference, provided the wife wore them at intervals; it is enough if she used them from time to time, such as birthdays,¹ or on public occasions.² Their value is immaterial, so long as they are suitable to her rank and degree.³ But the widow cannot claim as paraphernalia articles which are in fact heirlooms,⁴ such as old family jewels of her husband's family which she has been allowed to wear.⁵

Wife entitled to retain paraphernalia for her own use.

She is entitled to retain her paraphernalia for her own use, on the principle that the death of her husband should not leave her without the ordinary necessities of life, or surroundings suitable to her rank and condition. At law her husband may dispose of his wife's paraphernalia, excepting her necessary apparel, and with like exception they are liable to the claims of his creditors.⁶ The husband cannot "devise by his will such ornaments and jewels of his wife,"⁷ though during his life he hath the power (if unkindly inclined to exert it) to sell them or give them away."⁸ Thus, they are not to be considered as belonging to the wife during coverture for her separate use, for her right of property in them does not vest in her till the death of her husband.⁹ The right of the wife to her paraphernalia is purely personal, and if she does not make the claim to them in her lifetime, no right will vest in her executor or administrator¹⁰ and her right may be barred by a provision before marriage in lieu of it.¹¹

Right of wife is purely personal.

Distinction between paraphernalia and separate estate.

There is a distinction upon this subject of paraphernalia which is entitled to consideration. Where the husband, either before or after marriage, gives to his wife articles of paraphernal nature, they are not treated as absolute gifts to her, as her own separate property; for if they were, she might dispose of them at any time, and he could not appropriate them to his own use. But they are deemed as, technically, paraphernalia, to be worn by the wife as ornaments of her person; and so to be deemed gifts *sub modo* only.¹² But, if the like articles were bestowed upon her by a father or by a relative, or even by a stranger,

¹ *Northey v. Northey*, 2 Atk. 77.

² *Graham v. Lord Londonderry*, 3 Atk. 394.

³ *Northey v. Northey* (*ubi sup.*).

⁴ *Calmady v. Calmady*, 11 Vin. Abr. pl. 21; *Jerroise v. Jerroise*, 17 Beav. 566.

⁵ *Laing v. Walker*, 64 L. T. 527.

⁶ *Graham v. Lord Londonderry* (*ubi sup.*).

⁷ *Tipping v. Tipping*, 1 P. Wms. 729.

⁸ 2 Bl. Com. 436.

⁹ *Ridout v. Earl of Plymouth*, 2 Atk. 104.

¹⁰ *Clarges v. Duchess of Albemarle*, 2 Vern. 245

¹¹ *Read v. Sewell*, 2 Atk. 642.

¹² *Graham v. Lord Londonderry* (*ubi sup.*).

before or after marriage, they would be deemed absolute gifts to her separate use; and then if received with the consent of her husband, he could not, nor could his creditors, dispose of them any more than they could of any other property received and held to her separate use.¹ But if proof is forthcoming that the husband made to his wife gifts of jewelry and other matters of personal adornment to be her own separate property, he will not be entitled to recall them.² So, too, wedding presents given to a woman in contemplation of marriage belong to her for her separate use, and will not pass on the bankruptcy of her husband to his trustee unless it is clear that such were intended to be given to the husband so as to be liable for his debts.³

The widow's paraphernalia are liable to satisfy the debts of her deceased husband if his assets prove insufficient to meet them,⁴ even though they had been given to her before marriage.⁵ If the husband had not disposed of the paraphernalia absolutely, as he might do, but has merely given them in pledge, after his debts have been provided for, she will be entitled to have his assets applied to the redemption of the articles so pledged.⁶ If it has become necessary to resort to the paraphernalia to pay the husband's debts, the wife will be a creditor for their value, and his assets will be marshalled in her favour.⁷ "The widow of a deceased person is entitled to her paraphernalia without regard to any bequest of them which her husband may have made, but subject to the payment of his debts. If, therefore, any creditor should have seized upon the wife's paraphernalia, equity, out of regard for her claims, will so marshal the assets as to allow her to be recouped out of *any part* of her husband's property,"⁸ except, perhaps, real estate which may have been specifically devised prior to the statute 3 & 4 Wm. IV. c. 105;⁹ but since this statute, it would seem that this exception would not be made, for the wife, as to her paraphernalia, is in a position similar to that of a simple contract creditor,¹⁰ and such a creditor may now claim to be paid out of any part of the property of the deceased.¹¹

When assets
of husband
marshalled in
favour of wife.

¹ Story, Eq. Jur. s. 1377. Of course jewels and other personal ornaments settled to the wife's separate use, and forming part of the separate estate, will be liable to be taken in execution by her own creditors. *Mercier v. Williams*, 9 Q. B. D. 337; 10 App. Cas. 1. See *Grant v. Grant*, 34 L. J. Ch. 641; and chap. xiv., Contracts by Married Women, sub-s. 2, Gifts between Husband and Wife.

² *Bashall v. Bashall*, 11 Times Rep. 152.

³ *Re Jamieson. Ex parte Pannell v. Jamieson*, 60 L. T. 152.

⁴ *Boytun v. Boyntun*, 1 Cox, Eq. Cas. 106.

⁵ *Ridout v. Lord Plymouth* (*ubi sup.*).

⁶ *Graham v. Lord Londonderry* (*ubi sup.*).

⁷ *Aldrich v. Cooper*, 8 Ves. 397.

⁸ *Northey v. Northey* (*ubi sup.*), as against the heir taking by descent; *Snelson v. Corbet*, 3 Atk. 369, and devisees of land devised for payment of debts; *Boytun v. Boyntun* (*ubi sup.*).

⁹ *Probert v. Clifford*, Amb. 6.

¹⁰ *Lord Townshend v. Windham*, 2 Ves. Sen. 7.

¹¹ *Williams, Real Property Assets*, 118.

Wife's claim
superior to
those of
volunteers.

The wife's right to paraphernalia is superior to the claims of legatees, which are merely voluntary.¹

Notwithstanding the change effected by the Married Women's Property Act, 1882, in this branch of the law, if an express gift is made by a husband to his wife of jewels and other personal ornaments to be worn by her as his wife, such ornaments would be deemed to be "paraphernalia" only; for that Act has not abolished the general law affecting paraphernalia.² But, as before pointed out, nowadays a gift from husband to wife will *prima facie* be deemed a gift out and out to the wife's separate use, and none of the attributes of "paraphernalia" would be held to attach to it.³ But whether such gifts are to be treated as out and out presents to the wife or as paraphernalia will depend upon the facts of each case.

¹ See *Tipping v. Tipping*, 1 P. Wms. 729, and *Graham v. Lord Londonderry*, 3 Atk. 394.

² *Tasker v. Tasker*, [1895] P. 1.

³ *Tasker v. Tasker* (*ubi sup.*). See *Bashall v. Bashall*, 11 Times Rep. 152.

APPENDIX.

MARRIED WOMEN'S PROPERTY ACT, 1882.

45 & 46 VICT. c. 75.

An Act to consolidate and Amend the Acts relating to the Property of Married Women. [18th August, 1882.]

WHEREAS it is expedient to consolidate and amend the Act of the thirty-third and thirty-fourth Victoria, chapter ninety-three, intituled, "The Married Women's Property Act, 1870," and the Act of the thirty-seventh and thirty-eighth Victoria, chapter fifty, intituled, "An Act to amend the Married Women's Property Act, 1870":—

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows:—

1. (1) A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing, by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee.

Married woman to be capable of holding property and of contracting as a *feme sole*.

(2) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise.

(3) *Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown.* [Repealed by Married Women's Property Act, 1893, s. 4]

(4) *Every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire.* [Repealed by Married Women's Property Act, 1893, s. 4.]

(5) Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a *feme sole*.

2. Every woman who marries after the commencement of this Act shall be entitled to have and to hold as her separate property and to dispose of in manner aforesaid all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill.

3. Any money or other estate of the wife lent or intrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise, shall be treated as assets of her husband's estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the amount or value of such money or other estate after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied.

4. The execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act.

5. Every woman married before the commencement of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act, including any wages, earnings, money, and property so gained or acquired by her as aforesaid.

6. All deposits in any post office or other savings bank, or in any other bank, all annuities granted by the Commissioners for the Reduction of the National Debt or by any other person, and all sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England, or of any other bank, which at the commencement of this Act are standing in the sole name of a married woman, and all shares, stock, debentures, debenture stock, or other interests of or in any corporation, company, or public body, municipal, commercial, or otherwise, or of or in any industrial, provident, friendly, benefit, building or loan society, which at the commencement of this Act are standing in her name, shall be deemed, unless and until the contrary be shown, to be the separate property of such married woman; and the fact that any such deposit, annuity, sum forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England or of any other bank, share, stock, debenture, debenture stock, or other interest as aforesaid, is standing in the sole name of a married woman, shall be sufficient *prima facie* evidence that she is beneficially entitled thereto for

Property of a woman married after the Act to be held by her as a *feme sole*.

Loans by wife to husband.

Execution of general power.

Property acquired after the Act by a woman married before the Act to be held by her as a *feme sole*.

As to stock, &c., to which a married woman is entitled.

her separate use, so as to authorize and empower her to receive or transfer the same, and to receive the dividends, interest, and profits thereof, without the concurrence of her husband, and to indemnify the Postmaster-General, the Commissioners for the Reduction of the National Debt, the Governor and Company of the Bank of England, the Governor and Company of the Bank of Ireland, and all directors, managers, and trustees of every such bank, corporation, company, public body, or society as aforesaid, in respect thereof.

7. All sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Bank of England, or of any other bank, and all such deposits and annuities respectively as are mentioned in the last preceding section, and all shares, stock, debentures, debenture stock, and other interests of or in any such corporation, company, public body, or society as aforesaid, which after the commencement of this Act shall be allotted to or placed, registered, or transferred in or into or made to stand in the sole name of any married woman, shall be deemed, unless and until the contrary be shown, to be her separate property in respect of which so far as any liability may be incident thereto her separate estate shall alone be liable, whether the same shall be so expressed in the document whereby her title to the same is created or certified, or in the books or register wherein her title is entered or recorded, or not.

As to stock, &c., to be transferred, &c., to a married woman.

Provided always, that nothing in this Act shall require or authorize any corporation or joint-stock company to admit any married woman to be a holder of any shares or stock therein to which any liability may be incident, contrary to the provisions of any Act of Parliament, charter, by-law, articles of association, or deed of settlement regulating such corporation or company.

8. All the provisions hereinbefore contained as to deposits in any post office or other savings bank, or in any other bank, annuities granted by the Commissioners for the Reduction of the National Debt or by any other person, sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Bank of England or of any other bank, shares, stock, debentures, debenture stock, or other interests of or in any such corporation, company, public body, or society as aforesaid respectively, which at the commencement of this Act shall be standing in the sole name of a married woman, or which, after that time, shall be allotted to, or placed, registered, or transferred to or into, or made to stand in, the sole name of a married woman, shall respectively extend and apply, so far as relates to the estate, right, title, or interest of the married woman, to any of the particulars aforesaid which, at the commencement of this Act, or at any time afterwards, shall be standing in, or shall be allotted to, placed, registered, or transferred to or into, or made to stand in, the name of any married woman jointly with any persons or person other than her husband.

Investments in joint names of married women and others.

9. It shall not be necessary for the husband of any married woman, in respect of her interest, to join in the transfer of any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any

As to stock, &c., standing in the joint names of a married woman and others.

share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society as aforesaid, which is now or shall at any time hereafter be standing in the sole name of any married woman, or in the joint names of such married woman and any other person or persons not being her husband.

Fraudulent
investments
with money
of husband.

10. If any investment in any such deposit or annuity as aforesaid, or in any of the public stocks or funds, or in any other stocks or funds transferable as aforesaid, or in any share, stock, debenture, or debenture stock of any corporation, company, or public body, municipal, commercial, or otherwise, or in any share, debenture, benefit, right, or claim whatsoever in, to, or upon the funds of any industrial, provident friendly, benefit, building, or loan society, shall have been made by a married woman by means of moneys of her husband, without his consent, the court may, upon an application under section seventeen of this Act, order such investment, and the dividends thereof, or any part thereof, to be transferred and paid respectively to the husband; and nothing in this Act contained shall give validity as against creditors of the husband to any gift, by a husband to his wife, of any property, which, after such gift, shall continue to be in the order and disposition or reputed ownership of the husband, or to any deposit or other investment of moneys of the husband made by or in the name of his wife in fraud of his creditors; but any moneys so deposited or invested may be followed as if this Act had not passed.

Moneys
payable under
policy of
assurance not
to form part of
estate of the
insured.

11. A married woman may by virtue of the power of making contracts hereinbefore contained effect a policy upon her own life or the life of her husband for her separate use; and the same and all benefit thereof shall inure accordingly.

A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts: Provided, that if it shall be proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, they shall be entitled to receive, out of the moneys payable under the policy, a sum equal to the premiums so paid. The insured may by the policy, or by any memorandum under his or her hand, appoint a trustee or trustees of the moneys payable under the policy, and from time to time appoint a new trustee or new trustees thereof, and may make provision for the appointment of a new trustee or new trustees thereof, and for the investment of the moneys payable under any such policy. In default of any such appointment of a trustee, such policy immediately on its being effected, shall vest in the insured and his or her legal personal representatives, in trust for the purposes aforesaid. If, at the time of the death of the insured, or at any time afterwards, there shall be no trustee, or it shall be expedient to appoint a new trustee or new trustees, a trustee or

trustees or a new trustee or new trustees may be appointed by any court having jurisdiction under the provisions of the Trustee Act, 1850, or the Acts amending and extending the same. The receipt of a trustee or trustees duly appointed, or, in default of any such appointment, or in default of notice to the insurance office, the receipt of the legal personal representative of the insured, shall be a discharge to the office for the sum secured by the policy, or for the value thereof, in whole or in part.

12. Every woman, whether married before or after this Act, shall have in her own name, against all persons whomsoever, including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*, but except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. In any indictment or other proceeding under this section it shall be sufficient to allege such property to be her property; and in any proceeding under this section a husband or wife shall be competent to give evidence against each other, any statute or rule of law to the contrary notwithstanding: Provided always, that no criminal proceeding shall be taken by any wife against her husband by virtue of this Act while they are living together, as to or concerning any property claimed by her, nor while they are living apart, as to or concerning any act done by the husband while they were living together, concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife.

Remedies of married woman for protection and security of separate property.

13. A woman after her marriage shall continue to be liable in respect and to the extent of her separate property for all debts contracted, and all contracts entered into or wrongs committed by her before her marriage, including any sums for which she may be liable as a contributory, either before or after she has been placed on the list of contributories, under and by virtue of the Acts relating to joint-stock companies; and she may be sued for any such debt and for any liability in damages or otherwise under any such contract, or in respect of any such wrong; and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property; and as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts, contracts, or wrongs, and for all damages or costs recovered in respect thereof: Provided always, that nothing in this Act shall operate to increase or diminish the liability of any woman married before the commencement of this Act for any such debt, contract, or wrong, as aforesaid, except as to any separate property to which she may become entitled by virtue of this Act, and to which she would not have been entitled for her separate use under the Acts hereby repealed or otherwise, if this Act had not passed.

Wife's ante-nuptial debts and liabilities.

14. A husband shall be liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her, before marriage, including any liabilities to which she may be so subject under

Husband to be liable for his wife's debts contracted

before marriage to a certain extent.

the Acts relating to joint-stock companies as aforesaid, to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bonâ fide* recovered against him in any proceeding at law, in respect of any such debts, contracts, or wrongs for or in respect of which his wife was liable before her marriage as aforesaid; but he shall not be liable for the same any further or otherwise; and any court in which a husband shall be sued for any such debt shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, or value of such property: Provided always, that nothing in this Act contained shall operate to increase or diminish the liability of any husband married before the commencement of this Act for or in respect of any such debt or other liability of his wife as aforesaid.

Suits for antenuptial liabilities.

15. A husband and wife may be jointly sued in respect of any such debt or other liability (whether by contract or for any wrong) contracted or incurred by the wife before marriage as aforesaid, if the plaintiff in the action shall seek to establish his claim, either wholly or in part, against both of them; and if in any such action, or in any action brought in respect of any such debt or liability against the husband alone, it is not found that the husband is liable in respect of any property of the wife so acquired by him or to which he shall have become so entitled as aforesaid, he shall have judgment for his costs of defence, whatever may be the result of the action against the wife if jointly sued with him; and in any such action against husband and wife jointly, if it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband personally and against the wife as to her separate property; and as to the residue, if any, of such debt and damages, the judgment shall be a separate judgment against the wife as to her separate property only.

Act of wife liable to criminal proceedings.

16. A wife doing any act with respect to any property of her husband, which, if done by the husband with respect to property of the wife, would make the husband liable to criminal proceedings by the wife under this Act, shall in like manner be liable to criminal proceedings by her husband.

Question between husband and wife as to property to be decided in a summary way.

17. In any question between husband and wife as to the title to or possession of property, either party, or any such bank, corporation, company, public body, or society as aforesaid in whose books any stocks, funds, or shares of either party are standing, may apply by summons or otherwise in a summary way to any judge of the High Court of Justice in England or in Ireland, according as such property is in England or Ireland, or (at the option of the applicant, irrespectively of the value of the property in dispute), in England to the judge of the County Court of the district, or in Ireland, to the chairman of the Civil Bill Court of the division in which either party resides, and the judge of the High Court of Justice or of the County Court, or the chairman of the Civil Bill Court (as the case may be), may make such order with respect to the property in

dispute, and as to the costs of and consequent on the application as he thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the matters in question to be made in such manner as he shall think fit : Provided always, that any order of a judge of the High Court of Justice to be made under the provisions of this section shall be subject to appeal in the same way as an order made by the same judge in a suit pending or on an equitable plaint in the said court would be ; and any order of a County or Civil Bill Court under the provisions of this section shall be subject to appeal in the same way as any other order made by the same court would be, and all proceedings in a County Court or Civil Bill Court under this section in which, by reason of the value of the property in dispute, such court would not have had jurisdiction if this Act or the Married Women's Property Act, 1870, had not passed, may, at the option of the defendant or respondent to such proceedings, be removed as of right into the High Court of Justice in England or Ireland (as the case may be), by writ of *certiorari* or otherwise, as may be prescribed by any rule of such High Court ; but any order made or act done in the course of such proceedings prior to such removal shall be valid, unless order shall be made to the contrary by such High Court : Provided also, that the judge of the High Court of Justice or of the County Court, or the chairman of the Civil Bill Court, if either party so require, may hear any such application in his private room : Provided also, that any such bank, corporation, company, public body, or society as aforesaid, shall, in the matter of any such application for the purposes of costs or otherwise, be treated as a stakeholder only.

18. A married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person, or a trustee alone or jointly as aforesaid of property subject to any trust, may sue or be sued, and may transfer or join in transferring any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society in that character, without her husband, as if she were a *feme sole*.

Married woman as an executrix or trustee.

19. Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman, or shall interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument ; but no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors.

Saving of existing settlements, and the power to make future settlements.

Married woman to be liable to the parish for the maintenance of her husband.

31 & 32 Vict.
c. 122.

Married woman to be liable to the parish for the maintenance of her children.

Repeal of 33
& 34 Vict.
c. 93.
37 & 38 Vict.
c. 50.

Legal representative of married woman.

Interpretation of terms.

Commencement of Act.

Extent of Act.

Short title.

20. Where in England the husband of any woman having separate property becomes chargeable to any union or parish, the justices having jurisdiction in such union or parish may, in petty sessions assembled, upon application of the guardians of the poor, issue a summons against the wife, and make and enforce such order against her for the maintenance of her husband out of such separate property as by the thirty-third section of the Poor Law Amendment Act, 1868, they may now make and enforce against a husband for the maintenance of his wife if she becomes chargeable to any union or parish. Where in Ireland relief is given under the provisions of the Acts relating to the relief of the destitute poor to the husband of any woman having separate property, the cost price of such relief is hereby declared to be a loan from the guardians of the union in which the same shall be given, and shall be recoverable from such woman as if she were a *feme sole*, by the same actions and proceedings as money lent.

21. A married woman having separate property shall be subject to all such liability for the maintenance of her children and grandchildren as the husband is now by law subject to for the maintenance of her children and grandchildren: Provided always, that nothing in this Act shall relieve her husband from any liability imposed upon him by law to maintain her children or grandchildren.

22. The Married Women's Property Act, 1870, and the Married Women's Property Act, 1870, Amendment Act, 1874, are hereby repealed: Provided that such repeal shall not affect any act done or right acquired while either of such Acts was in force, or any right or liability of any husband or wife, married before the commencement of this Act, to sue or be sued under the provisions of the said repealed Acts or either of them, for or in respect of any debt, contract, wrong, or other matter or thing whatsoever, for or in respect of which any such right or liability shall have accrued to or against such husband or wife before the commencement of this Act.

23. For the purposes of this Act the legal personal representative of any married woman shall in respect of her separate estate have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living.

24. The word "contract" in this Act shall include the acceptance of any trust, or of the office of executrix or administratrix, and the provisions of this Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or devastavit committed by any married woman being a trustee or executrix or administratrix either before or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration. The word "property" in this Act includes a thing in action.

25. The date of the commencement of this Act shall be the first of January one thousand eight hundred and eighty-three.

26. This Act shall not extend to Scotland.

27. This Act may be cited as the Married Women's Property Act, 1882.

MARRIED WOMEN'S PROPERTY ACT, 1893.

56 & 57 VICT. c. 63.

An Act to Amend the Married Women's Property Act, 1882.

[5th December, 1893.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. Every contract hereafter entered into by a married woman, otherwise than as agent, Effect of contract by married woman.

(a) shall be deemed to be a contract entered into by her with respect to and to bind her separate property, whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract;

(b) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and

(c) shall also be enforceable by process of law against all property which she may thereafter, while discoverd, be possessed of or entitled to:

Provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating.

2. In any action or proceedings now or hereafter instituted by a woman or by a next friend on her behalf, the court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property or otherwise as may be just. Costs may be ordered to be paid out of property subject to restraint on anticipation.

3. Section 24 of the Wills Act, 1837, shall apply to the will of a married woman made during coverture, whether she is or is not possessed of or entitled to any separate property at the time of making it, and such will shall not require to be re-executed or republished after the death of her husband. Will of married woman.

4. Sub-sections 3 and 4 of section 1 of the Married Women's Property Act, 1882, are hereby repealed.

5. This Act may be cited as the Married Women's Property Act, 1893. Short title.

6. This Act shall not apply to Scotland. Extent.

CHAPTER XVI.

ACTIONS BY AND AGAINST HUSBAND AND WIFE.

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THE following chapter is intended to set forth shortly the practice and procedure in actions brought by and against husband and wife, showing where they must sue and be sued jointly or solely. It will be divided into two sections, dealing with actions by husband and wife, and actions against husband and wife.

SECTION I.

Actions by Husband and Wife.

Actions by
husband and
wife.
Joint actions.

(1) *Joint Actions by Husband and Wife.*—Joint actions were formerly brought in two cases—(a) in suits in which the husband was necessarily joined as a party, or where the wife might be joined, as being what was styled “the meritorious cause of action,” or where the cause of action would have survived to

her,¹ as in the case of contracts made by her before her marriage,² or where the action was brought for the recovery of her real estate, or in any case involving her title to it.³ (b) In suits in which the wife claimed as executrix or administratrix⁴ or trustee, or in an action to enforce a claim for a tort committed against her person or reputation,⁵ either before or during marriage. An alteration in the law in this respect has been brought about by the Married Women's Property Act, 1882, for now the husband need never be joined for mere conformity,⁶ and the wife can sue alone in her representative capacity.⁷ An action is no longer abated by reason of the marriage of a woman *pendente lite*, but if the cause of action survive, it shall survive to her solely, or to her and those jointly interested with her in the subject-matter of it.⁸

Cases in which husband and wife were necessarily joined as parties.

Under M.W.P. Act, 1882, husband need not be joined for mere conformity.

Of course, joint actions may be brought by husband and wife where they are both jointly interested in the matter in dispute. The husband's interest in the wife's cause of action does not now arise from any marital right he may possess over it, but from a bargain made with her, whether before or after marriage, which gives him an interest in it, as where he has become a purchaser by the settlement of his wife's choses in action, or where they have entered jointly into a contract which affects his estate as well as her separate property. Where he establishes such joint interest, he will be entitled to bring the action jointly with his wife. So, if in the opinion of the court or a judge, the addition of the husband is necessary for the complete adjustment of all questions involved in the action, or in the event of the death of the wife and the cause of action surviving, he can be added;⁹ and this, no doubt, will still be the practice. Claims by husband and wife may now be joined with claims by either of them separately.¹⁰ In the Common Law Courts before the Judicature Act this could not be done, except to the limited extent authorized by the Common Law Procedure Act, 1852,¹¹ by which in an action brought by a man and his wife for an injury done to his wife, where she was necessarily joined as co-plaintiff, the husband might add claims in his own right. Even before the Judicature Act these claims were not confined to claims arising consequentially from the injuries done to the wife.¹² Thus, in an action for slander of the wife, her husband, when joined as a party to the

When joint actions may be brought.

Joint claims may be added to separate claims.

¹ *Fosdike v. Sterling*, 1 Freem. 236.

² *Philliskirk v. Pluckwell*, 2 M. & S. 393.

³ 1 Selw. N. P. 243.

⁴ In such a case the husband had no beneficial interest in the action. See *Vint v. Hudspeth*, 30 Ch. D. 24.

⁵ Dicey, Part. 174. See *Weldon v. Winslow*, 13 Q. B. D. 784; *Dengate v. Gardiner*, 4 M. & W. 5; *Longmead v. Holliday*, 6 Exch. 761. See ante, p. 177.

⁶ Sect. 1, sub-s. 2.

⁷ Sect. 18.

⁸ R. S. C. 1883, Ord. XVII. rr. 1, 4; *Darcy v. Whittaker*, 24 W. R. 244.

⁹ R. S. C. 1883, Ord. XVII. r. 2.

¹⁰ *Ibid.* Ord. XVII. r. 4.

¹¹ 15 & 16 Vict. c. 76, s. 40.

¹² See *Hemstead v. The Phoenix Gaslight and Coke Co.*, 34 L. J. Ex. 108.

suit, might have added in their joint claim a special claim for any special damage that might have accrued to him through the tort done to his wife; as, for instance, in a case where his wife had been personally assaulted, and he had been deprived of her society and comfort; and this equally applied where the wife's state of health had been affected by a libel. But now this right of the husband to join in actions which are his wife's is applicable only to post-nuptial and not ante-nuptial torts done to her; for he has no need now to be joined as plaintiff for mere form's sake in tort any more than in contract.¹ If husband or wife is required to be a party to the action by the other, he or she can be added.² Under the present practice, if a husband needlessly join himself as a plaintiff, he will not recover his personal costs in the action in which his wife might be successful, and if he put the defendant to unnecessary cost in respect of his misjoinder, he personally, or his wife's separate estate, will be liable for the costs so incurred.

Husband
needlessly
joining himself
liable for costs.

When one set
of costs
ordered in
separate
actions.

Where the husband's and wife's interests in legal proceedings are practically one and the same, and they bring separate actions to enforce their rights, the court has power to order that only one set of costs shall be paid in respect of the separate actions.³

In the case where husband and wife are co-plaintiffs in a partition action the consent of the latter to a sale should be evinced by her request to her solicitor authorizing him to instruct counsel to consent to the sale.⁴ Where, though the action is joint, the wife is the substantial plaintiff, the costs of its unsuccessful termination may be ordered to be paid out of the wife's estate though subject to restraint against anticipation under section 2 of 56 & 57 Vict. c. 63.⁵

Effect of death
of husband
upon joint
action.

Effect of death
of wife.

The effect of the death of the husband in cases where both he and his wife were necessary co-plaintiffs would be that the action would survive to the wife, unless any circumstances had deprived her in the meantime of the right to carry it on. The effect of the death of the wife in cases where the husband's interests were not affected by her death, or where by some act he had become absolutely entitled to the subject-matter of the action, the right to carry it on would survive to him. If, on the contrary, his interest terminated, the action would survive to her legal personal representative.⁶ Where the husband and wife sue jointly, the defendant will be entitled to set off any claims that he may

Set-off.

¹ 45 & 46 Vict. c. 75, s. 1, sub-s. 2; 56 & 57 Vict. c. 63, s. 1. See *ante*, chap. xiv.

² R. S. C. 1883, Ord. XVI. r. 11.

³ *Heimbs v. Newcastle Co-operative Society*, 76 L. T. 109.

⁴ *Grange v. White*, 18 Ch. D. 612.

⁵ *Marchioness of Huntly v. Gaskell*, [1905] 2 Ch. 656.

⁶ 45 & 46 Vict. c. 75, s. 23.

have against either of them separately, because they now sue on a common cause of action; and the rights of all the parties can be adjusted in one and the same action. In such joint action the wife is treated as a separate person from her husband. Consequently a joint affidavit as to documents in their joint custody is insufficient, and each must make an affidavit as to such in the individual custody or possession of each of them.¹

Since it has been held that women married before the Act of 1882 came into force can sue alone in respect of causes of action (whether in contract or in tort), which arose previously to the coming in force of the Act, it would be of no practical utility to proceed further with the earlier law on the subject of joint actions by husband and wife.

(2) *Actions by Husband alone.*—The fact of marriage never placed the husband under any disability in respect of his capacity to bring actions; and his right of action never abated by reason of his marriage. A husband might formerly have sued alone (or jointly with his wife) in three cases: (i) on negotiable instruments given to his wife before marriage; (ii) on contracts made after marriage with his wife alone; (iii) on contracts made after marriage with himself and his wife.² Now, since the passing of the Married Women's Property Act, 1882, he cannot sue at all in the first case, unless he has by a marriage settlement purchased an interest in them, and in actions brought to recover them, his wife must be joined as a plaintiff. As regards the second case, a married woman, under the Married Women's Property Act, 1882, except with reference to her separate property, has not the capacity to make a contract except as agent, whether on behalf of her husband, or some third person, therefore such principal must sue on her contract in his own name; thus, if the wife lend money which is not her own, during the coverture, the husband alone must sue for it.³ If it is a contract which concerns only her separate estate, it is otherwise, and the husband has no interest in it. As regards the third case, where the husband and wife enter into a contract which in no way concerns her separate property, or is one into which she cannot validly enter, as where she is restrained from anticipating, it would seem that the husband must sue alone. If the wife be improperly joined, the action shall not be defeated, and the court at any stage of the proceedings may make an order striking out her name.⁴

There does not seem to be anything in the Married Women's Property Act, 1882, which would prevent a husband from suing alone in respect of a tort done to his wife, if he framed his action

Actions by husband alone.

In what cases in respect of his wife.

Wife's contract as agent.

Husband's right to sue alone for tort due to wife; claim for damages by way of compensation.

¹ *Fendall v. O'Connell*, 29 Ch. D. 889.

² *Dicey*, Part. 181.

³ R. S. C. 1883, Ord. XVI. r. 11.

⁴ *King v. Bassingham*, 8 Mod. 199.

as one for damages as compensation for the loss sustained by him in being deprived of the society, comfort, and assistance of his wife.¹ It would probably be held that the husband might sustain such sole action if the defendant were not likely to be injured by another action to be tried separately at the instance of the wife. But his right to sue for the tort as a tort done to his wife is now by implication taken away from him.² Where a husband is entitled or liable to execution upon a judgment or order for or against a wife, the party alleging himself to be entitled to execution may apply to the court or a judge for leave to issue execution on such judgment, and the court may make an order to that effect.³

Actions by
wife alone.

(3) *Actions by Wife alone.*—Until recent changes in the law, a married woman could not alone, and without joining her husband, bring an action at law, except under certain circumstances, of which the following are examples: (i) Where her husband was *civiliter mortuus*; (ii) where he was an alien and had left the kingdom, or had never been in this country; (iii) where she had been judicially separated, or had obtained a protection order,⁴ in which case she might sue as well in tort as in contract.⁵ Even where she was the meritorious cause of action, her husband had to be joined, if only for form's sake. In equity she could bring a suit alone when possessed of separate property, and the burden of proving that she was possessed of it lay upon her. In such an action she had to sue by her next friend, and make her husband a defendant.⁶

In equity.

Capacity for
suing alone
extended by
M.W.P. Act,
1870.

Her capacity for suing was extended by the Married Women's Property Act, 1870, to property which was declared by the Act to be her separate property, and to property belonging to her before marriage, which her husband had, by writing under his hand, agreed with her should belong to her as her separate property.⁷ But where she sued in respect of her other separate estate, she must have sued by her next friend, making her husband a defendant.⁸ Where the married woman is an infant (and only because she is an infant) she will still require a next friend to be joined with her in bringing actions, and the next friend and herself will be subject to the rules and regulations affecting infant plaintiffs and their next friends.⁹ Under the Judicature Act married women might by leave of the court or a judge sue without their husbands, and without a next friend, if they

Infant married
woman must
still sue by
next friend.

Practice under
the Judicature
Act.

¹ See *Hyde v. Scissor*, Cro. Jac. 538.

² Sect. 1, sub-s. 2.

³ R. S. C. Ord. XLII. r. 23.

⁴ 20 & 21 Vict. c. 85, ss. 21, 25, 26; 21 & 22 Vict. c. 108, ss. 6-8.

⁵ *Ramsden v. Brearley*, L. R. 10 Q. B. 147.

⁶ *Wake v. Parker*, 2 Keen, 59; *Holmes v. Penney*, 3 K. & J. 90.

⁷ 33 & 34 Vict. c. 93, s. 11; *Summers v. City Bank*, L. R. 9 C. P. 580.

⁸ *Roberts v. Evans*, 7 Ch. D. 830.

⁹ Dan. Ch. Pr. 139. See *post*, Part IV. chap. vii.

gave security for costs to the satisfaction of the court or judge.¹ In all other cases they were obliged to sue as co-plaintiffs with their husbands or next friends.

Since the coming into force of the Married Women's Property Act, 1882, there has been a complete change in this branch of the law; for it is now provided that "a married woman shall be capable of suing . . . either in contract or tort, or otherwise in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff . . . or be made a party to any action or other legal proceeding brought by . . . her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property."² Further, "a married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person, or a trustee alone or jointly as aforesaid of property subject to any trust, may sue . . . in that character without her husband, as if she were a *feme sole*."³ She need not describe herself as a married woman, or allege that she is suing in respect of her separate estate;⁴ but it appears that in the Chancery Division it was the practice to require the description of a female plaintiff.⁵

It has been decided that a woman married before the above Act came into operation may now sue alone both in contract⁶ and in tort,⁷ and in her own and a representative right in respect of a cause of action which arose before the Act came into force, as though she were a single woman. Leave to sue alone is not required of her; and she cannot be compelled to give security for costs, because she does sue alone,⁸ even where her separate property is subject to restraint,⁹ or she has no separate estate at all at the time of bringing the action;¹⁰ and her sole undertaking as to damages when she applies for an interlocutory injunction is sufficient.¹¹ But where she chooses to sue by a next friend who is a person of no substance, she will be required to give security for costs;¹² and if she sue by next friend, and the action is dismissed, she cannot bring another action against the same defendant by another next friend until

M.W.P. Act
1882.

M.W.P. Act,
1882, retro-
spective as to
procedure.

Married
woman sole
plaintiff need
not give
security for
costs.

Exceptions.

¹ Ord. XVI. r. 8; *Kingsman v. Kingsman*, 6 Q. B. D. 122.

² 45 & 46 Vict. c. 75, s. 1, sub-s. 2. See *Re Outwin's Trusts*, 48 L. T. 410.

³ Sect. 18. See remarks of North, J., in *Re Harkness and Allsopp's Contract* [1896] 2 Ch. 363.

⁴ See Rule 5 of the Practice Master's Rules.

⁵ Such cannot be since the Married Women's Property Act, 1893, came into force.

⁶ *Severance v. Civil Service Co-operative Supply Association*, 48 L. T. 485.

⁷ *James v. Barraud*, 49 L. T. 309 (trespass); *Weldon v. Winslow*, 13 Q. B. D. 784 (trespass); *Weldon v. De Bathe*, 14 Q. B. D. 339 (trespass); *Love v. Fox*, 15 Q. B. D. 667 (assault).

⁸ *Threlfall v. Wilson*, 8 P. D. 18.

⁹ *Re Prynn*, 53 L. T. 465.

¹⁰ *Re Isaac, Jacob v. Isaac*, 30 Ch. D. 418.

¹¹ *Pike v. Cave*, 62 L. J. Ch. 937.

¹² *Re Thompson, Stevens v. Thompson*, 38 Ch. D. 317.

the costs of the first action have been paid;¹ and where she has no separate estate, except such as she is restrained from anticipating, and she enters an appeal without a next friend, she must give security for the costs of the appeal;² or where she has no separate property at all, and appeals without a next friend.³ But the order for security is one altogether in the discretion of the court.⁴ It would seem that where she appeals against an order for attachment such order for security will not be made.⁵ No special case in any cause or matter to which a married woman (not being a party thereto in respect of her separate property or of any separate right of action by or against her) shall be set down for argument without the leave of the court or a judge.⁶

Special case.

Her personal incapacity to act as a next friend to an infant has not been removed.⁷

Capacity of wife to sue husband in contract and tort. Husband's right to sue wife.

The Married Women's Property Act, 1882, gives a wife the power to sue her husband generally in respect of her property;⁸ and where she dies her personal representatives can carry on the action.⁹ This power or capacity of the wife to sue her husband in contract in respect of her separate estate is not new law, and has been long recognized by the courts of equity.¹⁰ The right of the husband to sue the wife in respect of her separate property, as regards post-nuptial liabilities is recognized,¹¹ but not as regards ante-nuptial obligations.¹² Such action on his part is an admission that the property in question is her separate estate.¹³ The right to sue the husband in tort (though limited) is a novel provision.¹⁴ The wife will no longer be obliged to sue the husband together with her next friend; and she may proceed against him either by ordinary action,¹⁵ or summarily.¹⁶ Where she is living apart from her husband, and has instituted proceedings for divorce against him, she can restrain him by injunction from entering into her house, which forms part of her separate property.¹⁷

Married woman suing in forma pauperis.

A married woman will now, as heretofore, be allowed, under proper circumstances, to sue alone,¹⁸ or continue an action, in

¹ *Re Randle, Randle v. Payne*, 28 Ch. D. 288.

² *Whittaker v. Kershaw*, 44 Ch. D. 296.

³ *Weldon v. Scattergood*, W. N. [1887] 69.

⁴ *Hood Barrs v. Heriot*, [1896] 2 Ch. 375.

⁵ *Ibid.*

⁶ R. S. C. 1883, Ord. XXXIV. r. 4.

⁷ *Re Duke of Somerset, Thynne v. St Maur*, 34 Ch. D. 465.

⁸ Sect. 12.

⁹ *Hale v. Sheldrake*, 61, L. T. 292.

¹⁰ *Woodward v. Woodward*, 8 L. T. 749.

¹¹ *Ainslie v. Medlicott*, 13 Ves. 269; *Earl v. Ferris*, 19 Beav. 67; *Butler v. Butler*,

¹² 16 Q. B. D. 374.

¹³ *Butler v. Butler (ubi sup.)*.

¹⁴ *Earl v. Ferris (ubi sup.)*.

¹⁵ Sect. 12. In *Phillips v. Barnett*, 1 Q. B. D. 440, it was held that a woman who had been divorced could not sue her husband for an assault committed during coverture.

¹⁶ Sect. 12.

¹⁷ Sect. 17.

¹⁸ *Symonds v. Hallett* 24 Ch. D. 346.

¹⁹ *Hind v. Whitmore*, 2 K. & J. 458.

formâ pauperis;¹ but where she appeals *in formâ pauperis* in an action brought against a person other than her husband, her husband as well as herself must make the affidavit of poverty.²

The effect of the presumption that a contract made by a married woman has been made in respect of her separate estate will entitle her to bring an action solely and in her own name in respect of such contract, and the *onus* of proving that it was not so made will lie upon the other party to the contract, if the husband or some third party is sought to be joined as plaintiff, for the purpose of obtaining relief against him. This presumption of law is strongly in favour of the married woman when dealing with moneys or other property; thus, where she opens an ordinary banking account in her name, the contract is *primâ facie* between the banker and herself, and the rights depending on the contract are vested in her.⁴

A married woman is now subject to the provisions of the Statutes of Limitations, and must bring her action on any contract within the limit of six years from the date of its inception; and for any trespass, false imprisonment, assault or battery, within four years of the time when the right of action accrued; for the Married Women's Property Act, 1882, has made her "discover" for the purpose of bringing actions within the meaning of 21 Jac. I. c. 16.⁵ She must bring her action for libel within six years.⁶

If a married woman brings an action unsuccessfully, her free separate property is liable to satisfy the costs of the opposite party;⁷ but her separate estate, subject to the restraint against anticipation, is not available for this purpose.⁸ The costs of an unsuccessful action begun by a married woman suing by her next friend before the Act of 1882 came into force could only be raised out of such free separate property as she possessed at the time of bringing the action.⁹ Where a married woman has had judgment in an action given against her with costs, with execution limited to her separate estate, and while the judgment remains unsatisfied, the plaintiff in the same matter takes an unsuccessful application which is dismissed with costs, the plaintiff is entitled to set

Presumption of law that married woman now contracts in her own right.

Statutes of Limitations.

Liability for costs.

Under M.W.P. Act, 1882.

Set-off.

¹ *Re Foster*, 18 Beav. 525.

² *Re Roberts, Kiff v. Roberts*, 33 Ch.D. 265.

³ Sect. 1, sub-s. 3; 56 & 57 Vict. c. 63, s. 1.

⁴ Sects. 6 and 7, overruling in effect *Lloyd v. Pughe*, L. R. 8 Ch. App. 88.

⁵ *Lowe v. Fox*, 15 Q. B. D. 667.

⁶ *Weldon v. Neal*, 51 L. T. 289.

⁷ Sect. 1, sub-s. 2; *Galmoye v. Cowen*, 58 L. J. Ch. 769.

⁸ *Cox v. Bennett*, [1891] 1 C. D. 617. *Re Andrews*, 30 Ch. D. 159, to the contrary is overruled; but its principle is established by 56 & 57 Vict. c. 63, s. 2.

⁹ *Re Glanwill, Ellis v. Johnson*, 31 Ch. D. 532. But the principle of this case can have little or no effect at the present time. See *Neville v. Baker*, 4 Times Rep. 674; *Cox v. Bennett* (*ubi sup.*).

off against the costs of his unsuccessful application the unpaid costs of his successful action.¹

Under M.W.P.
Act, 1893.

A considerable alteration in respect of her liability for costs has been made by the Married Women's Property Act, 1893; ² for where either by herself or by next friend she commences an action or proceeding and is condemned in costs, the court before which such action or proceeding is pending may from time to time order payment of the costs of the opposite party out of her property *which is subject to a restraint upon anticipation*. This provision has, however, been held not to apply to an appeal instituted by her,³ nor to proceedings in which she is a defendant; though her act has been the cause of their institution, such as the entry by her of a *careat* against the grant of probate of a will;⁴ nor does it give the court jurisdiction to alter the effect of an order made before the Act came into operation.⁵ But it does apply to a counter-claim set up by her in an action against her,⁶ and to a claim to goods seized in execution by a judgment creditor, whereby interpleader proceedings are commenced.⁷

Summary.

Thus, in respect of her own property, and property which she holds in a representative capacity, her husband or a next friend need not be joined as a party in any action, as was formerly necessary. Not only need the husband not be joined, but he may himself be a defendant at the suit of his wife in respect of her property⁸ and the old practice with reference to the married woman obtaining leave to sue without her husband or next friend, on giving such security for costs as a court or judge might think fit and proper, is swept away.⁹ But she now becomes wholly responsible as regards her property for the payment of the costs of any action or proceeding (other than appeals) which is found to be improper.

SECTION 2.

Actions against Husband and Wife.

Actions against
husband and
wife.

Joint actions.

(1) *Joint Actions against Husband and Wife*.—The principles now regulating the bringing of joint suits against husband and wife are much the same as those regulating the commencement of joint actions by them. The husband will never be joined for

¹ *Pelton (Bros.) v. Harrison*, No. 2, [1892] 1 Q. B. 118.

² 56 & 57 Vict. c. 63, s. 2.

³ *Hood Barrs v. Cathcart*, [1894] 3 Ch. 376.

⁴ *Moran v. Place*, [1896] P. 214. See note 6, p. 343.

⁵ *Re Lumley, Ex parte Hood Barrs*, [1894] 3 Ch. 135.

⁶ *Hood Barrs v. Cathcart*, [1895] 1 Q. B. 873.

⁷ *Nunn v. Tyson, Tyson claimant*, [1901] 2 K. B. 487.

⁸ Section 12 of 45 & 46 Vict. c. 75.

⁹ A plea that the plaintiff is a married woman is more than ever ineffectual. See *Abouloff v. Oppenheimer*, 30 W. R. 429.

mere form ; his joinder as defendant will be a matter of substance. Formerly, a husband and wife must have been sued jointly in contract in two cases : (a) on contracts made by the wife before marriage ; (b) on contracts in which a claim is made against her as executrix or administratrix.¹ As regards the latter case, the law is definitely altered by the Married Women's Property Act 1882, for she may now as executrix or administratrix or trustee be sued alone without her husband.² As regards the first case the husband is still liable to be sued jointly with his wife, also for her ante-nuptial debts. If he was married before August 9, 1870,³ he is at common law liable for her ante-nuptial contracts and debts. If he was married between that date and July 30, 1874,⁴ he is not liable at all for her ante-nuptial debts, but only for contracts and torts ; but after the latter date he is liable to the extent of certain assets received by him in right of his wife for her ante-nuptial debts, contracts and torts ;⁵ and since January 1, 1883,⁶ in respect of her assets received by him generally on marriage.⁷ Creditors proceeding under the sections rendering the husband liable must be careful in exercising their discretion as to joining him or not, and the *onus* of proof that he has received assets of his wife will be cast upon them,⁸ and if they fail in their proof, they will be visited with the payment of his costs.⁹ A husband is entitled to defend separately whether by reason of his having a separate ground of defence, or his wife refusing or being unable or neglecting to put in a defence. A married woman now sued jointly may defend separately without giving security for costs, and applying for leave to do so.¹⁰ Where the husband is properly joined in an action against his wife for her ante-nuptial liabilities, but is successful in his defence, the amount of his costs can be added to the wife's debt, and be recovered out of her separate property.¹¹

In joint suits against husband and wife, their separate entity is now largely recognized ; for when both are defendants to an action they must both be served with the writ unless the court or a judge shall otherwise order ;¹² and in a case where husband and wife were joint defendants, and the former could not be found, he was ordered to be served by advertisement.¹³ If the subject-matter of the action arises in right of the wife, and the

Separate
service on
husband and
wife.

¹ Dicey, Part. 297.

² Sect. 18.

³ Date of the passing of the Married Women's Property Act, 1870.

⁴ Date of the passing of the Married Women's Property (Amendment) Act, 1874.

⁵ See *ante*, chap. xii. pp. 265 *et seq.*

⁶ Date of the operation of the Married Women's Property Act, 1882.

⁷ Sects. 14 and 15.

⁸ See *Matthews v. Whittle*, 13 Ch. D. 811.

⁹ *London and Provincial Bank v. Bogle*, 7 Ch. D. 773.

¹⁰ Effect of section 1 (2) of 45 & 46 Vict. c. 75.

¹¹ *Ibid.*

¹² R. S. C. 1883, Order IX., rr. 2, 3.

¹³ *Whitley v. Honeywell*, 35 L. T. 517.

husband is out of the jurisdiction, an order may be made for service on her alone, and then the action may proceed against her separately.¹

In tort. In actions founded in tort, as in those founded on contract, the husband will not in the future be joined for mere form's sake, but as a matter of substance. In actions founded on the tort of his wife, he will be joined under two different sets of circumstances; (a) where the tort is ante-nuptial; (i) where it may be the joint tort of himself and his wife;² or, (ii) where he has received on marriage property belonging to his wife, and to the extent of such property he will be liable; (b) where the tort is post-nuptial. The common law liability of the husband for his wife's post-nuptial torts remains unaffected by the Married Women's Property Act, 1882.³

Joint and
several claims
against hus-
band and wife.

Claims against husband and wife may now be joined with claims against either of them separately.⁴ Where husband and wife are made defendants to an action relating to personal property belonging to the wife, and they put in a joint defence, such defence may be read against them for the purpose of fixing them with the admissions contained in it. But where the action relates to the inheritance of the wife, it cannot be so read; and the facts relied upon must be proved against them by other evidence.⁵ A wife cannot be compelled to make discovery which may expose her husband to a charge of felony;⁶ nor can she be made a party to an action for the mere purpose of obtaining discovery from her to be used against her husband.⁷

Wife infant.

Where a married woman is an infant she must defend by her guardian *ad litem*, and it is the usual practice to appoint the husband as her guardian when he is a co-defendant and they intend to defend jointly.⁸ One judgment only is to be recorded against them; and it is not open for the husband in an action for libel by his wife to pay money into court and for the wife to deny liability.⁹

Joint judg-
ment against
husband and
wife.

A joint judgment obtained against the husband and wife will now be a judgment against the husband personally to the extent of his liability, and against the wife as to her separate property; and as to the residue of the debt or liability, the judgment will be a separate judgment against the wife as to her separate property.¹⁰ The separate existence of husband and wife is so clearly recognized that if a party suing them jointly obtain a judgment

¹ Dan. Ch. Pr. 186.

² *Vine v. Saunders*, 4 Bing. 96.

³ *Seroka v. Kattenberg*, 17 Q. B. D. 177; *Earle v. Kingscote*, [1900] 2 Ch. 585.

⁴ R. S. C. 1883, Ord. XVIII. r. 4.

⁵ Dan. Ch. Pr. 189.

⁶ *Cartwright v. Green*, 8 Ves. 405.

⁷ *Le Texier v. Margrave of Anspach*, 5 Ves. 322; Dan. Ch. Pr. 188.

⁸ *Colman v. Northcote*, 7 Jur. 528.

⁹ *Beaumont v. Kay*, [1904] 1 K. B. 292.

¹⁰ 45 & 46 Vict. c. 75. s. 15.

against the husband which is unsatisfied, the wife is entitled to the rule that a judgment recovered against one of two joint contractors is a bar to an action against the other.¹ A judgment against husband *or* wife in the alternative cannot be brought in respect of necessities ordered by the wife simply on the ground of co-habitation, and Order XIV. r. 5, of the rules of the Supreme Court does not enable such action to be sustained.² If a creditor elects to sue an agent, and is unsuccessful, he cannot afterwards proceed against the principal for the same debt. But if a creditor sues husband and wife jointly, though there is no real joint liability, and obtains judgment against the wife for part of the debt, he is not precluded from proceeding against the husband for the balance.³

(2) *Action against Husband alone on Contracts made by the Wife.* Actions against husband alone on contracts of wife.
—Wherever the cause of action brought against the husband arises from some act or representation on his part by which he directly or by implication of law confesses his liability on the contract made by his wife, then the husband may be sued alone, as where he requests money to be lent to his wife,⁴ or for necessities supplied to her under conditions which render him liable for their supply.⁵ But if the contract has been entered into by her in respect of her separate estate, he cannot be sued alone in regard to it.

The husband may be sued *alone* for his wife's ante-nuptial contracts, debts, and torts; but before he can be rendered liable in respect of them, it must be proved that he has received assets through his wife.⁶ This new provision renders him liable to be sued alone not only during coverture but after it has terminated, by death or divorce, and, in this latter respect, has broken in upon the old common law doctrine which freed him from liability for his wife's ante-nuptial engagements or torts, even though he had received assets.⁷ His liability, however, will extend only to the amount of the assets received by him through his wife; and if he has not received any assets at all in her right, he will be entitled to judgment and costs.⁸ His liability for such ante-nuptial debts of his wife will cease after six years from the time when they were incurred.⁹ The wife is not a necessary

¹ *Hoare v. Niblett*, [1891] 1 Q. B. 781.

² *Morel v. Westmorland (Earl of) and Wife*, [1903] 1 K. B. 64.

³ *French v. Howie and Wife*, [1905] 2 K. B. 580.

⁴ *Stephenson v. Hardy*, 3 Wils. 388.

⁵ See *ante*, pp. 311 *et seq.*

⁶ 45 & 46 Vict. c. 75, s. 14.

⁷ See *Heard v. Stamford*, 3 P. Wms. 409; *Bell v. Stocker*, 10 Q. B. D. 129. This last case decided that the Married Women's Property Act, 1874, did not deprive the husband of his common law protection against the claims of his wife's ante-nuptial creditors after her death, though he had received assets in her right.

⁸ Sect. 15.

⁹ *Beck v. Pierce*, 23 Q. B. D. 316.

party to an action seeking to charge her husband's interest in her real estate.¹

Actions
against wife
alone.

(3) *Actions against Wife alone*.—A married woman formerly could not be sued alone except under the same circumstances as those in which she could sue alone,² but her husband was a necessary party. Where she was sued in respect of her separate estate he must have been joined;³ so, too, where she was sued on her ante-nuptial liabilities. Under the Married Women's Property Act, 1870, it was at first held that she could not be sued alone in respect of her separate earnings, but in such action her husband had to be joined as a defendant;⁴ but in a later case she was held liable to be sued alone in respect of her ante-nuptial liabilities;⁵ and under the like Act of 1882 she may in all respects be sued, both in contract and in tort, as a single woman, and her husband need not be made a party in the action,⁶ and she may be solely sued by her husband.⁷ This liability of a married woman to be sued alone for her ante-nuptial debts and liabilities is expressly confirmed by this last Act,⁸ and is not curtailed by her settling her own property on herself on marriage, with a restraint upon anticipation.⁹ But property not settled by herself subject to the restraint cannot be touched for her ante-nuptial engagements.¹⁰ In the matter of procedure the Act of 1882 is retrospective; consequently a woman married before that Act came into force is liable to be sued alone after it came into force in respect of a contract made by her before it came into operation.¹¹ As an executrix or trustee she may be sued with her husband in respect of any property held by her in a representative capacity.¹²

M.W.P. Act,
1882, retro-
spective as to
procedure.

Possession of
free separate
property
necessary to
validity of
contract;

The liability of a married woman to be sued on a valid contract depended, as has been seen,¹³ both on the principles of equity and under the Married Women's Property Act, 1882, on the possession of free separate property at the time of entering into the contract,¹⁴ with respect to which she must reasonably be deemed to have contracted;¹⁵ and the *onus* of proof of possession of such property is on the plaintiff. But where a married woman pays

¹ *Waugh v. Wren*, 11 W. R. 244.

³ *Hancocks v. Lablache*, 3 C. P. D. 197.

⁵ *Mercier v. Williams*, 9 Q. B. D. 337.

⁷ *Butler v. Butler*, 16 Q. B. D. 374.

⁹ Sect. 19.

¹⁰ *Birmingham Excelsior Money Society v. Lane*, [1904] 1 K. B. 35.

¹¹ *Gloucestershire Banking Co. v. Phillips (Creagh, Third Party)*, 12 Q. B. D. 536; *Bursill v. Tanner*, 13 Q. B. D. 691.

¹² Married Women's Property Act, 1882, s. 18; and see Per North, J., in *Re Harkness and Alsopp's Contract*, [1896] 2 Ch. 363.

¹³ *Ante*, chap. xiv.

¹⁴ *Palliser v. Gurney*, 19 Q. B. D. 519; *Re Shakspear, Deakin v. Lukin*, 30 Ch. D. 169; *Stogdon v. Lee* [1891] 1 Q. B. D. 661; *Pelton (Bros.) v. Harrison*, [1891] 2 Q. B. 422.

¹⁵ *Harrison v. Harrison*, 13 P. D. 180; *Leake v. Driffield*, 24 Q. B. D. 98.

² Dan. Ch. Pr. 185, see *ante*, p. 436.

⁴ *Ibid.*

⁶ Sect. 1, sub-s. 2.

⁸ Sect. 13.

money into court as the price of getting leave to defend, she cannot, if the plaintiff recovers, be heard to say that the money so paid in is not available to satisfy the judgment.¹ But if a married woman is sued "otherwise" than in contract, the existence of separate estate when she incurred her liability does not seem to be necessary.² Under the Married Women's Property Act, 1893, the existence of any separate property at the time of entering into a contract is not necessary to its validity.³

but not under
M.W.P. Act,
1893.

As the liability of a married woman is proprietary and not personal,⁴ a judgment against her can only be executed on her free separate property, that is, property which she is not improperly restrained from anticipating.⁵ The various stages of her proprietary liability are as follows: Under the principles of equity the free separate property she possessed at the date of incurring her liability;⁶ under the Married Women's Property Act, 1870, her separate property which she possessed at the time of incurring her liability, whether free or subject to the restraint against anticipation;⁷ under the Married Women's Property Acts, 1882 and 1893, free separate property possessed by her at the time of incurring her liability and subsequently acquired free separate property, such property being deemed to be "free" if subject to the restraint against anticipation imposed by herself in such a way as to withdraw it improperly from the claims of her creditors.⁸ There is an exception under the Act of 1893 to the effect that costs of an unsuccessful action or proceeding instituted by her may be raised out of her property though subject to such restraint.⁹ Property which a married woman becomes possessed of or entitled to while discovery is now liable to satisfy claims against her.¹⁰ Property on the termination of the coverture ceases, it is true, to be separate estate; but if it has been subject to the fetter of restraint, her creditor cannot avail himself of the cesser of the restraint.¹¹

What property
liable to satisfy
judgment.

In equity.

Under M.W.P.
Act, 1870.

Under M.W.P.
Acts, 1882 &
1893.

Unconditional judgment cannot be signed against a married woman under Order XVI. r. 1;¹² and execution can only issue

Execution of
judgment
limited to free
separate
property.

¹ *Bird v. Barstow*, [1892] 1 Q. B. 94.

² *Re Kershaw, Whittaker v. Kershaw*, 45 Ch. D. 230; but see *Kay, L.J.*, in *Hood Barrs v. Cathcart*, [1894] 2 Q. B. 574.

³ Sect. 1 (a).

⁴ *Scott v. Morley*, 20 Q. B. D. 120.

⁵ *Ibid.*

⁶ *Johnson v. Gallagher*, 30 L. J. Ch. 298.

⁷ *London and Provincial Bank v. Bogle*, 7 Ch. D. 773; *Axford v. Reid*, 22 Q. B. D. 548.

⁸ *Scott v. Morley* (*ubi sup.*).

⁹ Sect. 2. For what is and what is not an "institution" of an action or proceeding by a married woman, rendering her restrained separate property liable or not liable, see *ante*, pp. 343 and 442.

¹⁰ 56 & 57 Vict. c. 63, s. 1 (c).

¹¹ *Barnett v. Howard*, [1900] 2 Q. B. 784; *Softlaw v. Welch*, [1899] 419; *Brown v. Dimbleby*, [1904] 1 K. B. 28.

¹² *Bursill v. Tanner*, 13 Q. B. D. 691; *Perks v. Mylrea*, W. N. [1884] 64.

against her separate estate free from restraint against anticipation.¹ Judgment may be signed against her (a) *in default of appearance*, although the indorsement of the writ does not contain an allegation that she was possessed of separate property at the time the liability was contracted; but the judgment must be limited as directed in *Scott v. Morley*;² (b) *in default of defence*; in such a case the statement of claim, whether specially indorsed or not, must contain an allegation that the married woman had separate property at the date of the contract in respect of which the action was brought;³ and if it does not contain such allegation, it must be amended or an affidavit filed that she did possess separate property. The above rules apply to contracts governed by the Married Women's Property Act, 1882, but as under the Married Women's Property Act, 1893, section 1 (a) the possession of separate property, whether free or restrained, is not now a condition precedent to a valid contract by a married woman, it will not be necessary to allege that she possessed separate property at the date of the contract; but as the later Act preserves the effect of the restraint, execution will be limited to what is her free separate property.⁴

Statute of
Limitations.

Claims against a married woman will now be barred unless brought within the time limited by the Statute of Limitations.⁵

M.W.P. Act,
1870; form of
judgment
under.

The following forms of judgment against a married woman have been settled. Under the Married Women's Property Act, 1870: "It is adjudged that the plaintiff do recover the sum of £ , and costs to be taxed against the defendant (the married woman) such sum and costs to be payable out of her separate property, whether subject to any restriction against anticipation or not, and not otherwise."⁶

M.W.P. Act,
1882; form of
judgment
under.

Under the Married Women's Property Act, 1882: "It is adjudged that the plaintiff do recover £ and costs (to be taxed) against the defendant (the married woman), such sum and costs to be payable out of her separate property, as herein-after mentioned, and not otherwise. And it is ordered that execution hereon be limited to the separate property of the defendant (the married woman) not subject to any restriction against anticipation, unless by reason of the Married Women's Property Act, 1882, the property shall be liable to execution, notwithstanding such restriction."⁷ This is still the proper form of judgment to be used in an action against a widow upon a contract entered into by her during coverture after the passing

¹ *Perks v. Mylrea*, W. N. [1884] 64; *Beckett v. Tusker*, 19 Q. B. D. 7.

² 20 Q. B. D. 120. But see such a case as *Beard v. Bellwood*, 89 L. T. Jo. 27.

³ See *Tetley v. Griffith*, 57 L. T. 673.

⁴ Sect. 1, proviso.

⁵ *Re Hastings, Hallett v. Hastings*, 35 C. D. 94.

⁶ *Aarford v. Reid*, 22 Q. B. D. at p. 553.

⁷ *Scott v. Morley*, 20 Q. B. D. 120; *Downe v. Fletcher*, 21 Q. B. D. 11.

of the Married Women's Property Act, 1882, and before the passing of the Married Women's Property Act, 1893.¹ The only difference in the case of ante-nuptial and post-nuptial liabilities is, that in the former there is no need on the part of the plaintiff to prove that the defendant possessed property at the time of their being incurred.² It was not necessary, under the Married Women's Property Act, 1882, for the plaintiff to prove the existence of free separate property at the date of the judgment,³ and certainly cannot be so since the passing of the Married Women's Property Act, 1893.

Judgment obtained against a married woman may be enforced against her free separate property by legal execution, as by *fi. fa.*, or *elegit* in the case of her realty; and by equitable execution where legal execution cannot reach the *corpus* of the property upon which the order is to operate, through the existence of some legal impediment, as by the appointment of a receiver.⁴ How judgment enforced.
Legal execution;
Receiver. Where an inquiry is directed as to the existence of free separate property of a married woman who is a judgment debtor, the direction does not authorize the examination of any other person than the married woman herself.⁵ The judgment can be enforced against arrears of income, though subject to the restraint, which have not actually come into her hands if they have become payable to her before the judgment;⁶ but not against arrears which have become due after the date of the judgment;⁷ and a creditor who has obtained leave to sign final judgment cannot, by delay in signing, even with leave of the court, get by the appointment of a receiver at her income which was not actually in arrear at the time of obtaining leave to enter judgment.⁸

The receiver does not interfere with the possession of the property by the trustees, but receives from them whatever they would otherwise have paid to the married woman; but the rights of the trustees over the property remain unaffected.⁹ The receiver may be appointed by an order obtained in a suit brought to charge the woman's separate estate; but he may also be appointed by an order without any fresh suit, where proceedings are already pending;¹⁰ also where her property has had an order made

¹ *Softlaw v. Welch*, [1899] 2 Q. B. 419.

² See *Downe v. Fletcher* (*ubi sup.*).

³ *Ibid.*

⁴ *Bryant v. Bull*, 10 Ch. D. 153; *Fuggle v. Bland*, 11 Q. B. D. 711; *Re Peace and Waller*, 24 Ch. D. 405; *Cummins v. Perkins*, [1899] 1 Ch. 16. This was a case in which a married woman suing in respect of her separate estate was condemned in costs, which were ordered to be paid out of her separate property and not otherwise.

⁵ *Hood Barrs v. Heriot*, *Re Blythe*, [1896] 2 Q. B. 338.

⁶ *Hood Barrs v. Heriot*, [1896] A. C. 174, overruling the reasoning in *Hood Barrs v. Cathcart*, [1894] 2 Q. B. 570, on this point.

⁷ *Hood Barrs v. Cathcart* (*ubi sup.*); *Whiteley v. Edwards*, [1896] 2 Q. B. 48.

See *ante*, p. 393.

⁸ *Colyer v. Isaacs*, 77 L. T. 198.

⁹ *Re Peace and Waller* (*ubi sup.*).

¹⁰ *Ibid.*

Sequestration.

Committal order.

How judgment cannot be enforced.

Joinder of trustees.

against it removing the restraint upon anticipation for the purpose of satisfying the costs of a proceeding unsuccessfully instituted by her within the meaning of section 2 of 56 & 57 Vict. c. 63.¹ Judgment may also be enforced by sequestration,² and a garnishee order.³ It is not an absolute condition precedent to obtaining a sequestration order that the judgment creditor should allege the existence of property on which the sequestration could take effect; it is for the judgment debtor to show that the issuing of the order would be a futile proceeding.⁴ She may also be committed under the Debtors Act, 1869,⁵ for ante-nuptial debts and post-nuptial torts,⁶ on the ground that where she was primarily liable to be taken under a writ of *capias ad satisfaciendum*, she can now be summoned under section 5 of the Debtors Act, 1869, and dealt with accordingly.

Judgment, on the other hand, cannot be enforced against her by committal under section 5 of the Debtors Act, 1869, for her post-nuptial debts,⁷ or by being made the ground for issuing a bankruptcy notice under section 4, sub-section 1 of the Bankruptcy Act, 1883.⁸ If she is imprisoned for non-compliance with an order to pay costs she is entitled to her writ of *habeas corpus*.⁹ But obedience to an order of the court to pay in money by her in the capacity of a trustee or administratrix may be enforced by attachment under section 4 of the Debtors Act, 1869.¹⁰

Where the property of a married woman is in trust, and her creditors seek no more than to obtain a charge upon it, her trustees are not necessary parties to the suit;¹¹ but where they seek to obtain payment out of the separate property vested in trustees, they must make the latter joint defendants with the married woman.¹² An order cannot be made against the trustees unless they are present before the court, but an order may be made declaring the demand of the woman's creditor payable out of the separate estate. This would seem to be still the law under the Married Women's Property Act, 1882.

¹ *Hood Barrs v. Cathcart*, [1895] 1 Q. B. 873.

² *Miller v. Miller*, L. R. 2 P. & M. 54; *Hyde v. Hyde*, 13 P. D. 166.

³ *Holtby v. Hodgson*, 24 Q. B. D. 103.

⁴ *Hulbert v. Cathcart*, [1896] A. C. 470.

⁵ 32 & 33 Vict. c. 62, s. 5.

⁶ *Scott v. Morley* (*ubi sup.*); *Robinson v. Lynes*, [1894] 2 Q. B. 577.

⁷ *Meager v. Pellew*, 14 Q. B. D. 973; *Draycott v. Harrison*, 17 Q. B. D. 147; *Scott v. Morley*, 20 Q. B. D. 120.

⁸ *Re Gardiner, Ex parte Coulson*, 20 Q. B. D. 249; *Re Lynes, Ex parte Lester*, [1893] 2 Q. B. D. 113.

⁹ *Re Walter*, 55 J. P. 551; 7 Times Rep. 445.

¹⁰ *Re Turnbull, Turnbull v. Nicholas*, [1900] 1 Ch. 180. It does not appear that the *semble* in this case is based on a correct apprehension of the decision in *Scott v. Morley* (*ubi sup.*).

¹¹ *Picard v. Hine*, L. R. 5 Ch. App. 274; *Collett v. Dickenson*, 11 Ch. D. 687; *Davies v. Jenkins*, 6 Ch. D. 728; *Flower v. Buller*, 15 Ch. D. 665; *Re Pearce and Waller*, 24 Ch. D. 405.

¹² *Collett v. Dickenson* (*ubi sup.*).

CHAPTER XVII.

AGREEMENTS FOR SEPARATION.

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THERE are three methods of putting an end to or suspending the relation of husband and wife: (1) By divorce *a vinculo matrimonii*, or dissolution of marriage;¹ (2) by judicial separation;² (3) by mutual separation. The first two can only be obtained by judicial intervention; the latter is effected by mutual and voluntary arrangement between the parties and their friends. To avoid recriminations, and unpleasant, not to say scandalous exposures in open court, and more effectually provide for their altered circumstances, the parties execute deeds of arrangement, which are called "separation deeds."

At one time the courts of equity were reluctant in any way to recognize the validity of these arrangements, and where they were in the form of articles of separation, refused to carry them into effect.³ The ground of this attitude of the courts towards these arrangements was that the marriage tie was indissoluble, and could not be broken except by the supreme force of the

Separation
deeds;

formerly held
*contra bonos
mores.*

¹ *Post*, p. 461.

² *Post*, p. 463.

³ *Worrall v. Jacob*, 3 Mer. 256.

Subsequent
recognition
by courts of
equity.

Legislature, or suspended by the sentence of a competent ecclesiastical court pronounced *pro salute animæ* of the offending party; and that it was *contra bonos mores*, that is, against public policy, to allow them. Indeed, in more than one case it was seriously doubted whether this separation *in pais* of husband and wife was valid and ought to be enforced.¹ In time, however, the courts of equity recognized that such deeds, when not contemplating a future separation, were valid so far as related to the trusts and covenants by which the husband made a provision for the wife, and the indemnity given to the husband by the trustee.² The theory of a deed of separation is that it is a contract between the husband and wife through the intervention of a third party, namely, the trustee; and the husband's contract for the benefit of the wife is supported by the contract of the trustee on her behalf.³ As will be seen lower down,⁴ the more modern opinion is that husband and wife can enter into a deed of separation without the intervention of a trustee.⁵

Recognition at
common law.

In the earlier times the common law courts gave effect to a deed of separation, and held that it was a good answer to a husband seeking by *habeas corpus* to obtain the person of his wife.⁶ The Court of King's Bench, in *Rodney v. Chambers*,⁷ held that covenants by the husband with the wife's trustees to allow her a sum of money on their mutual separation could be enforced, and that the husband's liability in such a matter was too inveterate and well settled to be disturbed. In this case it was also held that the husband's covenant could be enforced even in the case of a future separation, provided that it took place with the consent and approbation of the trustees. The way the courts enforced these deeds was by giving effect to the minor and auxiliary part of the agreement, such as the covenant of the husband to pay an annuity, or the covenant of the trustees to indemnify the husband; but the principal and essential motive, the actual separation, they did not enforce.⁸

The mere arrangement for separation was not recognized by the ecclesiastical courts, and formed no bar to a suit for the restitution of conjugal rights.⁹

Validity of
deeds of sepa-
ration fully
recognized in
modern times,
unless clearly
against public
policy.

In time, however, a conviction that to settle unhappy differences and quarrels in the domestic forum of friends and relatives was really less shocking than parading them in open court, brought about a change in the attitude of the courts towards

¹ See *St. John v. St. John*, 11 Ves. 526; *Westmeath v. Westmeath*, 1 Dow, H. L. (N. S.) 519. See *Smythe v. Smythe*, 18 Q. B. D. 544.

² *St. John v. St. John* (*ubi sup.*); see Lord Eldon's remarks in that case, p. 537.

³ Per Lord Westbury in *Hunt v. Hunt*, 4 De G. F. & J. 221, 239.

⁴ *Post*, p. 451.

⁵ *Sweet v. Sweet*, [1895] 1 Q. B. 12.

⁶ *Rev v. Mead*, 1 Burr. 542; *Rev v. Winton*, 5 T. R. 91.

⁷ 2 East, 283.

⁸ See *Frampton v. Frampton*, 4 Beav. 293.

⁹ See *Mortimer v. Mortimer*, 2 Hag. Con. R. 318.

these private arrangements, and a series of decisions recognizing their validity has long since placed their legality on a secure basis and footing, unless the deed is founded on a consideration clearly illegal, such as an agreement to facilitate divorce proceedings,¹ or to enable the wife to commit adultery.²

The courts now give full effect to a deed arranging for present separation with the intervention of a trustee, and the mere fact of its being voluntary and not founded on valuable consideration, does not make it less binding on the husband.³ It is now no longer necessary to recite facts which would entitle one of the parties to a judicial separation, or a divorce *a vinculo matrimonii*.⁴

But an agreement for separation to be valid and enforceable must be followed at once by actual separation;⁵ for the court only gives effect to the contract between the parties when their separation has become inevitable.⁶

Formerly the intervention of a trustee was in all cases necessary;⁷ but now, where the wife is at arm's-length with her husband, and is proceeding against him in the Divorce Court, she may contract with him, without the intervention of a trustee, for the abandonment of the suit in consideration of an annuity to be paid by him; and from this it follows that she can enter into a valid and enforceable contract to live separate and apart from him.⁸ "The trustee was interposed for the purpose of supplying a consideration when otherwise there would have been none. The notion was that the contract between husband and wife being *prima facie* void, the trustee was introduced in order that his covenant to indemnify the husband might afford a consideration for the husband's promise. But where there is a valid consideration between husband and wife, there is no need of a trustee."⁹ Under the Married Women's Property Act, 1882, a married woman has full capacity, without the intervention of a trustee, to contract by deed to live apart from her husband.¹⁰ How far a deed unsupported by what may be termed sufficient consideration would of its own force support the separation covenants, if at all, is not yet finally decided.¹¹ But where husband and wife, hopelessly at arm's-length, agree to separate and live apart, and the only consideration for their separation is their mutual covenants

Separation must be actual.

Agreement for separation, without the intervention of a trustee.

M.W.P. Act, 1882.

Husband and wife hopelessly at arm's-length.

¹ *Hope v. Hope*, 26 L. J. Ch. 417.

² *Evans v. Carrington*, 2 De G. F. & J. 481; and per Cotton, L.J., in *Fearon v. Earl of Aylesford*, 14 Q. B. D. 792.

³ *Frampton v. Frampton* (*ubi sup.*).

⁴ *Macq. H. & W.* 368; *Waite v. Waite*, 5 Bing. N. C. 341.

⁵ *Westmeath v. Salisbury*, 5 Bli. (N.S.) 339; *Bindley v. Mulloney*, L. R. 7 Eq. 343.

⁶ See *Bateman v. Ross*, 1 Dow, 235.

⁷ *Worrall v. Jacob*, 3 Mer. 256.

⁸ *Gibbs v. Harding*, L. R. 4 Eq. 490.

⁹ Per Lindley, L.J., in *Macgregor v. Macgregor*, 21 Q. B. D. 431.

¹⁰ *Sweet v. Sweet*, [1895] 1 Q. B. 12.

¹¹ See *Marshall v. Marshall*, 5 P. D. 19.

to allow each other to live apart, and not to molest each other, or seek for restitution of conjugal rights (but there is no covenant by trustees to indemnify the husband, and no covenant by the husband to allow his wife an annuity), such an arrangement will in all probability be recognized and enforced by the courts. An oral agreement between husband and wife to live separate, which was based on a compromise or cross criminal proceedings for assault, and without the intervention of a trustee, is binding and enforceable.¹

Distinction
between
executed and
executory
arrangements
for separation.

At one time a distinction was drawn between an executed deed arranging for a present separation and an executory arrangement, that is, articles of separation; the courts would enforce the first, but refused to give any validity to the latter. This distinction was swept away by the House of Lords in *Wilson v. Wilson*,² in which it was held that the Court of Chancery had power to decree specific performance of such articles, if founded on sufficient consideration, and the parties were separated. There is, however, a distinction which still holds good between an executed and an executory arrangement for separation; thus, if in the first there is an illegal condition or provision among good and valid ones, the whole deed will not be vitiated, but only the illegal provision ignored; but if in articles of separation there is an illegal condition or provision, such will render the contract null and void, for an executory contract must be performed *in toto* or not at all;³ thus, where a deed had been executed, and contained certain stipulations that were good, and others that contravened the law, the latter were held not to vitiate the deed, but the court only enforced those that were in consonance with the law.⁴

Specific per-
formance of
executed
arrangements.

The Court of Chancery will decree specific performance of executed deeds of separation, and will give the widest possible effect to them consistent with the interests of society. It is true that in *Marshall v. Rutton*⁵ it was decided that husband and wife were unable of their own will and act, and without the sentence of a competent tribunal, to alter their legal status and capacity; but the modern view of the law is to the contrary effect, and now a married woman can contract for valid and sufficient reasons to live apart from her husband, and is entitled to come to the court to enforce specific performance of such a contract.⁶ The court will also restrain the parties from persistent breaches of the covenants in the deed; thus it would restrain a husband from

¹ *Macgregor v. Macgregor*, 21 Q. B. D. 431.

² 1 H. L. Cas. 538.

³ *Vansittart v. Vansittart*, 27 L. J. Ch. 290.

⁴ *Ibid.*; *Hamilton v. Hector*, L. R. 13 Eq. 511.

⁵ 8 T. R. 545.

⁶ *Wilson v. Wilson*, 1 H. L. Cas. 538.

molesting his wife,¹ and a wife from instituting proceedings for restitution of conjugal rights.² Compensation for breach of the covenants may be assessed at a pecuniary sum.³

The covenants in a separation deed are independent of each other; and a breach of the covenant on the one side will not exonerate the covenantor on the other side from the due performance of his covenant.⁴ But it would seem that where one party acted in a manner wholly inconsistent with the objects of the deed, in such a case the other party would be exonerated from liability under the deed; that is, would be entitled to treat the deed as at an end.⁵

Covenants in separation deeds not inter-dependent.

Where a wife or a trustee for her covenants that she will not "molest" her husband, mere adultery on her part, or adultery followed by the birth of a child, is not a breach of the covenant not to molest.⁶ Molestation must be some act done by the wife or her authority with the intent to annoy her husband, and which is in fact an annoyance to him; or at least some act must be done by her or her authority with a knowledge that it must of itself, without more, annoy her husband, or annoy a husband with reasonable and proper feeling.⁷ Therefore, if a wife give birth to a bastard child while living separate from her husband, and put forward that child as being one of her husband's, especially with intent to claim a title or property which a legitimate child of her husband would take, that conduct might be evidence of a breach of a covenant not to molest.⁸ But where there is no *dum casta* clause and the wife covenants not to "annoy" as well as "molest" her husband, adultery resulting in the birth of a child does not disentitle her to the annuity payable under the deed.⁹ So, on the other hand, if a husband go to a distant country, and unreasonably begin divorce proceedings there against his wife, and serve her with a notice of them, such conduct is "molestation," and so a breach of the covenant not to molest.¹⁰

Molestation : what is.

Again, formerly the court was wont to restrain by injunction either of the parties from continuing or attempting to commit a breach of the covenants in the deed; thus, a covenant on the part of a husband in a separation deed, that it should be lawful for the wife to live separate and apart from him, and that he would not compel her to cohabit with him by any legal proceedings, was held enforceable in equity by injunction against proceedings in the Divorce Court for the restitution of conjugal

Restraint by injunction of proceedings in Divorce.

¹ *Saunders v. Rodway*, 22 L. J. Ch. 230. ² *Besant v. Wood*, 12 Ch. D. 605.

³ *Fearon v. Earl of Aylesford*, 14 Q. B. D. 792.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*

⁷ Per Brett, M.R., in *Fearon v. Earl of Aylesford* (*ubi sup.*).

⁸ *Hunt v. Hunt*, [1897] 2 Q. B. 304.

⁹ *Sweet v. Sweet*, [1895] 1 Q. B. 12.

¹⁰ *Hunt v. Hunt* (*ubi sup.*)

rights;¹ and where by a deed of separation a husband covenanted with a trustee to make an allowance to his wife, and the trustee covenanted on behalf of the wife neither to sue for restitution of conjugal rights or alimony, nor to molest, trouble, or disturb the husband, and shortly after the execution the wife commenced proceedings in the Divorce Court for a judicial separation and for alimony, the husband was held entitled to a perpetual injunction to the extent of restraining the proceedings in the Divorce Court.² But now, when a suit in the Divorce Court has been already begun, and one of the parties seeks to restrain the other from prosecuting it, the old remedy by prohibition, or injunction, or by an indefinite stay of proceedings, on the ground of a covenant in a separation deed, is no longer available, for by the Judicature Act³ that remedy is taken away; but every matter of equity on which an injunction against the prosecution of any cause or proceeding might have been obtained, either unconditionally or on any terms or conditions, may be relied on by way of defence; where one of the parties to a deed of separation commits a breach of a covenant not to sue for restitution of conjugal rights, the separation deed itself may be pleaded by way of equitable defence.⁴

Ground for injunction now to be pleaded by way of equitable defence.

The court will now decree specific performance of agreements to execute a deed of separation, where the stipulations are not contrary to law, or in contravention of public policy.⁵ But the agreement must be founded on sufficient consideration.⁶ An agreement for compromise of a divorce suit may be made an order of court in any division of the High Court.⁷

Specific performance of executory arrangements for separation founded on good consideration.

Every separation deed must not only provide for an actual or immediate separation, but must be founded on valuable consideration. The following are instances of good and sufficient consideration for entering into an arrangement for separation: Forbearance to sue for a divorce,⁸ or for a nullity of marriage;⁹ a compromise of a misdemeanour by one party towards the other.¹⁰ Though not absolutely necessary, the usual consideration for the husband's covenant to pay an annuity to the wife is the covenant of the trustees on her behalf to hold the husband indemnified against her debts.¹¹ A covenant by the trustees to

¹ *Hunt v. Hunt*, 31 L. J. Ch. 161; see *Rowley v. Rowley*, L. R. 1 Sc. & Div. App. 63.

² *Flower v. Flower*, 25 L. T. 902.

³ 36 & 37 Vict. c. 66, s. 24, sub-s. 5.

⁴ *Marshall v. Marshall*, 5 P. D. 19, approved in *Clark v. Clark*, 10 P. D. 188.

⁵ See *Vansittart v. Vansittart*, 2 De G. & J. 255.

⁶ *Wilson v. Wilson*, 1 H. L. Cas. 538; *Aldridge v. Aldridge* (otherwise *Morton*), 13 P. D. 210.

⁷ *Smythe v. Smythe*, 18 Q. B. D. 544.

⁸ *Augier v. Augier*, Prec. Ch. 496.

⁹ *Wilson v. Wilson* (*ubi sup.*).

¹⁰ See *Elworthy v. Bird*, 2 Sim. & St. 372; *Macgregor v. Macgregor*, 21 Q. B. D. 424.

¹¹ *Wilson v. Wilson* (*ubi sup.*); see *Gibbs v. Harding*, L. R. 5 Ch. App. 336.

indemnify the husband against his own debts would be sufficient;¹ so, too, a covenant to pay the husband an annuity, or a covenant by the husband to pay half the costs of the deed of separation.² A release by the husband of his rights in respect of his wife's acquired property would be a sufficient consideration for an annuity to be paid to him by the wife.³ An agreement by the husband to execute a deed of separation is a good consideration for a third party undertaking to pay the husband's debts.⁴ A covenant by the wife's trustee in a deed of separation binds her as a party to it to observe the covenants entered into on her behalf.⁵

The consideration necessary to support the deed against creditors will be shortly considered below.⁶ The consideration for these agreements must not be illegal, or they will be null and void; thus, an agreement based upon a provision to facilitate proceedings for a divorce would be invalid;⁷ or an omission of a *dum casta vixerit* clause with the intent that the wife might be at liberty to commit adultery.⁸

Consideration must not be illegal.

The payment of money by a third person to induce the parties to live separate would be an illegal consideration, and the arrangement based upon it would be futile and inoperative.⁹ The illegality of separation deeds is not presumed, but must be proved.¹⁰

It is quite possible, notwithstanding the validity of these deeds, that one of the parties to an agreement of this kind might so misconduct himself or herself that on equitable principles the court would refuse to enforce specific performance at his or her instance;¹¹ but a mere trifling breach of a covenant by a party will not disentitle him to a specific performance of the deed.¹² The Court of Probate and Divorce can under its statutory powers act on equitable principles in construing or giving effect to these deeds; and if a state of facts is proved to exist which was not in contemplation of the parties when the agreement was executed, owing to the fault or misconduct of one of the parties (as where the husband was guilty of incestuous adultery after its execution) the other party is not prevented by the restraining covenants of the deed to enforce the full and ample remedy to which he or she is entitled;¹³ and though a deed of separation is not an

Enforcement of deeds.

¹ *Wilson v. Wilson (ubi sup.)*

² *Gibbs v. Harding (ubi sup.)*. Any annuity agreed to be paid in advance is not apportionable. *Trevallion v. Anderton*, 66 L. J. Q. B. 489.

³ *Logan v. Birkett*, 1 Myl. & K. 220.

⁴ *Jones v. Waite*, 9 Cl. & F. 101.

⁵ *Clark v. Clark*, 10 P. D. 188.

⁶ *Post*, p. 460.

⁷ *Hope v. Hope*, 26 L. J. Ch. 417.

⁸ *Fearon v. Earl of Aylesford*, 14 Q. B. D. 792.

⁹ See *Jones v. Waite (ubi sup.)*

¹⁰ *Ibid.*

¹¹ *Besant v. Wood*, 12 Ch. D. 695.

¹² *Ibid.*; and see *Crouch v. Waller*, 7 W. R. 318. See also *Fearon v. Earl of Aylesford (ubi sup.)*.

¹³ *Morrall v. Morrall*, 6 P. D. 98. See *Bishop v. Bishop*, *Judkins v. Judkins*, [1897 P. 138; *Gandy v. Gandy*, 30 Ch. D. 57.

agreement that the parties to it should live apart in chastity, yet, in the case of a husband, gross misconduct, that is, misconduct of a nature so entirely different from that which the parties were providing for when they entered into the deed of separation, might prevent him from relying on the deed, and might entitle the wife to disregard the bargain made between them for maintenance.¹

Where a wife in an agreement for separation has agreed to accept from her husband a certain sum for maintenance to be paid in any event, whether the marriage should be afterwards dissolved or not, and such agreement contained no express provision by her not to sue for increased alimony in the event of a divorce grounded on future misconduct of her husband, the court has power under the Divorce Acts, after a decree for *dissolution of the marriage* on a fresh petition by her based on misconduct of the husband since the agreement, to disregard the agreement and order permanent alimony to be paid her at a rate exceeding the amount specified in the agreement, if the husband's means permit of such increase.² So again, where by a separation deed a wife has agreed to accept a sum certain for maintenance, the deed to become void if the marriage is afterwards dissolved for any future misconduct of either party, the court has power to order the payment of permanent alimony to her after a decree for *judicial separation* by reason of her husband's misconduct since the execution of the deed, if there has been such an alteration of circumstances as renders it unjust that she should be bound by the deed.³ Where a husband has in agreement for separation agreed to make his wife an allowance, and she has agreed to maintain the children of the marriage out of it, and she afterwards files her petition for dissolution of the marriage, the court has, notwithstanding the agreement, statutory jurisdiction⁴ to make provision for the maintenance and education of the children.⁵

The power of the Divorce Court to alter or disregard these deeds depends upon whether the conduct of the one party entitles the other party to a dissolution of the marriage tie, because in the case of judicial separation "the Legislature has not thought fit to give the same powers to the court that it has given in the case of dissolution of marriage. In the case of dissolution of marriage the court has had conferred upon it the

¹ *Gandy v. Gandy*, 7 P. D. 168 ; reversing 7 P. D. 77.

² *Bishop v. Bishop*, [1897] P. 138. In this case the Court of Appeal expressed a doubt whether the wife could by any such express provision debar herself of the right to apply for an increased alimony in the suit for the dissolution of her marriage.

³ *Judkins v. Judkins*, [1897] P. 138.

⁴ 20 & 21 Vict. c. 85, s. 35 ; 22 & 23 Vict. c. 61, s. 4.

⁵ *Barry v. Barry*, [1901] P. 87.

right to vary not only post-nuptial but ante-nuptial settlements, and to deal with them in any way which may be thought just and expedient. But in the case of judicial separation, there being no such power, the deed remains binding. The wife is entitled to the annuity secured her by the deed, the husband is liable to pay the annuity. It is impossible, therefore, for the court to allot such alimony as it may think just, because in the case of its thinking that the amount of alimony should be less than the annuity secured by the deed, it has no power of setting aside the deed, and no power to stop an action brought under the covenants of the deed by the trustees against the husband. It is, therefore a case where the ordinary powers of the court cannot be exercised, except in one direction, viz., by increasing the amount of alimony."¹ The power of the Divorce Court to make just and proper orders for alimony is contained in 20 & 21 Vict. c. 85, s. 17. The effect of the law is, that where the conduct of the husband does not entitle his wife to a divorce, but only to a judicial separation, the wife will be barred by her trustee's agreement and contract to accept a certain sum by way of alimony; and the court has no power to increase that amount; that is, the trusts of a separation deed are not put an end to by a mere judicial separation.² But where the husband's misconduct amounts to a cause which would entitle the wife to a dissolution, or she has by reason of such conduct obtained a dissolution of marriage, the court has more ample power over the amount to be ordered as alimony, and the wife in such a case will not be restrained by the covenant from asking for a larger amount than that agreed to be allowed her by the deed.³

A mere provision for future and prospective separation is bad;⁴ and this is so, whether the provision is made by deed or by articles; and a deed has been held to be void which in terms provided for an immediate separation, but which really meant to provide for a future separation.⁵ A condition in a gift by a third party would be void if it tended to a separation.⁶ A deed or arrangement for separation must be contemporaneous with, or immediately followed by, actual separation, for cohabitation after its execution renders it null and void.⁷ In one case,⁸ however, where the parties were living together, a deed which contained an arrangement by which the wife could live apart if circumstances

Arrangement
for prospective
separation bad.

¹ Per Jessel, M.R., in *Gandy v. Gandy*, 7 P. D. 168, 172.

² See *Jee v. Thurlow*, 2 B. & C. 547.

³ *Wilkinson v. Wilkinson*, 69 L. T. 459.

⁴ *Cocksedge v. Cocksedge*, 5 Ha. 397; *Hindley v. Westmeath*, 6 B. & C. 200; *Westmeath v. Salisbury*, 5 Bli. N. R. 339.

⁵ *Hindley v. Westmeath* (ubi sup.).

⁶ *Cartwright v. Cartwright*, 3 De G. M. & G. 982.

⁷ *Durant v. Titley*, 7 Pri. 577.

⁸ *Joddrell v. Joddrell*, 15 L. J. Ch. 17. See *Vandergucht v. De Blaquière*, 5 Myl. & Cr. 229; reversing 7 L. J. Ch. 270.

should render it necessary, was held valid notwithstanding such clause; but perhaps less on the ground that it was a deed providing for future separation than that it was in the nature of a family arrangement and the termination and compromise of a pending suit for divorce. A deed providing for the wife's support on the occasion of an immediate separation is good.¹ Where the future separation is dependent on the consent or approbation of third persons, as, for instance, the trustees, then the deed was formerly held good;² but it is more than doubtful whether such would be the case now.³

Determination
of separation
arrangement.

A separation deed entered into in order to determine the relationship of the parties while living apart and separate is put an end to by reconciliation and renewed cohabitation;⁴ but the reconciliation and re-cohabitation must be real, and mere dwelling under the same roof, but in a state of animosity towards one another, would be insufficient;⁵ so would be mere communication by letters without cohabitation.⁶ "The true principle is that a renewal of cohabitation will put an end to all or any of the provisions of a separation deed, so far as the language of the deed properly construed by the light of surrounding circumstances shows that its provisions were only intended to take effect whilst the separation lasted."⁷

When trusts
temporary;

The trusts of a deed of separation may take effect as being only of a temporary nature during the period that the parties shall live separate and apart, or they may take effect as a permanent settlement to last during the joint lives of the parties, or during the life of one of them. In the first case the trusts will be active only during the suspension of the cohabitation of the husband and wife; and if the two are reconciled and resume cohabitation, the whole object of the deed is gone.⁸ In the second case the separation deed may take the form of a permanent settlement, where other matters than the continuance of the separation is provided for, or where the covenant to pay the annuity is absolute and not limited only to the period of separation; thus where the interests of existing children are provided for, resumption of cohabitation of the parents does not affect the provisions for the children.⁹ "There is another class of cases where the deed con-

when
permanent.

¹ *Jee v. Thurlow*, 2 B. & C. 547; *Jones v. Waite*, 9 Cl. & F. 101.

² *Rodney v. Chambers*, 2 East, 283.

³ See *Cocksedge v. Cocksedge*, 5 Ha. 397; *Proctor v. Robinson*, 14 W. R. 381.

⁴ *Westmeath v. Westmeath*, 1 Dow, H. L. (N.S.) 569; *Besant v. Wood*, 12 Ch. D. 605; *Nicol v. Nicol*, 31 Ch. D. 524. In the latter case the Court of Appeal questioned the dictum of Lord Campbell in *Randle v. Gould*, 8 El. & B. 457.

⁵ *Bateman v. Ross*, 1 Dow, H. L. 245.

⁶ *Slatter v. Slatter*, 1 Y. & C. Ex. 28; *Frampton v. Frampton*, 5 Jur. 980.

⁷ Per Bowen, L.J., in *Nicol v. Nicol* (*ubi sup.*).

⁸ *Negus v. Forster*, 46 L. T. 675; *Webster v. Webster*, 22 L. J. Ch. 837.

⁹ *Ruffles v. Alston*, L. R. 19 Eq. 539; *Re Spark's Trusts*, *Spark v. Massey*, [1904] 1 Ch. 451.

tains other and separate provisions—a provision for an annuity during the life of the wife in some cases, a particular house given up to her in others; and where there are absolute provisions of that sort the deed is a perfectly valid deed, and may be enforced by either party notwithstanding re-cohabitation”;¹ as where a husband covenanted to pay an annuity to his wife during their joint lives;² or where the husband agreed to pay the wife an annual sum *while she should live chastely*;³ or where the separation deed provides that if the husband and wife should afterwards agree to live together again, such cohabitation should in no way alter the trusts of the deed;⁴ and such an agreement if the parties at the time of entering into it were separated or intended immediately to separate is good and valid;⁵ or where the deed makes provision for a child or children of the marriage.⁶ If in such cases the parties re-cohabit, the trusts continue,⁷ and if they separate again they revive in full force.⁸ The effect of such a covenant as to pay an annuity to the wife for the joint lives of herself and husband, is that it is payable to her though she has committed adultery since the separation, and the marriage has been dissolved in consequence;⁹ and it has been decided in more recent cases that a *dum casta* clause is not one of the usual covenants in a deed of separation, but must be expressly stipulated for.¹⁰ It is a clause over which the Court of Divorce has jurisdiction in allowing alimony.¹¹ Where a husband covenanted to pay his wife £100 a year while she should live chastely, and for ten years lived apart, but subsequently resumed cohabitation, but seven years afterwards again separated, and the wife obtained a decree of judicial separation, with alimony at the rate of £180 per annum, it was held that the deed was not rescinded by cohabitation.¹² Though this clause is not usually inserted in a deed of separation, yet if the wife while living apart is guilty of adultery, on which a successful petition for dissolution is brought by the husband, the original separation may be varied by inserting this clause.¹³ Where there is no *dum casta* clause, the wife can claim her annuity, though she commit adultery during separation.¹⁴ An annuity covenanted by the husband to be paid

Dum casta
clause.

¹ Per Coleridge, C.J., in *Negus v. Forster* (*ubi sup.*). See *Dodd v. Cary*, 13 L. J. Ch. 103.

² *Grant v. Budd*, 30 L. T. 319.

³ *Negus v. Forster* (*ubi sup.*).

⁴ *Wilson v. Mushett*, 3 B. & Ad. 743.

⁵ *Ibid.*

⁶ *Ruffles v. Alston* (*ubi sup.*).

⁷ See *Charlesworth v. Holt*, L. R. 9 Ex. 38.

⁸ *Negus v. Forster* (*ubi sup.*); *Nicol v. Nicol* (*ubi sup.*).

⁹ *Charlesworth v. Holt* (*ubi sup.*).

¹⁰ *Hart v. Hart*, 18 Ch. D. 679.

¹¹ *Corbett v. Corbett*, 14 P. D. 736; *Lister v. Lister*, 15 P. D. 4.

¹² *Negus v. Forster* (*ubi sup.*).

¹³ *Saunders v. Saunders and Beck*, 69 L. T. 498.

¹⁴ *Sweet v. Sweet*, [1895] 1 Q. B. 12.

to the wife for her life, will on his death become payable by his executors.¹ Whether the separation deed is to take effect as a temporary arrangement or permanent settlement depends upon its language.² Resumption of cohabitation is not *per se* accord and satisfaction of arrears of an annuity which a husband has covenanted to pay his wife while living apart under a deed of separation.³

Summary.

A separation deed whose only object is to provide for the parties living apart from one another is put an end to for every purpose if the parties subsequently become reconciled and return to cohabitation; but if it is a deed which has separation for one of its objects but others as well, then return to cohabitation does not put an end to it.

Effect of fraud.

A wife who obtains a separation deed by concealing some material fact from her husband, such as her adultery, and he in ignorance executes it, is debarred from enforcing her rights under it.⁴

Validity of separation deed against creditors in respect of property affected by it.

The mere agreement of the parties to execute a deed of separation and to live apart is sufficient to render it binding on both of them, both as regards their pecuniary and social status towards one another. But as regards creditors and purchasers,⁵ that is not so, and the deed being post-nuptial, to be effectual must be supported by valuable consideration. The court, however, will not weigh the consideration in too nice scales; the following has been held sufficient: the usual indemnity against the wife's debts,⁶ an indemnity against the husband's own debts,⁷ the relinquishment by the wife of her claim to alimony,⁸ and probably a compromise of litigated rights by the wife would be held a valuable and sufficient consideration.⁹

Custody of the children.

An agreement by the father in a separation deed to surrender the custody of the infant children to the mother was in former times invalid, and vitiated the articles of separation *in toto*; for it was held that he could not derogate from his own rights, and for him to attempt to do so was contrary to public policy;¹⁰ for the law had given him their custody unless he had done something to forfeit it.¹¹ But an important alteration was effected by

¹ *Randle v. Gould*, 6 W. R. 108. Here the deed was held to be not merely a separation deed but a post-nuptial settlement.

² *Nicol v. Nicol*, 31 Ch. D. 524.

³ *Macan v. Macan*, 70 L. J. K. B. 90.

⁴ *Brown v. Brown*, L. R. 7 Eq. 185; see *Evans v. Carrington*, 29 L. J. Ch. 330.

⁵ *Fitzer v. Fitzer*, 2 Atk. 511; *Clough v. Lambert*, 10 Sim. 174; *Cowx v. Foster*, 1 J. & H. 30.

⁶ *Stephens v. Olive*, 2 Bro. C. C. 90.

⁷ *Wilson v. Wilson*, 1 H. L. Cas. 538.

⁸ *Hobbs v. Hull*, 1 Cox, Eq. Cas. 445.

⁹ See *Nunn v. Ladbroke*, 8 T. R. 521; *Joddrell v. Joddrell*, 15 L. J. Ch. 17; *Wilson v. Wilson* (*ubi sup.*).

¹⁰ *Vansittart v. Vansittart*, 27 L. J. Ch. 222, 290.

¹¹ *Hunt v. Hunt*, 28 Ch. D. 606.

the Infants' Custody Act, 1873,¹ for it enacts,² that "no agreement contained in any separate deed made between the father and the mother of an infant or infants shall be held to be invalid by reason only of its providing that the father of such infant or infants shall give up the custody or control thereof to the mother: Provided always, that no court shall enforce any such agreement if the court shall be of opinion that it will not be for the benefit of the infant or infants to give effect thereto." The result of this is that the husband can agree with his wife on separation to allow her to have the care and custody of the children, and the agreement can be enforced. But as the benefit of the infant child is ever the chief concern of the court, if it subsequently becomes evident that the custody of the mother would be harmful to the infant, the father may apply to the court to rescind the agreement and recover its custody.³ Every such agreement in a separation deed is therefore accompanied by a proviso that the court shall not enforce the agreement as regards the children unless it be to their advantage.⁴ This subject of the custody and control of children is further pursued in another portion of this book.⁵

Infants' Custody Act, 1873.

If, however, the parties are unable or unwilling to settle their matrimonial differences in private by means of a separation deed, they may have recourse to the Divorce Court for relief. It is not here intended to discuss the powers and jurisdiction of the Court of Divorce, but to give a mere outline of the subject. Prior to the year 1858 the ecclesiastical courts had no power to divorce *a vinculo matrimonii*, or dissolve the union of married persons; that jurisdiction was confined to degrees or orders of divorce *a mensâ et thoro*, or judicial separation, by which those who were united in the bonds of marriage were enabled for specified causes to live apart, and not compelled to cohabit, and to sentences of nullity. It seems too strong an expression to say that before that year marriage in England was indissoluble; the case rather was, that there were no means in existence by which the courts were able to separate for all purposes those lawfully joined in matrimony. But in order to meet the exigencies of different cases, especially in cases where by the adultery of the wife, bastard issue might be fathered on the husband, *privilegia* or private relief Acts of Parliament were from time to time passed which operated to dissolve the tie, and enabled either party to re-marry during the life of the other.⁶ The powers of the old ecclesiastical courts

Dissolution of marriage and judicial separation.

Jurisdiction of the Divorce Court.

¹ 36 Vict. c. 12.

² Sect. 2.

³ *Re Besant*, 11 Ch. D. 508.

⁴ *Ibid.*

⁵ See *post*, Part II., Parent and Child, chap. ii.

⁶ Such Acts are usually intitled as follows: "An Act to dissolve the marriage of A. B. with C. D., and to enable him to marry again." In the recitals of the Act the decree of judicial separation (if any) of the ecclesiastical court was mentioned, but such decree was not a condition precedent to the passing of the Act.

and further and wider powers were conferred upon the Divorce Court by the Acts of 1857¹ and 1858;² this court now forms a branch of the Probate, Divorce, and Admiralty Division of the High Court of Justice.

If the court is satisfied that there are sufficient grounds for pronouncing a decree of dissolution, it will grant the prayer of the petitioner. The grounds for relief in a petition for dissolution of marriage are, where the husband is petitioner, the adultery of the wife;³ where the wife is petitioner, on the part of the husband, incestuous adultery, bigamy with adultery,⁴ sodomy, bestiality, or adultery coupled with such cruelty (which need not be necessarily physical violence⁵) as without adultery would have entitled her to a divorce *a mensâ et thoro*, or adultery coupled with desertion without reasonable excuse for two years or upwards.⁶ The effect of a sentence of dissolution of marriage is that the parties are no longer husband and wife, and are strangers to one another as regards person and property,⁷ save so far as the statutory jurisdiction of the court enables it to alter and vary the settlements whether ante-nuptial or post-nuptial,⁸ including a separation deed,⁹ and whether there are children or not.¹⁰ In many ways the effect of a decree of dissolution is as though the parties had never married.¹¹ The parties are also enabled to re-marry. The decree absolute for the dissolution of the marriage must be made before either of the spouses dies; if not so made the parties die husband and wife.¹² The expression in "a settlement surviving the coverture" is satisfied if the coverture is put an end to by a decree of dissolution of marriage.¹³ The court has also wide discretion on the question of alimony,¹⁴

¹ 20 & 21 Vict. c. 85.

² 21 & 22 Vict. c. 108.

³ 20 & 21 Vict. c. 85, s. 27.

⁴ The adultery must be substantially proved; mere evidence of a bigamous marriage does not satisfy the requirements of the statute; *Ellam v. Ellam*, 58 L. J. P. 56.

⁵ *Bethune v. Bethune*, 63 L. T. 259; *Walmesley v. Walmesley*, 69 L. T. 152. See *Russell v. Russell*, [1895] P. 315, 322, for a definition of cruelty. The cruelty must be of such a nature as to cause danger to life, limb or health, or a reasonable apprehension of such danger; thus a false charge of having committed an unnatural offence brought by a wife against her husband, and known by her to be false, is not *per se* sufficient evidence of legal cruelty. *Russell v. Russell*, [1897] A. C. 395. Indeed, where the parties are living apart anything short of physical violence would seem to be insufficient evidence of legal cruelty. *Ibid.*

⁶ 20 & 21 Vict. c. 85, s. 27.

⁷ *Re Morrisson, Hitchins v. Morrisson*, 40 Ch. D. 30, in which *Bullmore v. Wynter*, 22 Ch. D. 619, was observed upon.

⁸ 20 & 21 Vict. c. 85, s. 45; 22 & 23 Vict. c. 61, s. 5.

⁹ *Worsley v. Worsley*, L. R. 1 P. & D. 648.

¹⁰ 41 Vict. c. 19, s. 3. But it is doubtful whether the Court of Divorce has power to interfere with the interests, rights and liabilities of persons not parties to the suit.

Re Crawford, Cooke v. Gibson, [1905] 1 Ch. 11.

¹¹ See *Re Lesingham's Trusts*, 24 Ch. D. 703.

¹² *Stanhope v. Stanhope*, 11 P. D. 103.

¹³ *Re Crawford, Cooke v. Gibson* (*ubi sup.*).

¹⁴ 20 & 21 Vict. c. 85, s. 32.

and can order an innocent husband to make provision for a guilty wife if her circumstances warrant such order.¹

There are two classes of defences to a suit for dissolution of marriage. Absolute bars, such as denial of the facts alleged in the petition, connivance, condonation,² and collusion; these are facts which, if proved to the satisfaction of the court, are a complete answer to the petition, and leave the court no discretion but to dismiss it. Discretionary bars, or facts which if proved leave to the court a discretion as to the decree, such as adultery of the petitioner,³ unreasonable delay in presenting or prosecuting the petition, cruelty, desertion, or wilful separation from the other party before the alleged adultery without reasonable excuse, and such wilful neglect or misconduct as has conduced to the adultery complained of.

Defences in suits for dissolution.

The husband and wife may also obtain a sentence of judicial separation, or divorce *a mensâ et thoro* from each other for various grounds.⁴ The principle upon which each of these grounds rests is that it must be such as *per quod consortium amittitur*; thus, the husband may obtain a sentence by reason of his wife's adultery, or cruelty, or desertion, without cause for two years and upwards; and the wife may obtain a sentence by reason of her husband's adultery, or cruelty, or desertion, without cause for two years and upwards. If a husband is convicted summarily, or on indictment of an aggravated assault on his wife, the court before which he is convicted can order what is practically a judicial separation between them;⁵ but an order under the Summary Jurisdiction (Married Women) Act, 1895,⁶ is not a decree of judicial separation in a matrimonial cause.⁷ The defences to a suit for judicial separation are practically the same as those in suits for dissolution of marriage. The consequences of this sentence are not so wide as those of a dissolution of marriage; the parties are still husband and wife, they are not free to re-marry, and they may come together and live as husband and wife again without going through any ceremony of re-marriage. The court itself has not the same power of dealing with settlements on a sentence of judicial separation as on one of dissolution of marriage.⁸

Judicial separation.

Grounds for relief.

Difference between divorce and judicial separation.

The effect of a decree of judicial separation is put an end to by the resumption of cohabitation on the part of the spouses.⁹

Effect of decree ended by resumed cohabitation.

¹ *Ashcroft v. Ashcroft and Roberts*, [1902] P. 270.

² See *Bernstein v. Bernstein* (No. 2), [1893] P. 292.

³ See *Whitworth v. Whitworth*, [1893] P. 85; *Potter v. Potter*, 67 L. T. 721.

⁴ 20 & 21 Vict. c. 85, ss. 7, 16.

⁵ 58 & 59 Vict. c. 39, s. 4, repealing 41 Vict. c. 19, s. 4. See *post*, p. 464.

⁶ *Ibid.*

⁷ See *Sweet v. Bishop of Ely*, [1902] 2 Ch. 508.

⁸ *Gandy v. Gandy*, 7 P. D. 168.

⁹ See *Haddon v. Haddon*, 18 Q. B. D. 778.

But it would appear that mere isolated acts of matrimonial cohabitation subsequent to the separation would not put an end to the separation if it was not the intention of the parties to abrogate the separation.¹

The effect of dissolution of marriage and judicial separation on the property rights of the spouses has been discussed under various headings.

One method of obtaining a decision that two people are not married to each other is by bringing a suit for jactitation of marriage. This is brought, where one party maliciously boasts or gives out (*jactitatio*) that he or she is married to the other, in order to prevent a common reputation of their marriage from ensuing. Unless the defendant makes out a proof of the actual marriage, he or she is enjoined perpetual silence on that head.² Before Lord Hardwicke's Act³ this suit was frequently brought owing to the great facilities for clandestine and irregular marriages. But of late years it is not very frequently resorted to. In this suit there are three defences: (1) Denial of the boasting; (2) the truth of the representations; (3) full authorization of the pretension by the complainant, though no marriage ever took place; that is, the representation, though false, is not malicious.⁴ This last defence is based on the principle that a complainant who has for some time authorized the respondent to make representations such as those afterwards complained of does not come into court with clean hands to seek relief *ex debito justitiæ*.⁵

Under the Summary Jurisdiction (Married Women) Act, 1885,⁶ a married woman whose husband has been convicted summarily of an aggravated assault,⁷ or an indictment of an assault upon her, and sentenced to pay a fine of more than £5 or to a term of imprisonment exceeding two months, or who has deserted her, or has been guilty of persistent cruelty to her, or has wilfully neglected to provide reasonable maintenance for her or her infant children, whom he is legally liable to maintain, and has by such cruelty or neglect caused her to leave and live separately and apart from him, may obtain more speedy relief than by petition for judicial separation in the Divorce Court from the Court of Summary Jurisdiction for the district in which the husband has been

¹ *Rowell v. Rowell*, [1900] 1 Q. B. 9.

² 3 Bl. Com. 93.

³ 26 Geo. III. c. 33.

⁴ *Hawke v. Corri*, 2 Hag. Con. R. 280.

⁵ *Thompson v. Rourke*, [1893] P. 70.

⁶ 58 & 59 Vict. c. 39, repealing (sect. 12) 41 Vict. c. 19, s. 4; and 49 & 50 Vict. c. 52.

⁷ An "aggravated assault" is one which the justices having heard the case deem to be of such a nature as cannot be sufficiently punished by the ordinary punishments for assault, but deserving of a sentence of imprisonment up to six months, or a fine up to £20. 24 & 25 Vict. c. 100, s. 43.

Jactitation of marriage.

Defences.

Summary Jurisdiction (Married Women) Act, 1885.

convicted or the cause of complaint has wholly or partially arisen.¹ The orders which a Court of Summary Jurisdiction can make may contain all or any of the following provisions: (a) That the applicant be no longer bound to cohabit with her husband (this provision is to have the effect in all respects of a decree of judicial separation on the ground of cruelty); (b) That the legal custody of any children of the marriage while under sixteen years of age be committed to the applicant. (c) That the husband shall pay to the applicant personally, or, for her use, to any officer of the court, or third person on her behalf, a weekly sum not exceeding £2, which the court shall consider reasonable, having regard to the means of both husband and wife. Before the court can make an order of reasonable maintenance against the husband, it must be satisfied that he is in the receipt of actual earnings, or has the capability of earning them; and cannot dispense with the evidence of means;² and the guiding principle and practice ought to be those of the Divorce Division in suits for judicial separation.³ A voluntary allowance is to be taken into consideration.⁴ (d) The payment by the applicant or the husband, or both, of the costs of court, and such reasonable costs of either of the parties as the court may think fit.⁵ The effect of an order under this Act is, while it lasts, to make a married woman a *feme sole* just as though she had obtained a decree of judicial separation in the Divorce Court; thus, where she has obtained an order under section 5, a general grant of administration with justifying sureties may be made to her, passing over her husband without citing him.⁶ Costs of applications under this Act are not recoverable by action; but must be ordered by the Court of Summary Jurisdiction to be enforced.⁷ As this Act repeals the Act of 1886, the recent cases under the earlier Act will be set out. The Act is retrospective, therefore a married woman deserted by her husband before it came into force may obtain relief under it;⁸ for it was passed to cure an existing evil, and to give the parties injured a new remedy, and it is immaterial whether the injury arose before or after the Act was passed.⁹

Judicial
separation;custody of the
children;weekly
alimony;

costs.

¹ Sect. 4. See *Reg. v. Leresche*, 56 L. J. M. C. 158. The Court of Quarter Sessions or the Assize Court before which the husband is convicted becomes a Court of Summary Jurisdiction for the purposes of this section. Sect. 8 provides that all applications under this Act shall be made in accordance with the Summary Jurisdiction Act, and in case of the conviction of husband for aggravated assault upon his wife, her application may, by leave of the court, be made by summons, to be issued and made returnable immediately upon such conviction.

² *Earnshaw v. Earnshaw*, [1896] P. 160.

³ *Cobb v. Cobb*, [1900] P. 294.

⁴ *Nott v. Nott*, [1901] P. 241.

⁵ Sect. 5. Under the repealed Act of 1878, unless the justices made an order on the husband for payment of an allowance to his wife at the time of his conviction she could not afterwards apply for it. *Woodhead v. Woodhead*, [1895] P. 343.

⁶ *In The Goods of Jones*, 74 L. J. P. 164.

⁷ *Cale v. James*, [1897] 1 Q. B. 418.

⁸ *Reg. v. Birtwhistle and Others*, 58 L. J. M. C. 158; *Lane v. Lane*, [1896] P. 133.

⁹ *Ibid.*

What
desertion is.

Desertion implies *prima facie* that the parties are living together at the time when desertion takes place,¹ and there must be a deliberate purpose of abandoning the conjugal society.² Desertion is based upon facts, and these facts may and do vary with the surrounding circumstances of the parties.³ It further implies a cessation of cohabitation and an intention on the part of the guilty spouse to desert the other.⁴ It is not always or even necessarily the guilty spouse who leaves the matrimonial home. The spouse who intends to bring the cohabitation to an end, and whose conduct in reality causes its termination, commits the act of desertion.⁵ Thus, a wife who without cause refuses to permit marital intercourse to her husband cannot allege desertion without reasonable cause by him if in consequence he refuses to live with her, but is herself in such circumstances guilty of desertion.⁶ Desertion also implies a wilful absenting on the part of one spouse, and such absence and cessation of cohabitation must be in spite of the other spouse;⁷ if, therefore, husband and wife mutually agree to separate, and separation follows, there is no desertion on the husband's part;⁸ that is to say, where the state of cohabitation has ceased to exist, whether by the adverse act of husband or wife, or even by the mutual consent of both, desertion becomes impossible to either until their common life and home have been resumed;⁹ and the refusal by one at the request of the other to resume cohabitation does not constitute the offence of desertion.¹⁰ But conjugal society or cohabitation does not necessarily imply that the parties must be living together continually under one roof.¹¹ Desertion may take place even where there has been no cohabitation.¹² Where a husband without reasonable excuse obtains from his wife an agreement to live apart from each other, which is acted upon, he commits desertion of her; and if she subsequently commit adultery, he will be disentitled to have the marriage dissolved.¹³ But if husband and wife live apart under a deed which neither party is to require or attempt to compel the other to live together or cohabit or take

¹ *Fitzgerald v. Fitzgerald*, L. R. 1 P. & D. 694.

² *Reg. v. Leresche*, [1891] 2 Q. B. 418; and see *Wynne v. Wynne*, [1898] P. 18.

³ See *Williams v. Williams*, 33 L. J. P. M. & A. 172.

⁴ *Sickert v. Sickert*, [1899] P. 278.

⁵ *Ibid.*

⁶ *Synge v. Synge*, [1900] P. 180.

⁷ *Thompson v. Thompson*, 27 L. J. P. M. & A. 65.

⁸ *Smith v. Smith*, 28 L. J. P. M. & A. 27.

⁹ *Fitzgerald v. Fitzgerald*, L. R. 1 P. & D. 694; *Piper v. Piper*, [1902] P. 198.

¹⁰ *Ibid.*; *Reg. v. Leresche*, [1891] 2 Q. B. 418.

¹¹ *Bradshaw v. Bradshaw*, [1897] P. 24. This was a case of a married female domestic servant who never lived with her husband under the same roof, but was visited by him from time to time at her mistress' house, and had a child by him while in such service. The husband refused to receive his wife in the house where he lodged, or to give her any help towards her maintenance. The court held that there was sufficient cohabitation to give jurisdiction to the justices under section 4 of the Summary Jurisdiction Act (Married Women) Act, 1895, and to make an order on the husband thereon.

¹² *De Laubenque v. De Laubenque*, [1899] P. 43.

¹³ *Dagg v. Dagg and Speake*, 7 P. D. 17.

any proceedings for the restitution of conjugal rights, he agreeing to pay her a weekly allowance which he fails to keep up, the wife has no remedy against him under this Act;¹ and so where husband and wife are living apart under a separation deed, and the husband refuses to resume cohabitation.² The effect of the deed is to put an end to desertion.³ But where the husband is under an order obtained by guardians to pay a weekly allowance in respect of the chargeability of his wife to the Poor Law, and she comes out of the workhouse and he does not make a *bonâ fide* offer to resume cohabitation, she is entitled to an order under this Act;⁴ and where she leaves her husband for a temporary purpose and for their mutual convenience, cohabitation does not thereby cease, and if her husband afterwards refuse to take her back or maintain her, he may be guilty of desertion within the meaning of the Act.⁵ It would seem, too, that where a husband had already deserted his wife and they afterwards agreed by separation deed to live apart, but the wife did not condone her husband's past marital offences, and did not covenant not to sue him, she might be entitled to an order under the Act.⁶ Under this section⁷ the matrimonial offence of desertion would seem to be complete where the husband withdraws himself from cohabitation against the wife's will, though he continues to afford her maintenance. The desertion must be continuing at the time of the making of the order for separation and maintenance; and a *bonâ fide* offer on the part of the husband to return and provide for his wife would disentitle her to an order.⁸ A wife is (under the Divorce Acts) entitled to a decree for judicial separation, if her husband petitions for a dissolution of marriage on the ground of her adultery and fails, and in the suit she prays for judicial separation on the ground of his desertion without a cause.⁹ Though the keeping apart of the spouses under a decree of judicial separation pronounced by the High Court is not desertion of the one by the other; yet an order of judicial separation made under section 5 of the Act of 1895 does not prevent the injured party from relying on desertion in a petition in the High Court for dissolution of marriage, if the circumstances of the case warrant the court in coming to the conclusion that desertion has in fact taken place.¹⁰ Desertion by the husband is a continuing offence, and a married woman is not obliged to apply for an order under section 4 of this Act within six months of the commencement of the desertion.¹¹

Desertion must exist at time of order.

Desertion a continuing offence.

¹ *Pape v. Pape*, 20 Q. B. D. 76.

² *Reg. v. Leresche*, [1891] 2 Q. B. 418.

⁴ *Kershaw v. Kershaw*, 51 J. P. 646.

⁶ See *Moore v. Moore*, 12 P. D. 193.

McCarthy, [1892] P. 21.

⁸ See *Cargill v. Cargill*, 27 L. J. P. M. & A. 69.

¹⁰ *Smith v. Smith*, [1905], P. 249.

³ *Piper v. Piper*, [1902] P. 198.

⁵ *Chudley v. Chudley*, 59 L. T. 617.

For what is not "desertion," see *Mahoney v.*

⁷ Sect. 4.

⁹ *Ibid.*

¹¹ *Heard v. Heard*, [1896] P. 188.

Habitual
drunkenness
ground of
order in favour
of wife or
husband.

Under the Licensing Act, 1902,¹ where a husband is a habitual drunkard the wife may apply for an order under the Summary Jurisdiction (Married Women) Act, 1895, for an order that she be no longer bound to cohabit with him, which provision (as has been seen) while in force has the effect in all respects of a decree of judicial separation on the ground of cruelty; and, on the other hand, where a wife is a habitual drunkard, the husband is now entitled (a new provision) to apply for a similar order with similar effect, and for this purpose the Act of 1895 is made to apply to the application and order on the part of the husband.²

Adultery of
wife disentitles
her to relief.
Variation or
discharge of
orders.

The adultery of the wife will disentitle her to any such order unless the husband has condoned, or connived at, or by his wilful neglect or misconduct, conduced to the adultery.³ A Court of Summary Jurisdiction of the district in which any order under this Act (also any order that may have been made under the Matrimonial Causes Act, 1878, and the Married Women (Maintenance in case of Desertion) Act, 1886), may, on the application of either the wife or husband on satisfactory fresh evidence,⁴ at any time alter, vary, or discharge such order, and may increase or diminish the amount of any weekly payment, so that it does not exceed in any case £2.⁵ The court shall discharge any such order if the wife has subsequently resumed cohabitation, or has been proved to commit adultery;⁶ but the cohabitation must have been resumed with the intention of putting an end to the separation.⁷

The power of the justices to rehear a summons under the Act of 1886 at the instance of the husband was held to be limited to an application on his part to show that his means had been altered in amount since the making of the original order for the purpose of varying the order.⁸ But under the present Act there does not appear to be any such limitation to the husband's right of application. But if he suggests adultery at the original hearing and is offered an adjournment for the purpose of proving it, but he declines and allows the case to go on, he cannot afterwards apply for a rehearing on that ground.⁹

A Court of Summary Jurisdiction would now seem to possess the power of altering, varying, or discharging any such order which has been made by a Court of Quarter Sessions or by a judge of assize.¹⁰ The justices may refuse to make any such order, and leave the parties to go to the High Court if the matters in question between the parties could be more conveniently dealt with by the superior court.¹¹ But the High Court may direct the Court of Summary Jurisdiction to rehear

¹ 2 Edw. VII. c. 28, s. 5.

² *Ibid.*

³ Sect. 6.

⁴ For what is fresh evidence, see note 7 on p. 263; *Johnson v. Johnson*, [1900] P. 19.

⁵ Sect. 7.

⁶ *Ibid.*

Rutter v. Rutter, [1903] 2 K. B. 270.

⁷ *Rowell v. Rowell*, [1900] 1 Q. B. 9.

⁸ *Sephion v. Sephion*, 58 L. T. 281.

⁹ *Reg. v. Justices of Oldham*, 51 J. P. 647.

¹⁰ Sect. 7.

¹¹ Sect. 10.

and determine the application.¹ Appeals from the order or refusal to make an order by a Court of Summary Jurisdiction under this Act lies to the Probate, Divorce, and Admiralty Division of the High Court.² Appeals.

In order to put a stop to proceedings that amounted to a scandal, a short but important Act was passed in the year 1884,³ to effect an alteration in the law relating to the restitution of conjugal rights. A decree for restitution is no longer enforceable by attachment;⁴ but failure to comply with the decree shall be deemed desertion without reasonable cause, entitling the petitioner to bring forthwith a suit for judicial separation.⁵ Intentional disobedience of the decree is desertion within the meaning of the Act;⁶ accordingly, if a husband has been guilty of adultery, and has refused compliance with a decree for restitution of conjugal rights, a wife may petition for dissolution of the marriage on the ground of his adultery and statutory desertion.⁷ Conduct on the part of one of the spouses which may not amount to matrimonial misconduct entitling him or her to a judicial separation may, on the other hand, disentitle him or her to a decree for restitution of conjugal rights.⁸ If one spouse has a reasonable cause for leaving the other, who afterwards refuses to cohabit, such leaving is not desertion disentitling the spouse that left the matrimonial domicile from maintaining a suit for restitution of conjugal rights.⁹ The court has power to order the husband to make his wife periodical payments in the nature of alimony;¹⁰ and where the wife is in fault to order a settlement to be made of her property for the benefit of the husband and children, or either of them;¹¹ and the court in ordering a settlement of the property of one party for the benefit of the other may in its discretion take into account the general conduct of the parties;¹² but the court in making a settlement out of the wife's property has no power to order a settlement of her property which is subject to a restraint against anticipation.¹³ Restitution of conjugal rights. Matrimonial Causes Act, 1878. Attachment abolished.

The court has power before or after final decree to make orders as to custody, maintenance, and education of the children, as though the proceedings were for judicial separation;¹⁴ and can make such Custody, &c., of children.

¹ 2 Edw. VII. c. 28, s. 10.

² Sect. 11.

³ 47 & 48 Vict. c. 68 (Matrimonial Causes Act, 1884).

⁴ Sect. 1.

⁵ Sect. 5. Service of the citation and petition in a suit for restitution may be served upon the respondent though residing out of the jurisdiction, in which case a reasonable time for appearance must be given. *Bateman v. Bateman*, [1901] P. 136; *Harding v. Hardie*, 70 L. J. P. 29.

⁶ *Harding v. Harding*, 11 P. D. 111.

⁷ *Dicks v. Dicks*, [1899] P. 275.

⁸ So held by the Court of Appeal in *Russell v. Russell*, [1895] P. 315.

⁹ *Oldroyd v. Oldroyd*, [1896] P. 175. This point was debated but not decided by the House of Lords in *Russell v. Russell*, [1897] A. C. 395.

¹⁰ See *Theobald v. Theobald*, 15 P. D. 26.

¹² *Swift v. Swift*, [1891] P. 129.

¹¹ Sect. 3.

¹³ *Mitchell v. Mitchell*, [1891] P. 208.

¹⁴ Sect. 6.

an order at the time of pronouncing a decree for restitution of conjugal rights.¹ The Act is retrospective in its operation.²

Right of divorced woman to retain her married name.

There seems to be some doubt prevailing on the question whether a married woman on dissolution of her marriage is entitled to retain the name of her husband, with the description of "Mrs." before it. It has been held³ that she is entitled to retain it; and on this ground, that marriage confers a name upon a woman which becomes her actual name, and she can only obtain another by reputation. There is no power in the courts to compel her to take another name, even if she has been divorced by reason of her misconduct; a choice of names by which to be known is free and unlimited to all persons (save for purposes of fraud); and she cannot be compelled to take another name, so she cannot be compelled to give up that name which she has lawfully acquired by the fact of marriage as well as by reputation. From this it follows, that a woman on dissolution of her marriage may continue to style herself by her married name, or may revert to her maiden name, or may seek by reputation to gain an altogether new name.

A man has no property in his name.

This view is supported by the case of *Cowley v. Cowley*,⁴ in which a husband, a peer of the realm, sought to restrain by injunction his late wife who had divorced him from continuing to use his name, though she had since married a commoner. This case strongly supports the proposition in the text, for it was admitted that by marrying a commoner the Countess of Cowley had no legal right to the user of that name; yet her act in retaining her former married name did not amount to a legal wrong against her former husband, or so affect the enjoyment of the incorporeal hereditament he possessed in his title as to entitle him in the absence of malice,⁵ to an injunction to restrain her use of the title.⁶

A dignity obtained by a woman through marriage remains hers though her husband die, and she remains noble for life. This privilege remains hers even though she marry again; provided her second husband is of noble birth; thus if a woman marry a duke who dies, and she marries again, she continues a duchess.⁷ But if she has acquired her dignity by marriage, and afterwards marries a commoner, that is, one who is not noble, then she loses her dignity, and all the rights and privileges annexed to it.⁸

¹ See *Paine v. Paine*, 50 W. R. 382.

² *Weldon v. Weldon*, 54 L. J. P. D. & A. 60.

³ *Fendall v. Goldsmith*, 2 P. D. 263.

⁴ In the Court of Appeal, [1900] P. 305; in the House of Lords, [1901] A. C. 450.

⁵ See *Jactitation of Marriage*, ante, p. 464.

⁶ Indeed, in the House of Lords it was determined that if such user amounted to a question affecting a dignity, it could only be disposed of by that House, sitting as a Committee of Privileges.

⁷ *Co. Litt.* 16 b; *Com. Dig.* Dignity (c 6.)
⁸ *Ibid.*; *Countess of Rutland's Case*, 6 Co. Rep. 360; *Howard v. Duke of Suffolk*, 1 Dyer, 79 b; *Cowley v. Cowley* (ubi sup.).

CHAPTER XVIII.

INTERNATIONAL ASPECT OF MARRIAGE AND DIVORCE.

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It would seem almost out of place to introduce into a work of Introduction.
this description a chapter which deals with international law; but when it is remembered how easy is modern intercourse between members of different nationalities, how liable they are to be affected by such intercommunion, how the laws dealing with the same subjects in various countries differ and conflict, and how knowledge of discrepancies may tend to remove them, then the importance of these considerations is a sufficient reason for their discussion.

Owing to the isolated position of England, the study of international law was not forced upon her jurists; and from the sixteenth down to the beginning of the present century it was a domain of jurisprudence almost unknown. Nor is it altogether to be wondered at, for she was not bordered by various nations, having each their own peculiar and probably conflicting laws, like the different continental countries, or the separate sovereign communities constituting the United States of America; neither

was there that intercommunion of the people in the way of commercial contracts or matrimonial alliances which would give rise to doubts as to the laws of which country should govern the transactions, and the explication of which would be most necessary. Though this chapter will deal with matrimonial questions from an international aspect, it will not deal with mere abstract propositions, but practically discuss the international validity of marriage and divorce.

The chapter will be divided into two sections: (1) the international aspect of marriage; (2) the international aspect of divorce.

SECTION I.

Marriage.

Marriage.

It would be impossible to treat of this question without first inquiring shortly into the nature of the most important factor which regulates the position of the spouses to each other both as regards the inception, maintenance, and dissolution of the marriage tie, namely, domicile. The parties must have a domicile somewhere or another, and it often becomes necessary to inquire by the laws of what place the true position of the parties to each other in the multifarious relations of married life is to be regulated and governed. It is obvious that domicile must be an essential consideration in treating of the international aspect of marriage.

Domicil.

Domicil has never been satisfactorily defined, and it may be that, owing to the complexity of ideas involved in it, it never will be. It is an amalgamation or combination of the fact of residence, and an *animus* or intention of remaining for an indefinite or unlimited time in a particular place; and unless both these elements are present, there is no domicile in the legal and technical sense, though the particular residence of the individual might popularly and accurately enough be described as his "home." The residence in the chosen place must be based upon the intention to remain there for an indefinite period.¹ Added to these two ideas there is a possible third—an *animus relinquendi*, or intention to abandon a former domicile, whether of origin or of choice. Domicil is established not by naked assertion but by deeds and acts.² It will suffice to give a few of the leading definitions of this subject, which more or less include

¹ *Udny v. Udny*, L. R. 1 Sc. App. 441. "Domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time." Per Lord Westbury, p. 458.

² Per Sir B. Peacock in *M'Mullen v. Wadsworth*, 11 App. Cas. 631.

the above constituents essential to an accurate description of the idea.

Story¹ defines domicile as "that place in which a person's Story. habitation is fixed, without any present intention of removing therefrom."

Phillimore:² "A residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time."

Vice-Chancellor Kindersley:³ "That place is properly the domicile of a person in which he has voluntarily fixed the habitation of himself and his family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected or uncertain) shall occur to induce him to adopt some other permanent home."

Dicey:⁴ "The place or country either (i) in which a person in fact resides with the intention of residence; or (ii) in which having so resided he continues actually to reside, though no longer retaining the intention of residence (*animus manendi*); or (iii) with regard to which, having so resided there, he retains the intention of residence (*animus manendi*), though in fact he no longer resides there."

Strictly speaking, there are but two kinds of domicile: (1) domicile of choice; (2) domicile not of choice, which includes (a) birth domicile (*domicilium originis*), and (b) domicile by operation of law.

It is to the domicile of choice, or that acquired *proprio marte*, that the above definitions and remarks apply. The domicile of birth (*domicilium originis*) is imposed upon a person who has not acquired another for the purpose of assigning him some law by which his personal status or property shall be governed. This domicile easily reverts, and the presumption of law is against the intention to abandon it.⁵ But in order to lose the domicile of choice and revive the domicile of origin, it is not sufficient for the person to form the intention of leaving the domicile of choice, but he must actually leave it with the intention of leaving it permanently.⁶

The domicile by operation of law is imposed on those who are not *sui juris*, but are dependent upon others—thus a wife takes the domicile of her husband; a legitimate infant,⁷ born in the

¹ Conflict of Laws, s. 41.

² Law of Domicil, 13.

³ In *Lord v. Colvin*, 28 L. J. Ch. 361, 366.

⁴ Law of Domicil, 44.

⁵ *Bempde v. Johnstone*, 3 Ves. 190; *Hodgson v. De Beauchesne*, 12 Moo. P. C. 285.

⁶ *Re Marrett, Chalmers v. Wingfield*, 36 Ch. D. 400. See *Bell v. Kennedy*, L. R.

1 H. L. (Sc.) 307; *Re Patience, Patience v. Main*, 29 Ch. D. 976.

⁷ *Udny v. Udny* (*ubi sup.*).

father's lifetime, that of his father ; a posthumous,¹ or an illegitimate² infant, that of his mother. Domicil, whether of birth or of choice, must be gathered from a person's surroundings, and is to be ascertained either by presumptions of law, or by the known facts of the case, which must be tested by the ordinary rules of evidence. The actual residence in any one place is a physical fact of easy proof, but the difficulty arises in balancing nicely conflicting points of evidence adduced to show that the *animus manendi* was directed to one spot in preference to another ; or, in other words, that the *animus relinquendi* was or was not complete as to a particular place.³ Domicil may be proved by the statements of a person,⁴ by his acts,⁵ and by the presumption that a domicil once obtained continues,⁶ and that it is there where a man's wife and family are.⁷

Domicil of husband the true matrimonial domicil.

The true seat of the matrimonial relations is undoubtedly the domicil of the husband, because it is the place of the performance of the duties arising from the marriage.⁸ It is to the abode of the husband that both parties look when entering into this contract ; and both may be taken to be willing to bring themselves under the laws and customs which there obtain.⁹ By the laws of all civilized nations the husband takes the lead in married life, and to his rule the wife and the family are subjected ; he has the power to alter his place of residence, and make choice of the spot where their fixed abode shall be. As a necessary consequence of this, if the husband should change his domicil during coverture, that of the wife will change also ;¹⁰ and the conjugal rights as to movable property will vary, though as to immovable or real property the *lex situs* prevails. This view as to property rights is held by the English law. This, however, is not the view of the eminent German jurist, Savigny,¹¹ who holds that the conjugal rights of the spouses should be immutably settled according to the local law of the earliest domicil ; and this on the ground that the wife's rights were fixed by the law of her first and earliest matrimonial domicil ;¹² and that it might put into the hands of the husband an unfair and one-sided power to effect a change detrimental to the interests of his wife ; and the

¹ Westlake, Priv. Int. Law, s. 35 (1st edit.). *The Venus*, 8 Cr. 253.

² *Re Wright's Trusts*, 25 L. J. Ch. 621.

³ *Re Stern*, 28 L. J. Ex. 22.

⁴ *Brodie v. Brodie*, 30 L. J. P. M. & A. 185.

⁵ *Doucet v. Geoghegan*, 9 Ch. D. 441.

⁶ *Crookenden v. Fuller*, 1 Sw. & Tr. 441.

⁷ *Platt v. Att.-Gen.*, 3 App. Cas. 336.

⁸ Savigny, Priv. Int. Law, § 379, pp. 240, 241.

⁹ *Se De Nicols v. Curlier*, [1900] A. C. 21.

¹⁰ *Warrender v. Warrender*, 2 Cl. & F. 488 ; *Re Daly's Settlements*, 27 L. J. Ch.

751 : *Yelverton v. Yelverton*, 29 L. J. P. M. & A. 34.

¹¹ Priv. Int. Law, s 379, p. 243. He says this is the law of Prussia, Allg. Landrecht, ii. 1, ss. 350-355.

¹² This view has been pronounced by the House of Lords to be the law of England. *De Nicols v. Curlier* (*ubi sup.*). See *ante*, p. 145.

result might be the same, though the change on the part of the husband were involuntary. A third and intermediate view is that the law of the earliest domicile always affects the property acquired at the time of the marriage, and that only future acquisitions should be affected by the law of the new domicile. A widow retains her husband's last domicile until she acquires a new one for herself.

It would be quite beyond the scope of this work, even if it would be useful, to investigate the distinction which formerly existed between *real* and *personal statutes*;¹ and how the one class governed those affected by them only in the particular territories in which they obtained, while the other was impressed as a personal quality inherent in the individual affected, and was carried with him even beyond the limits of his domicile. It is enough to say that a person's status and capacity were to be regulated not only at home, but abroad, by the law of his domicile. *Habilis et inhabilis in loco domicilii est habilis vel inhabilis in omni loco*.² This strict rule was applied equally to real as well as to personal property; and the inconveniences and difficulties attending its application compelled the jurists who approved of it to make certain exceptions which nullified its full effect. The Code Napoléon in its third article adopts this principle in the case of French citizens.³

There are two laws which can govern a matrimonial contract; one, that of the domicile of the parties; the other, that of the place in which the marriage is celebrated. Marriage contract governed by what law?

There is good authority for saying that formerly the theory of the English law on this point was, that a marriage valid by the *lex loci contractus*, or *celebrationis*, was valid everywhere,⁴ unless there was a positive enactment binding on the English courts, and preventing them from recognizing certain marriages as good and valid. According to a modern decision,⁵ the principle is as follows: The *lex loci celebrationis* is to govern and decide all questions relating to the validity of the ceremony by which the marriage is constituted. The *lex domicilii*, on the other hand, is to decide the question of the capacity of the parties for contracting a valid marriage;⁶ with this result, that if both parties *Lex loci celebrationis* governs the formalities of marriage;

the *lex domicilii* governs the capacity of the parties.

¹ The best distinction between these statutes is the one which Merlin has drawn, to the effect that the laws which regulate the condition, capacity or incapacity of persons are *personal statutes*; while those that regulate the quality, transmission, and disposition of real property are *real statutes*.—Répertoire de Jurisprudence, tit. Autorisation Maritale, s. 10.

² Boullenois' rule adopted by Bouhier. Coutumes de Burgogne, ch. xxiii. ss. 91-96, p. 461, cited in Story's Conflict of Law, s. 51 a.

³ "Les lois concernant l'état et la capacité des personnes régissent les français, même résident en pays étranger." Art. 3.

⁴ *Serimshire v. Serimshire*, 2 Hag. Con. R. 412: *Simonin v. Maillac*, 29 L. J. P. M. & A. 97.

⁵ *Sottomayor v. De Barros*, 3 P. D. 1.

⁶ See also *Re Bozzelli's Settlement*; *Husey-Hunt v. Bozzelli*, [1902] 1 Ch. 751.

are domiciled in a country the laws of which prevent their marrying, and though validly married according to the *lex loci celebrationis*, both as regards forms and capacity, then their marriage is to be null and void. "Upon this point of principle, how does the matter stand? Let it be granted (and I think it is well settled) that the general rule internationally recognized as to the constitution of marriage is that when there is no personal incapacity attaching upon either party, or upon the particular party who is to be regarded, by the law to which he is personally subject, that is, the law of his own country, then marriage is held to be constituted everywhere, if it is well constituted *secundum legem loci contractus*. But that merely determines what in all these cases is the point you start from. When a marriage has been duly solemnized according to the law of the place of solemnization, the parties become husband and wife."¹ But where the wife is a domiciled English subject, then the above rule may possibly not be strictly applied.²

The case in which both parties are foreigners, but married in England, and one of them is domiciled in a country the laws of which permit of their intermarrying, and the other is domiciled in a country the laws of which render them incapacitated from intermarrying, does not seem to be provided for.³ Which law, that of the domicile or that of the place of celebration, do the principles of international jurisprudence require should prevail and govern the contract? Clearly the *lex loci celebrationis*. A marriage valid by the law of the place where it is celebrated ought to be valid everywhere is an axiom of international law. Marriage may truly be said to be a matter *juris gentium* from its universality, for every civilized nation recognizes the institution, and the status created by it; and when properly constituted ought to be universally recognized. This is the undoubted view held by the American jurists;⁴ and is the earlier and sounder view of the English courts. The English law regarded the pretensions of the *lex loci celebrationis* to govern the marriage if celebrated in conformity with its provisions, and this even where the parties had recourse to a foreign country to

¹ Per Selborne, L.C., in *Harvey v. Farnie*, 8 App. Cas. 43, 50.

² *Sottomayor v. De Barros*, 3 P. D. 1, *sed quere*.

³ *Ibid.* Take the case of a domiciled American subject and a domiciled Portuguese subject, properly intermarrying in London according to the laws of England; they are first cousins. By his State law he may marry his first cousin; by the law of Portugal, a Portuguese subject may not marry a first cousin without first obtaining the Papal dispensation; this dispensation is not obtained. The validity of this marriage is litigated in the English courts; to the law of which party must the English courts pay deference? See remarks of Cresswell, J., in *Simonin v. Maillac*, 29 L. J. P. M. & A. 97.

⁴ Kent, Commentaries, ss. 454, 458; Story, Conf. of Laws, ss. 75, 76; Bish. Mar. and Div. s. 355.

Lex loci celebrationis ought generally to prevail.

avoid disabilities in their own.¹ Another reason for preferring the law of the place of celebration rather than that of the domicile is, that it may frequently be most difficult to ascertain or determine a person's domicile. A third is the difficulty of being able to give effect to the validity of a contract, if the capacity of a contracting party depended upon the law of his domicile.² A fourth reason is, that though an independent State may impose restrictions upon its citizens³ either within or without its own territories, it has no right to call upon another independent State to give effect to such restrictions, which would amount to a virtual surrender of its independence and supremacy within its own borders.⁴ "A contract, valid by the law of the place where it is made is, generally speaking, valid everywhere *jure gentium* and by tacit assent. The *lex loci contractus* controls the nature, construction, and validity of the contract; and on this broad foundation the law of contracts, founded on necessity and commercial convenience, is said to have been generally established. If the rule were otherwise, the citizens of one country could not safely contract or carry on commerce in the territories of another. The necessary intercourse of mankind requires that the acts of parties, valid where made, shall be recognized in other countries, provided they be not contrary to good morals, nor repugnant to the policy and positive institutions of the State."⁵ This rule exists not out of mere international courtesy, but is founded *ex debito justitiæ* upon the acts and intentions of the parties. Now the policy of the law ought to be and is in favour of marriage, and the principles of convenience and propriety applied to commercial contracts affect in a more marked degree the status of marriage and the results flowing therefrom. Upon this assumption the English courts have hitherto acted, and held that a marriage valid by the law of the place where it was celebrated was a good and valid marriage in England.⁶ At any

¹ *Compton v. Bearcroft*, 2 Hag. Con. Rep. 443 n. See also *Steele v. Braddell*, Milw. Ir. Eccl. Rep. 1.

² For the curious, if not serious, anomalies which might result from enforcing the claims of the *lex domicilii*, see Bish. Mar. and Div. s. 359.

³ As the Code Napoléon does in Article 170: "Le mariage contracté en pays étranger entre français, et entre français et étrangers, sera valable, s'il a été célébré dans les formes usitées dans le pays, pourvu qu'il ait été précédé des publications prescrites par l'article 63, au titre des Actes de l'état civil, et que le français n'ait point contrevenu aux dispositions contenues au chapitre précédent." This is the provision which enables so many Frenchmen marrying abroad to get rid of their foreign wives, by obtaining a decree of nullity on the ground that they have not complied with the statutory requirements of their *lex domicilii*.

⁴ *Cresswell, J., in Simonin v. Maillac (ubi sup.)*.

⁵ Kent, Commentaries, s. 454; 1 Burge, For. and Col. Law, 129. See the English cases, *Male v. Roberts*, 3 Esp. 163; *Dalrymple v. Dalrymple*, 2 Hag. Con. Rep. 54; and the leading American case, *Saul v. His Creditors*, 5 Martin, N. S. [La.] 569.

⁶ *Dalrymple v. Dalrymple (ubi sup.)*; *Scrimshire v. Scrimshire*, 2 Hag. Con. Rep. 395; *Herbert v. Herbert*, 2 Hag. Con. Rep. 263; *Lacon v. Higgins*, 3 Stark. 178; *Ryan v. Ryan*, 2 Phil. Eccl. 332. The validity of the Gretna Green marriages

rate, the earlier decisions did not in the conflict between the *lex loci* and the *lex domicilii* make any distinction between the *capacity* of the parties to contract and the *forms* of the ceremony to be observed.¹

Qualifications
and exceptions
to the rule that
the *lex loci*
celebrationis
governs
marriages.

There are, however, exceptions and qualifications of the above rule, for any independent State may refuse to accept as valid within its territory certain marriages which might be valid in all respects in the place where they were celebrated,² and the courts of such State would be compelled to refuse them recognition whenever they were debated before them, and these exceptions do not necessarily strike at the soundness of the rule. No State, for instance, ought to be compelled, if it were possible, to countenance a marriage which is declared to be incestuous by the universal voice of Christendom;³ or to recognize a marriage which is polygamous.⁴ Again, if a State elects to say that its domiciled citizens shall under certain circumstances be incapacitated from contracting a valid marriage, and its citizens so incapacitated from intermarrying cross over its borders and marry in a neighbouring State which allows them to marry, and on return to their domicile their marriage is called in question, the courts must pronounce against its validity.⁵ The very furthest limit to which any country should consent to extend by recognition the disabilities by their *lex domicilii* of parties who are present in that country and are desirous of intermarrying, is an unconditional prohibition which cannot be removed by any act of the parties. This even is asking too much of the law of the country in which the parties happen to be residing. Where the prohibition of the *lex domicilii* is penal in its nature and operation, such prohibition ought not to have any ex-territorial force; and if the marriage is otherwise valid by the *lex loci contractus*, such marriage should be valid everywhere. Thus, by the law of the State of New York, one of a divorced couple cannot marry during the lifetime of the other, and if he or she do contract a marriage, the other living, a particular punishment is provided for such offence. Should, however, one of the divorced parties come over to England, or go to a neighbouring State where such prohibition does not exist, and contract

has been upheld in a petition under the Legitimacy Declaration Act, 1857; *Gardner v. Gardner*, 60 L. T. 839. The American courts have acted upon the same principle (*Story*, Conf. of Laws, s. 79).

¹ *Dalrymple v. Dalrymple*, 2 Hag. Con. Rep. 54; but see *Brook v. Brook*, 9 H. L. Cas. 193.

² Such as marriages which infringe the provisions of the Royal Marriage Act, 12 Geo. III. c. 11. *Sussex Peerage Case*, 11 Cl. & F. 85.

³ See *Re Bozzelli's Settlement*, *Husey-Hunt v. Bozzelli*, [1902] 1 Ch. 751.

⁴ *Hyde v. Hyde and Woodmansee*, L. R. 1 P. & D. 130; *Story*, Conf. of Laws, s. 113 *a*.

⁵ *Brook v. Brook* (*ubi sup.*); *Mette v. Mette*, 28 L. J. P. M. & A. 117.

a marriage, such marriage is valid not only in the place where it is celebrated, but also in the State of New York itself.¹

The modern theory of English law on this subject is thus summed up in Mr. Dicey's valuable work on Domicil:—²

"A marriage is valid when each of the parties has, according to the law of his or her respective domicile, the capacity to marry the other, and if the marriage is celebrated in accordance with any form recognized as valid by the law of the country where the marriage is celebrated."

Capacity of parties decided by their *lex domicilii*.
Validity of forms by the *lex loci celebrationis*.

The converse proposition, that marriages not conforming to the requirements of the place of celebration in the matter of form and ceremonies are invalid, does not hold good in certain cases, where—(i) "the parties enjoy the privilege of ex-territoriality, and the marriage is celebrated in accordance with any form recognized as valid by the law of the State to which they belong, or (ii) the marriage (being between British subjects?) is celebrated in accordance with the requirements of the English common law in a country where the use of the local form is impossible; or (iii) the marriage is celebrated in a country not being part of the British dominions, in accordance with the provisions of, and the forms required by, 4 Geo. IV. c. 91, 12 & 13 Vict. c. 68, or any other statute applicable to the case."³

Thus, the capacity of the parties is judged of by the *lex domicilii*, and the validity of the forms and ceremonies by the *lex loci celebrationis*, and the consent of parents or others are to be deemed part of the ceremony.⁴ If the ceremonies of the *locus celebrationis* are strictly followed, the validity of the marriage is in no way affected by the parties having gone there to avoid the requirements of the law of their domicile as to consents of proper parties, publicity, or the like, or that no regular ceremony is required by the law of the country where the marriage takes place.⁵ It thus seems to be the law that where two persons not under any disability by their *lex domicilii*, contract a marriage in a country where they would be incapacitated from intermarrying, such marriage is valid.⁶ This incapacity by the *lex domicilii* applies equally to marriages of domiciled English subjects marrying abroad, and domiciled foreign subjects marrying in England.⁷ The English Court of Divorce has recognized

¹ *Ponsford v. Johnson*, 2 Blatch. 51; Dicey, Dom. 223, 224.

² Pp. 200, 201.

³ *Ibid.*

⁴ *Sottomayor v. De Barros*, 3 P. D. 1. For very full remarks on this case see the first edition of this work, pp. 494-498.

⁵ *Dalrymple v. Dalrymple* (*ubi sup.*); *Swift v. Kelly*, 3 Knapp, 257.

⁶ *Sottomayor v. De Barros* (*ubi sup.*).

⁷ Dicey, Dom. 218. *Mette v. Mette* (*ubi sup.*); *Brook v. Brook* (*ubi sup.*).

the validity of a divorce by the court of the *lex loci celebrationis* of the marriage, though by the *lex domicilii* of the parties their marriage was indissoluble. In this case neither of the parties to the marriage was a domiciled English subject.¹

Marriage
invalid by the
lex loci cele-
brationis
invalid every-
where.

Exceptions.

The converse of the proposition that a marriage valid by the law of the place of celebration is valid everywhere, namely, that a marriage invalid by the law of the place of celebration is invalid everywhere, is equally true. But to this proposition there are exceptions, and these are demanded by the necessity of the case, for otherwise parties who were in foreign countries, whether transiently or in permanent residence, and who were utterly unable to conform to the requirements of the local law, could never contract a valid marriage at all, though no obstacle (other than the impossibility of conforming to the local law) intervened. These exceptions are really based upon only one ground or factor, namely, an insuperable incapacity to conform to the *lex loci*. They have been thus classified:—²

Impossibility
of being mar-
ried according
to the law of
the place of
celebration.

(1) If the parties are sojourning in a foreign country and under the local law there is no way by which they can enter into valid marriage, they may marry in their own forms, and it will be recognized at home as good. The basis of this exception is the practical impossibility of conforming to the laws of the country in which the parties are commorant, such as by reason of the impediment of religion; thus, where two Protestants are in a Roman Catholic country in which they could not be married according to the *lex loci* without abjuring or mocking their own religious faith.³ The obstacle to the marrying by the local law must be practically insuperable, and no mere temporary obstruction which by the lapse of a short time, or by making slight concessions could be overcome.⁴ Foreigners would not be bound to conform in a country the *lex loci* of which fixed the age of majority at some comparatively late period of life, e.g., thirty or forty years, and required the consent of parents up to that age. There may be another exception added to the foregoing, viz., the provisions of an Act of Parliament that the marriage of a British subject abroad shall be valid if celebrated in a particular manner, though by the *lex loci* such marriage is invalid for want of form.⁵ But such exception would now have but little effect given to it.⁶

Obstacle must
be insuperable.

¹ *Ingham (f. c. Sachs) v. Sachs*, 56 L. T. 920.

² 1 Bish. Mar. & Div. ss. 392-400.

³ *Lord Cloncurry's Case*, Cr. Dig. 276; and see *Sussex Peerage Case*, 11 Cl. & F. 152.

⁴ *Kent v. Burgess*, 11 Sim. 361.

⁵ See *Hay v. Northcote*, [1900] 2 Ch. 262.

⁶ Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23, s. 2; and Regulation No. 4 under the Act).

(2) If in the place of celebration there is a special law, differing from the general, permitting foreigners to marry in a way peculiar to themselves, and making their marriages good, they may avail themselves of it, and their marriages, if not contrary to the law of their domicile, will be valid also at home. That is, where a country recognizes the marriage laws and rites of a definite set of persons who have rites differing from those recognized by the country at large, as in England Jews; ¹ persons who are married according to the excepted and not general rites of that country will be deemed to be validly married. "There is a *jus gentium* upon this matter—a comity which treats with tenderness, or at least with toleration, the opinions and usages of a distinct people in this transaction of marriage. It may be difficult to say *à priori* how far the general law should circumscribe its own authority in this matter; but practice has established the principle in several instances, and where the practice is admitted, it is entitled to acceptance and respect. It has sanctioned the marriages of foreign subjects in the houses of the ambassadors of the foreign country to which they belong. I am not aware of any judicial recognition upon the point; but the reputation which the validity of such marriages has acquired makes such a recognition by no means improbable, if such a question was brought to judgment."²

Special law
permitting
foreigners
to marry
according to
their own rites.

(3) An invading army carries with it the law of the country to which it belongs (including the matrimonial law); and if, while hostilities are progressing, a marriage is celebrated within its lines, it need not conform to the law of the invaded country. Thus, where two British subjects were married by an army chaplain under a licence from the Commander-in-chief, within the lines of the British army which had invaded a Dutch province that had surrendered, but had not been ceded to the British crown, and was awaiting a treaty of peace, their marriage was held good.³

Marriage cele-
brated within
the lines of an
invading army.

SECTION 2.

Divorce.

Divorce must be regarded from a different standpoint to marriage, because while the status of marriage is universally recognized throughout the civilized world, divorce meets with only a partial recognition, and is therefore more in the nature of a

Marriage and
divorce to be
differently
regarded.

¹ *Lindo v. Belisario*, 1 Hag. Con. Rep. 216; *Goldsmid v. Bromer*, 1 Hag. Con. Rep. 324.

² Per Lord Stowell in *Ruding v. Smith*, 2 Hag. Con. Rep. 371, 384.

³ *Ruding v. Smith* (*ubi sup.*). That the matrimonial law is included, see *Lantour v. Teasdale*, 8 Taunt. 830; *Rez v. Brampton*, 10 East, 282; *Catterall v. Catterall*, 1 Rob. Eccl. 580. See *ante*, p. 109.

local institution. Divorce is also not an incident of the marriage contract to be governed by the *lex loci contractus*, but is an incident of status to be disposed of by the law of the domicile of the parties, namely, that of the husband.¹ It is now well established, at any rate in most countries where divorce is permitted, that competent tribunals have jurisdiction to put an end to a contract of marriage which was not originally made within their jurisdiction. The circumstances which form the grounds for divorce are such as are likely to cause scandal and offence in the society shared by the guilty husband or wife; and the protection of its own subjects constitutes an ample reason for a State to assume jurisdiction over those who offend against its laws or good morals. Thus, the distinction has been made between marriage and divorce; for marriage is a thing *juris gentium*, and of universal recognition, and if valid by the *lex loci celebrationis* should be held valid in all countries, for this is most conducive to the interests of the contracting parties. Divorce, on the contrary, is not of general prevalence, and where permitted, is deemed either a *quasi* punishment for offences against the moral law, or as a means to prevent grave abuses and scandals, and these should be settled by the *lex domicilii*, for such can only concern the society in which the parties have taken up their permanent abode and residence.

The validity of divorce depends upon the *lex domicilii*.

Domicile not test of jurisdiction in suits for nullity.

Where the suit is for the pronouncement or decree of nullity of marriage the test of the jurisdiction of the court is not the domicile of the parties, that is, of the husband, because the question litigated is the validity or invalidity of the marriage; and if the marriage is annulled the pretended wife never had a husband whose domicile she could take.² But matrimonial residence within the jurisdiction is sufficient to entitle the court to pronounce a decree of nullity.³

The question to be discussed below is, how far a divorce decreed in one State will receive recognition in another. Mr. Justice Story observes: ⁴ "Other most perplexing inquiries may grow out of the consideration of the national character of the parties; whether they are both citizens or subjects, or both foreigners, or one a citizen and the other a foreigner; whether the marriage is celebrated at home or celebrated abroad; whether the jurisdiction of any court to pronounce a decree of divorce is to be founded on the national character of the parties, or upon the celebration of the marriage within the territorial jurisdiction, or upon the domicile of the parties within it, or upon the actual presence or temporary residence of one or both of them at the time when the process

¹ *Harvey v. Farnie*, 6 P. D. 35.

² See *Niboyet v. Niboyet*, 4 P. D. 9.

³ *Roberts (f. c. Brennan) v. Brennan*, [1902] P. 143.

⁴ Conf. Laws, s. 204.

for divorce is instituted. And if, upon any of these grounds, the jurisdiction is sustained, another not less important inquiry is, whether the law of divorce of the place of the marriage, or that of the place where the suit is instituted, is to be administered by the court before which the suit is pending."

It is not proposed here to discuss the competency or jurisdiction of the English Court of Divorce to pronounce sentences of dissolution of marriage, but only how far the English courts will recognize the validity of foreign divorces, in other words, how far they will recognize the validity of sentences of dissolution by foreign tribunals of marriages contracted in England, or by English subjects domiciled in other countries.

How far
English courts
recognize
validity of
foreign
divorces.

The English courts were formerly inclined to hold fully the contractual theory of marriage, and that the right to divorce depended upon whether the *lex loci celebrationis* permitted or refused divorce to the parties. The question whether or not an English marriage was indissoluble before the passing of the Divorce Act, 1857, has ranged the authorities on either side, but later decisions and the text-writers on the subject generally hold that a foreign court of competent jurisdiction is enabled under certain circumstances to pronounce a dissolution of a marriage celebrated in England between an Englishwoman and a domiciled native in the country where such court has jurisdiction. The English Court of Divorce claims under the Divorce Act jurisdiction over, and a right to dissolve a marriage celebrated abroad between, foreigners, if they bring themselves within its jurisdiction by acquiring an English domicile.¹ The English courts ought to act (and do act) reciprocally, and attach the like credit to a dissolution of an English marriage by a foreign court, as they would demand for a dissolution effected by them of the marriage of non-English persons over whom they might claim to exercise such jurisdiction. The effect of a foreign divorce on an "English marriage," or a marriage celebrated in England, is in no way hampered in the English courts by questions of the allegiance or nationality of the parties,² or whether or not the *delictum* forming the ground for divorce was committed within the jurisdiction of the *forum* pronouncing the dissolution.

International
reciprocity
needful and
expedient.

So far as the English courts are concerned there are two important questions involved:—

(1) Can a marriage celebrated in England between two persons domiciled in a foreign country, or between a man domiciled in a foreign country and a domiciled Englishwoman,

¹ *Wilson v. Wilson*, L. R. 2 P. & D. 435.

² It is otherwise with French and Italian subjects, for their personal capacity does not depend upon domicile, but upon allegiance, and divorce is not recognized in Italy. *Dacey, Dom.* 238. Divorce, however, has been legalized in France.

be put an end to by a decree of a court of competent jurisdiction in their own country, for causes sufficient or insufficient by the law of England?

(2) Can an "English marriage," that is, one celebrated between domiciled English subjects who afterwards *bonâ fide* change their domicile, be dissolved by a decree of a court of competent jurisdiction in the country of their new domicile, for causes sufficient or insufficient by the law of England?

As regards the first question there is no doubt that formerly, when there were few facilities for providing divorce, and it was maintained that an English marriage was indissoluble, the courts were inclined to include in the phrase "English marriage" any and every marriage celebrated in England, though the contracting parties were not domiciled in the country at the time of contracting the marriage tie. This question was involved in some of the most serious conflicts between the English and Scottish courts.¹ The Scottish courts claimed to dissolve marriages of persons *resident* in Scotland, and originally a formal residence of forty days sufficed to found jurisdiction; but since the case of *Pitt v. Pitt*,² this claim can hardly be maintained.³ The English courts strenuously resisted the right of the Scottish or other foreign courts to dissolve marriages contracted, at any rate, between parties who retained their English domicile. An "English marriage" is now construed to mean a marriage celebrated between parties of whom the husband has an English domicile; thus, a marriage celebrated abroad between a domiciled Englishman and a foreigner would be "English"; while, on the contrary, a marriage in England between a foreigner domiciled abroad and a domiciled Englishwoman is a foreign marriage.

Domicil of the parties is the test applied by the English courts of the jurisdiction of foreign courts to pronounce a dissolution of a marriage celebrated in England or out of England. The question under discussion has been answered in the affirmative by the House of Lords in the case of *Harvey v. Farnie*⁴ (upholding the decisions of the Court of Appeal,⁵ and of Sir James Hannen⁶). That supreme tribunal held that the English courts will recognize as valid the decision of a competent foreign tribunal dissolving a marriage which had been celebrated in

¹ *Lolley's Case*, 1 R. & R. 236; 2 Cl. & F. 567 n; *Conway v. Beazley*, 3 Hag. Eccl. Rep. 639; *Utterton v. Tewsh*, Ferg. Cons. Rep. 23 (and the other cases given in that work); *Warrender v. Warrender*, 10 Cl. & F. 488; *Dolphin v. Robbins*, 7 H. L. Cas. 390; *Pitt v. Pitt*, 4 Macq. H. L. Cas. 627; *Shaw v. Gould*, L. R. 3 H. L. 55. ² *Ubi sup.*

³ But see Fraser H. & W. 1280 *et seq.* The answer to his lordship's reason for holding that jurisdiction in divorce may be constituted by residence without domicile, is that the Scottish court may pronounce a sentence of divorce valid in Scotland and for Scottish purposes, which, however, need not be recognized by the courts of the domicile of the husband.

⁴ 8 App. Cas. 43.

⁵ 6 P. D. 35.

⁶ 5 P. D. 153.

Marriage in England between domiciled foreigners, &c., dissolved by court of husband's domicile.

"English marriage."

Such marriage can be dissolved for grounds insufficient in England.

England between a domiciled native in the country where such tribunal has jurisdiction and an Englishwoman, where the decision is not impeached by any kind of collusion or fraud, even though the cause dissolving the marriage was not sufficient to found a divorce in England. The facts of the case were shortly as follows: A, a domiciled Scotsman, married in England B, a domiciled Englishwoman. After marriage they resided in Scotland, and while there B obtained a decree of dissolution of the marriage from the Scottish court, on the ground of A's adultery alone. A, during the life of B, married C in England. C, desiring to have her marriage with A dissolved, and hearing of his former marriage and divorce in Scotland, presented a petition for declaration of nullity of marriage, on the ground (among others) that the Scottish courts could not dissolve an English marriage, that is, a marriage celebrated in England between parties one of whom was a domiciled English subject. The President of the Probate Division dismissed the petition; on appeal, the Court of Appeal upheld his decision, and the decision of the latter court was in its turn upheld by the House of Lords.¹ But even before this case the current of thought and opinion was in this direction. Lord Westbury, in *Shaw v. Gould*,² said: "The right to reject a foreign sentence of divorce cannot rest on the principle . . . that where by the *lex loci contractus* the marriage is indissoluble, it cannot be dissolved by the sentence of any tribunal. Such a principle is at variance with the best established rules of universal jurisprudence, that is to say, with those rules which, for the sake of general convenience, and by tacit consent, are received by Christian nations, and observed in their tribunals. One of these rules certainly is, that questions of personal status depend on the law of the actual domicile." Lord Penzance, in *Wilson v. Wilson*,³ said: "It is the strong inclination of my opinion that the only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon the parties in all cases referring their matrimonial differences to the courts of the country in which they are domiciled." In *Maghee v. McAllister*,⁴ Lord Chancellor Blackburne held the same view. So, too, in *Shaw v. Attorney-General*,⁵ Lord Penzance said: "In no case has a foreign divorce been held to invalidate an English marriage between English subjects where the parties were not domiciled in the

¹ This case clearly decides the point that a woman on marriage assumes the domicile of her husband for all purposes, which, it is submitted, is inconsistent with the qualification suggested by the Court of Appeal in *Sottomayor v. De Barros*, 3 P. D. 1, 7. See *Turner (f. c. Thompson) v. Thompson*, 13 P. D. 37.

² L. R. 3 H. L. 55, 83.

³ L. R. 2 P. & D. 435, 442.

⁴ 3 Ir. Ch. Rep. 604.

⁵ L. R. 2 P. & D. 156, 161. This case was decided nearly two years before *Wilson v. Wilson* (*ubi sup.*).

country by whose tribunals the divorce was granted. Whether, if so domiciled, the English courts would recognize and act upon such a divorce appears to be a question not wholly free from doubt; but the better opinion seems to be that they would do so if the divorce be for a ground of divorce recognized as such in this country, and the foreign country be not resorted to for the collusive purpose of calling in the aid of its tribunals." Where the parties are not domiciled in the country of the tribunal which pronounces a decree of dissolution of marriage, the English courts would be very loath to give effect to the sentence; thus, where a woman who was a domiciled native of the State of Pennsylvania at the time of her marriage in England with a domiciled Englishman returned to her native State, and there procured a divorce from him in a suit in which he was cited but did not submit to the jurisdiction of the court, and married again, the husband in England was held entitled to a decree of dissolution of marriage with his wife on the ground of her adultery.¹ The domicile must at any rate be a genuine one, and the proceedings to obtain the decree of dissolution must be free from collusion or fraud.² It is true that there is the case of *Niboyet v. Niboyet*,³ which has decided that a residence less than domicile is sufficient to ground divorce proceedings. This case will be discussed more fully in a later page.⁴

Domicil must
be genuine.

Lolley's Case.

Though the various courts before which the case of *Harvey v. Farnie*⁵ came had no difficulty in arriving at their decision, it was strongly urged in argument that the resolution of the judges in the celebrated case of *Reg. v. Lolley*⁶ was a strong and binding authority for the contrary of the first proposition set out in the text. The facts of Lolley's case are as follows: Lolley, who was a domiciled Englishman at the time of his marriage, went to Scotland with his wife, and there committed adultery. Lolley went to Scotland for the purpose of inducing and enabling his wife to procure a sentence of divorce. His wife proceeded against him in the Scotch courts and obtained a decree of dissolution of marriage; his domicile remained English throughout. Lolley, on his return to England, contracted a second marriage, and was indicted for bigamy. He was found guilty. The case came up to the House of Lords on error. The judges were summoned to assist the House, and after argument they unanimously resolved that "no sentence or act of any foreign country or State could dissolve an English marriage *a vinculo matrimonii*, for ground on which it was not liable to be dissolved *a vinculo matrimonii* in England." Here the Scottish domicile of the parties

¹ *Green v. Green*, [1893] P. 89.

³ 2 P. D. 1.

⁵ See *ante*, p. 484.

² *Bonaparte v. Bonaparte*, [1892] P. 402.

⁴ *Post*, p. 489.

⁶ 2 Cl. & F. 567 n.

was clearly fictitious, for their domicile remained English the whole time. A considerable war has been waged over the meaning of the term "English marriage," some holding that it was wide enough to embrace "every marriage contracted in England." Among those was Lord Brougham, who was counsel for Mr. Lolley. His lordship was very angry with the decision, and always thought it wrong, and in order to prove it wrong, as he thought, he proceeded to reduce it to an absurdity, and this he did in the case of *McCarthy v. Deccaux*,¹ when he held that the marriage of a domiciled Dane contracted in England with an Englishwoman could not be and was not dissolved by a competent Danish tribunal on the return of the husband and wife to their Danish domicile. But this case has been distinctly overruled in the House of Lords in *Harvey v. Farnie*, and is no longer the law. On the other hand, the remarks of Dr. Lushington, in *Conway v. Beazley*,² and the distinction laid down by Sir James Hannen and the House of Lords in *Harvey v. Farnie*, have supplied the true meaning and limit of the expression "English marriage," in the resolution of the judges in *Lolley's Case*, namely, that it is a marriage where the husband is a domiciled Englishman at the date of the marriage.

As it is clear that the tendency of the English authorities is towards holding that the law of the domicile of the parties is the proper and only law by which to test the validity of their divorce, the second question now becomes of importance, namely, "Can an 'English marriage,' that is, one celebrated between domiciled English subjects who afterwards *bond fide* change their domicile, be dissolved by a decree of a court of competent jurisdiction in the country of their new domicile, for causes sufficient or insufficient by the law of England?"

"English marriage" dissolved by a competent court of the husband's new domicile.

There is no actual decision on this point, but there are some very strong observations by an eminent judge,³ to the effect that, as domicile is the true and proper test, if English domiciled subjects *bond fide* acquired a foreign domicile, and there have recourse to a competent tribunal for the purpose of obtaining a dissolution of their marriage, and do obtain it, the English courts should recognize its validity, at all events if for causes sufficient to ground a divorce in England. But the application of the test of domicile ought to bring out the same results, even where the

¹ 2 Cl. & F. 568 n. The following are the facts: One Tuite, a domiciled Dane, was married to an Englishwoman in England. They left England and went to Denmark, where they were subsequently divorced. The husband's domicile remained Danish the whole of the time. The wife returned to England. Lord Brougham held that the resolution of the judges in *Lolley's Case* prevented the Danish divorce from having any legal operation in England, the marriage between the parties having been contracted in England.

² 3 Hag. Eccl. Rep. 639.

³ Lord Penzance in *Shaw v. Att.-Gen.*, L. R. 2 P. & D. 156, 162. See *ante*, pp. 485, 486.

parties obtain their divorce for causes insufficient to found a dissolution of marriage in England. Thus A and B, English domiciled subjects, contract a marriage in England, and subsequently acquire a *bonâ fide* Prussian domicile; they there discover that they cannot get on together through what is termed "incompatibility of temper," which is a good ground for divorce in Prussia. They have recourse to the Prussian tribunals, and obtain a decree of divorce on that ground. The English courts would probably recognize the validity of the divorce. The Divorce Act of 1857,¹ gives power to the Divorce Court to entertain "in England . . . all causes, suits, and matters matrimonial"; and the only limit to its jurisdiction is the required domicile of the parties having recourse to it.² This English domicile is not lost by mere non-residence in this country.³ If, then, this court claims to dissolve marriages celebrated abroad between persons who were not at the time of marriage British subjects, or possessed an English domicile, it is only just and expedient that the courts of this country should reciprocally recognize the validity of like sentences passed by the courts of foreign countries.

In summing up the reasons why the *lex domicilii* should prevail in questions of divorce, it may be put forward that, neither the *lex loci celebrationis* nor any foreign law of the parties can claim to be heard beyond the limits of its application (1) to ask for a divorce in a country which does not permit it; or (2) to ask for it on grounds insufficient in the country where the parties are domiciled, though permitted by the *lex fori*; or (3) to forbid a divorce which the public interests of the place where the parties are domiciled demand.

There is yet a third question that may be asked. Can a marriage between two persons retaining their English domicile be dissolved by a foreign court of competent jurisdiction on grounds sufficient for grounding a divorce in England? It is quite clear that the question should be answered in the negative, if the grounds for divorce in the foreign court would be insufficient in England. But it is more difficult to state definitely the answer to the above question; because, as will appear lower down, the English courts have claimed to exercise a jurisdiction to pronounce sentences of divorce between persons not domiciled in this country; and so by a kind of international reciprocity, the sentences of foreign courts pronounced upon the matrimonial status of English domiciled subjects should be regarded as valid in this country.

¹ 20 & 21 Vict. c. 85.

² See *Simonin v. Maillac*, 29 L. J. P. M. & A. 97; and *Brodie v. Brodie*, 30 L. J. P. M. & A. 185.

³ *D'Etchegoyen v. D'Etchegoyen*, 13 P. D. 132. It is not necessary to raise the question of domicile on the pleadings, it can be dealt with at the trial, *Parkinson v. Parkinson*, 69 L. T. 53.

Domicil not
lost by mere
non-residence.

Marriage of
domiciled
English
persons
dissolved by
foreign
tribunal.

The Scottish courts formerly did not, and those of certain of the American States do not require a domicile of both parties, or of either of the parties, to found jurisdiction in divorce, but a residence far short of domicile, and even a temporary resort to the country for divorce purposes, is sufficient in those States.¹ It has been seen that the English courts, according to the better authorities, require more than the mere presence of the parties in a country to produce amenability to the jurisdiction of the *forum*, that is, more than a forensic domicile. They require a domicile *bonâ fide* and full for all purposes in order to found jurisdiction. Without domicile they refuse to assume jurisdiction, and without domicile in the foreign country they refuse to recognize the divorce there obtained. There are no doubt cases² which support a view more in accordance with the earlier Scottish and present American principles, that residence short of domicile will suffice to found divorce jurisdiction; but such are either explicable on the ground that they supply some necessary exceptions to a hard-and-fast rule, or they must be put aside as contrary to the general run of the decisions.

An important case on this point is *Niboyet v. Niboyet*,³ in which the majority of the Court of Appeal (James and Cotton, L.JJ.; Brett, L.J., dissented) held, reversing the decision of Sir Robert Phillimore,⁴ that residence of parties in England not amounting to domicile gave the English Divorce Court jurisdiction over their matrimonial relations. The facts were, that A, a domiciled Frenchman, married B, an English-woman, at Gibraltar. A (with his wife) came to England as a French consul, therefore retaining his French domicile. A was alleged by B to have deserted her and committed adultery at various times. Sir R. Phillimore dismissed B's petition for dissolution of marriage on the ground of want of jurisdiction. The conclusion arrived at by the two assenting judges of the Court of Appeal was based upon principles which, when applied by the Scottish and other foreign tribunals, the English courts have steadfastly refused to recognize. They held that because the courts Christian did not recognize nationality or secular domicile of individuals, but only proceeded against them when necessary wherever they found them *pro salute animarum*, and because the English Divorce Court succeeded to the matrimonial jurisdiction of the ecclesiastical courts in England by the operation of the

Theory of the
lex fori.

Niboyet v.
Niboyet.

Residence less
than domicile.

¹ The principle upon which the courts of Scotland formerly, and those of some of the American States now proceed is, that the *lex fori* of the parties alone can determine whether or not they shall be divorced; if it permit divorce, and the parties produce grounds for dissolution of the marriage tie recognized by it, the courts of that *forum* will assume jurisdiction and grant divorce irrespectively of the law under which the parties were married or any foreign law which may affect them.

² *Deck v. Deck*, 29 L. J. P. M. & A. 129; *Brodie v. Brodie* (*ubi sup.*).

³ 4 P. D. 1.

⁴ 3 P. D. 52.

Divorce Act, therefore the Court of Divorce must obey the statute, and entertain any matrimonial suits brought by persons resident in England, because a divorce *a mensâ et thoro* was in previous times an ecclesiastical sentence for the benefit of the soul of the guilty party. The logical conclusion of this decision is that if a Frenchman and wife come over to England, and the former commits adultery and cruelty while only temporarily sojourning here, the wife may bring a petition for divorce, and the courts must entertain it.¹ This decision clothes the English Court of Divorce established under the Divorce Act, 1857, with complete jurisdiction over all married couples temporarily commorant in this country. The legislature has so clothed it probably quite unintentionally. Lord Justice James said he thought he was not overruling any English cases in so holding; but the cases set out below show that it was somewhat too full an assertion;² and as the House of Lords has repeatedly held a full and *bonâ fide* domicile to be necessary to found divorce jurisdiction, *Niboyet v. Niboyet* seems to create an exception to the general law of the land on this point. Brett, L.J., strongly insisted upon the principle that the only law which should take upon itself to alter the status of married persons should be the law of their domicile, that is, the husband's domicile; for it is the community of their domicile that is affected by their relation towards one another. In commenting upon *Brodie v. Brodie*,³ his lordship quoted the judgment of the court, which was: "We say nothing as to what the effect of the evidence might be in a testamentary suit; we think that the petitioner was *bonâ fide* resident here, not casually or as a traveller. After he became resident here, his wife was carrying on an adulterous intercourse in Australia. He is therefore entitled to a decree *nisi* for a dissolution of the marriage"; and remarked: "If this was held to be a domicile, it

¹ This judgment is in curious contrast with that of the same judges in *Sottomayor v. De Barros*, 3 P. D. 1.

² *Lolley's Case*, R. & R. 237; 2 Cl. & F. 567 n.; *Warrender v. Warrender*, 2 Cl. & F. 288 (Scottish case); *Conway v. Beazley*, 3 Hag. Ecc. Rep. 639; *Yelverton v. Yelverton*, 29 L. J. P. M. & A. 34; *Tollemache v. Tollemache*, 30 L. J. P. M. 115; *Firebrace v. Firebrace*, 4 P. D. 63; *Ratcliff v. Ratcliff*, 29 L. J. P. M. & A. 171; *Wilson v. Wilson*, L. R. 2 P. & D. 435 (per Lord Penzance); and see *Briggs v. Briggs*, 5 P. D. 163. The leading American text-writers hold that domicile is necessary for divorce jurisdiction. Story (Conf. Laws, s. 230 a) says: "The doctrine now firmly established in America upon the subject of divorce is, that the law of the place of the actual *bonâ fide* domicile of the parties gives jurisdiction to the proper courts to decree a divorce for any cause allowed by the local law, without any reference to the laws of the place of the original marriage, or the place where the offence for which the divorce is allowed was committed." Again, Bishop (Mar. and Div. s. 120 b) says: "The rule is believed to be that the domicile must be complete and full, in distinction from a *quasi* domicile, adequate for every other purpose"; and (s. 124 a) that mere residence as distinguished from domicile is insufficient; but that the residence must not only be permanent but accompanied with an *animus manendi*.

³ 30 L. J. P. M. & A. 185. In the suit it was proved that the husband was an Australian and domiciled in Australia, where both the marriage and the wife's adultery took place, but at the time of the suit was resident in England.

is consistent with all the cases; if it is to be taken as a decision that there can be a minor species of domicile sufficient for one purpose and not for another, I know of no authority or ground of reason for such a distinction. I cannot agree with it." It is to be noticed that the different judges who constituted the House of Lords in the case of *Harvey v. Farnie* did not in any way accept without questioning the accuracy of the decision in *Niboyet v. Niboyet*; and laid some stress upon the fact that the Court of Appeal was divided. While it was not obligatory upon them to overrule it, or impugn its authority, they did not accept it as an absolutely accurate decision. Apart from any other considerations, the domicile of the parties ought to be the test of jurisdiction, if only to prevent the risk of collusion, and the scandalous and disgraceful abuse of the courts of the *forum* to which they would be subjected by those who resorted to them for the purpose of freeing themselves from the irksome fetters imposed by the law of their domicile. Mere temporary residence within their jurisdiction would otherwise suffice, and every guarantee against fraud and chicanery would be rendered powerless and ineffectual. If *Niboyet v. Niboyet* is to be taken as an accurate exposition of the law of England, the residence of the petitioning party must be a genuine one, and the proceedings to obtain the decree of dissolution must be free from collusion or fraud.¹ Again, if it does represent the law of this country, the English courts will find great difficulty in refusing to recognize the validity of decrees of dissolution of marriage pronounced by competent foreign tribunals of domiciled English subjects resident abroad whether for causes sufficient or insufficient by the law of this country.

The authority of this case to the extent of its decision can no longer be deemed unquestionable, for the Privy Council in *Le Mesurier v. Le Mesurier*² held that there was an obvious fallacy running through the judgments of the majority of the Court of Appeal, that because the Divorce Court succeeded to the jurisdiction of the old ecclesiastical courts which had the power to grant divorces *a mensâ et thoro*, restitution of conjugal rights, and make decrees for alimony, whether the parties were domiciled in England, or only temporarily resident, therefore the new court had jurisdiction to pronounce a decree for dissolution of marriage between parties who were not domiciled in England. In *Armytage v. Armytage*,³ Barnes, J., treated *Niboyet v. Niboyet*⁴ as practically overruled by *Le Mesurier v. Le Mesurier*.⁵ Still

Domicil
necessary in
suit for dis-
solution of
marriage;

¹ See *Bonaparte v. Bonaparte*, [1892] P. 402.

² [1895] A. C. 517. It is quite true that the decisions of the Privy Council are not binding on the English judiciary; but they are treated with the greatest respect.

³ [1898] P. 178.

⁴ 4 P. D. 1.

⁵ *Ubi sup.*

further doubts have been thrown on the accuracy of this case by the action of the House of Lords in *Malone's Divorce (Valid Action) Bill*.¹

but not for
judicial separa-
tion.

Recognition of
Indian
divorces of
Christian
British
subjects.

The English Court of Divorce has jurisdiction to entertain a suit for divorce *a mensâ et thoro* on the ground of cruelty where the parties reside within its jurisdiction at the beginning of the suit, though not domiciled in England, though the cruelty was committed outside the jurisdiction, if apprehension of further acts of cruelty exists.²

The decree of the High Court of Judicature in any of the Indian Presidencies, dissolving the marriage of British subjects professing the Christian religion under 24 & 25 Vict. c. 104, s. 9, the letters patent of December 28, 1865, and the Indian Divorce Act of 1869, will be recognized in this country.³

¹ [1905] A. C. 314.

² *Armytage v. Armytage*, [1898] P. 178.

³ *In the Goods of Nares*, 13 P. D. 35.

PART II.

PARENT AND CHILD.

CHAPTER I.

LEGITIMACY.

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see 7501*

*rebutted
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"THE next and most universal relation in nature is immediately derived from the preceding, being that between parent and child."¹ The relation of parent and child is an important element in the constitution of the family. There are two classes of children; (1) legitimate, and (2) illegitimate. Legitimate children are those born within wedlock, or within some

Relation of
parent and
child.

reasonable time after its dissolution. Illegitimate, or bastard children (*spurii, filii nullius*), are those not born in lawful wedlock, or if so born, are proved not to have been begotten by the husband of their mother.

Legitimacy.

The full and complete legal relations of parent and child in England can only exist where the child has been born of his parents in lawful wedlock. Legitimacy is derived from birth in wedlock and from nothing else. The law of England, like that of Rome, recognizes broadly the doctrine *pater est quem nuptiæ demonstrant*,¹ or the paternity of the child is tested or proved only by reason of its having been born of a union sanctioned by the law. The *patria potestas*, or parental dominion, extends over such a child. Bastards are, according to the stricter interpretation of the law, strangers to those who have brought them into being. The Legislature, however, on ground of public policy, has recognized the natural tie existing between them and their parents, and has imposed the obligation of their support and maintenance upon the latter. This subject of parent and child will be treated of under the headings of legitimate and illegitimate children.

Illegitimate children.

Legitimate Children.

Status of legitimacy how constituted.

Legitimacy is a status arising out of the fact of birth within lawful wedlock, or within a reasonable time after its dissolution, or an act of legitimation subsequent to birth out of wedlock. By the law of England the full and complete relations of parent and child can only exist where the child has been born of his parents in lawful wedlock. It is true that Blackstone² mentions the possibility of legitimation by Act of Parliament in cases where the parents have not married subsequently to the birth, as was done in the case of the bastard children of John of Gaunt, Duke of Lancaster; but practically, as regards persons born of parents domiciled in England at the time of birth, legitimacy alone proceeds from birth in lawful wedlock. For the succession to real property in England on intestacy, the law was and still is that wedlock must precede the birth;³ as regards the distribution of personal property to be administered in this country the like rule formerly prevailed, but has been lately altered in favour of the claimants who are legitimate by the law of their parents' domicile, though not born in wedlock.⁴ "Legitimacy by birth depends on two facts; the one is the lawful marriage of the parents of the child, and the other that the child is the fruit of that

¹ Just. Inst. Bk. I, tit. ix.

² 1 Com. 459

³ *Birchistle v. Vardill*, 7 Cl. & F. 895.

⁴ *Re Goodman's Trusts*, 17 Ch. D. 266. See *post*, p. 503.

marriage.”¹ From legitimacy flow many important considerations, Results of legitimacy. the right of inheritance, the right of bearing the father’s name, kinship and family ties, involving the right to be maintained, educated, and protected.

The English law adopts as a presumption the Roman law *maxim pater est quem nuptiæ demonstrant*; in other words, the Pater est quem nuptiæ demonstrant. child of a married woman is presumed to be legitimate.

This presumption holds good not only where the child is born Presumption holds good where child born soon after marriage. some time after the celebration of the marriage, but where it is born within such a short time after that the conception could not have taken place in wedlock. Thus, if a man marries a woman with child, whether begotten by him or some other man, the child when born is presumed to be his, and legitimate until the contrary be shown.² If proof is forthcoming that the man knew of the condition of the woman before marriage, there is a very strong presumption that it is his own, “for where a man marries a woman whom he knows to be in this situation, he may be considered as acknowledging by a most solemn act that the child is his.”³ *Foxcroft’s Case*,⁴ it is true, has been held to be an authority against this proposition, but probably this is due to a wrong view of the case; and the law as above is clear and without dispute. Where after open courtship and constant intercourse a man and woman, she being in an advanced state of pregnancy, hurry on their marriage to prevent or mitigate scandal, and a child is born soon after, the presumption that the husband is father to that child is next to insuperable, and the *onus* of establishing his denial of paternity lies upon him.⁵ And where a man has been reputed all his life to be the legitimate child of his parents, those who dispute his legitimacy after his death must produce very strong and unequivocal evidence in support of their contention.⁶

This presumption of legitimacy, which is based on the interests Strong presumption in favour of legitimacy. of morals and society, is very strong, but not one *juris et de jure*, so as never to be assailed or impugned, and consequently exceptions to the rules have at all times been admitted.⁷ The civil

¹ 1 Bur. For. & Col. Laws, 58.

² Co. Litt. 244 (a).

³ *Ree v. Luffe*, 8 East, 193, 210, per Lawrence, J., citing the authority of Lord Rolle.

⁴ 10 E. 1 B. Rot. 23; 1 Rol. Abr. 359. This was a case of an infirm and bedridden man who married a woman far gone with child, not in a church, and without the Mass being said. The child was born twelve weeks after the marriage, and was adjudged a bastard, probably on the ground of the invalidity of the marriage.

⁵ *Gardner v. Gardner*, 2 App. Cas. 723.

⁶ *Haslam v. Cron, Re Olivant*, 19 W. R. 968.

⁷ *Bosville v. Att.-Gen.*, 12 P. D. 177. In this case the child was born 276 or 277 days after the last opportunity of sexual intercourse between the wife and the husband, and on the facts of the case the court pronounced the child to be illegitimate. The French code is stricter in its presumption than the English; thus, by Article 312 of the Code Civil it is enacted that the child conceived during the marriage has as its father the husband of its mother. The article goes on to add that the father, however,

Civil law
exceptions.

law admitted four exceptions: (1) The absolute and permanent impotence of the husband; (2) the accidental impotence or bodily disability of the husband; (3) his absence from his wife during that period of time in which, to have been the father of the child, he must have had intercourse with her; (4) long-continued non-intercourse from sickness or other reason.

Presumption
rebuttable.
Non-access.

In English law this presumption may be rebutted by proof of non-access on the part of the husband.¹ The rebutting evidence must not be circumstances which only create doubt and suspicion, but must be strong, distinct, satisfactory, and conclusive.² Mere adultery of the wife is not enough;³ and where husband and wife have cohabited together, and no impotency is proved, the issue is conclusively proved to be legitimate, though the wife is shown to have been at the same time guilty of adultery,⁴ even in cases where her adultery is notorious,⁵ and no evidence except to disprove it will be admitted.⁶ But where the husband and wife have been judicially separated, and the latter bears children, they are *prima facie* illegitimate, for the parents will be deemed to have obeyed the sentence of the Divorce Court.⁷ The old common law rule that husband or wife cannot give evidence to prove access or non-access,⁸ whether directly or indirectly, so as to bastardize their issue, is still recognized.⁹ But in pedigree cases where the legitimacy of a child born in wedlock is in issue, previous statements by the mother that the child is a bastard are admissible as evidence of her conduct though such statements could not be made by her in the witness

Husband and
wife cannot
give evidence
to prove access
or non-access.

may repudiate the child if he can prove that from the 300th to the 180th day before the birth of the child it was physically impossible for him, whether from absence or result of an accident, to have had intercourse with his wife. This limits the power of the father or the father's heir to rebut the presumption of law to cases where the intercourse of the husband with his wife was physically impossible between the 300th and 180th day, *i.e.*, between the tenth and sixth month, before the birth of the child. The French law does not recognize the moral impossibility of access of the husband to the wife. M. Rivière, editor of the *Codes Français et Lois Usuelles* (1876), notes the statement of how that the child conceived during the marriage has as its father the husband of its mother. Thus: "La présomption que l'enfant né pendant le mariage a pour père le mari n'est point altérée par l'indication dans l'acte de naissance d'un père autre que le mari."—Cass. 13 Juin, 1865.

¹ By Scottish law "the rule, *pater est quem nuptiæ demonstrant*, creates merely a *presumptio juris*, which may be redargued by contrary proof, showing that the child cannot be the issue of the husband and wife. The grounds upon which the presumption may be overthrown resolve themselves into two: (1) That the husband could not have sexual intercourse with his wife by reason of his impotency; and (2) that, having the power, he had in fact no sexual intercourse with her at the time of the conception."—Fraser, P. & C. 4.

² *Morris v. Davies*, 5 Cl. & F. 163; *Atchley v. Sprigg*, 33 L. J. Ch. 345; *Bosrile v. Att.-Gen.*, 12 P. D. 177. See p. 7.

³ See *Gordon v. Gordon and Gordon*, [1903] P. 141; *post*, ch. vi.

⁴ *Cope v. Cope*, 1 M. & R. 269; *Morris v. Davies* (*ubi sup.*).

⁵ *Reg. v. Mansfield*, 1 Q. B. 444; *Atchley v. Sprigg* (*ubi sup.*).

⁶ Opinion of the judges in *The Banbury Peerage Case*, 1 Sim. & St. 156; Nic. Ad. Bast.

⁷ *St. George v. St. Margaret*, 1 Salk. 123.

⁸ *Goodright v. Moss*, Cowp. 591; *Ree v. Sourton*, 5 A. & E. 180.

⁹ *Ulverstone Union v. Park*, 53 J. P. 629; *Hewat's Divorce Bill*, 12 App. Cas. 312.

box.¹ It is true, however, that by the Evidence Amendment Act, 1869,² "in proceedings instituted in consequence of adultery," that is, in matrimonial suits, the wife, as well as the husband, may give evidence as to her adultery, and so indirectly afford important testimony as to the bastardy of her child or children;³ but the bastardizing of such child or children cannot directly follow from such evidence.⁴ There are two modern equity decisions⁵ (one of which no doubt directly impugns the common law doctrine), the authority of which has been denied in a still later case.⁶ In *Re Rideout's Trusts*, James, V.C., admitted the husband's evidence to prove non-access, though he required corroborative evidence. In *Re Yearwood's Trusts*, Hall, V.C., on the assumption that the earlier case had altered the law, and that the proceedings before him had been instituted in consequence of the wife's adultery, admitted the husband's evidence to prove non-access, though he required it to be corroborated. But in the more recent case of *The Guardians of Nottingham Union v. Tomkinson* the Common Pleas Division was of opinion that "proceedings instituted in consequence of adultery" in the Evidence Amendment Act, 1869, are confined to proceedings in the Divorce Courts for divorce or judicial separation; and that apart from such proceedings the evidence of husband or wife to prove non-access with the result of bastardizing the issue was inadmissible. Such non-access must be proved *aliunde*. This rule is based upon good sense and public policy; for the indecency of husband or wife giving such evidence is avoided; and any temptation to bastardize a particular child is defeated and discouraged. The non-access of the husband may be supported by proof of (1) natural or physical impossibility; (2) moral impossibility.

(1) Natural or physical impossibility may be due to *impotency* on the part of the husband, whether arising from natural or accidental causes. It may also arise from the *absence* of the husband. "The physical impossibility, arising from the absence of the husband, exists when the birth of a child takes place at a period so distant from the commencement of that absence, or so recently after it has ceased, that it cannot, according to the course of nature, be attributed to his sexual intercourse with his wife."⁷

Under the old common law a child born during the marriage of its parents was presumed to be legitimate except for "special

Physical impossibility.
Impotency.
Absence of the husband.

Special matter,
or bastardy.

¹ *Aylesford Peerage Case*, 11 App. Cas. 1.

² 32 & 33 Vict. c. 68.

³ Sect. 3.

⁴ See *Pryor v. Shelford*, 12 P. D. 165; *Hewat's Divorce Bill* (*ubi sup.*).

⁵ *Re Rideout's Trusts*, L. R. 10 Eq. 41; *Re Yearwood's Trusts*, 5 Ch. D. 545.

⁶ *Nottingham Union v. Tomkinson*, 4 C. P. D. 343.

⁷ 1 Bur. For. & Col. Laws, 63.

Impotency.

Separation.

Husband being
extra quatuor
maria.

Doctrine now
exploded.

matter." Special matter, or bastardy, arose from (1) the impotency of the husband; (2) his being separated from his wife by sentence of divorce, for separation without such sentence was insufficient; (3) his being *extra quatuor maria*, that is, being absent from the King of England's dominions when the child was conceived.¹ The ridiculous doctrine that unless the husband of the mother happened to be abroad and out of England, a child born to her must conclusively be deemed to be his, though convincing evidence might be adduced that he could not be the father, and was during the whole period of gestation hundreds of miles away from the mother, has been for a long time exploded.² The effect of absence on the question of bastardy does not depend upon the propinquity or distance of the husband from the wife during the alleged period of absence and non-access; the parties might be living in the same town, yet if conclusive evidence was produced that there was no such access as might have resulted in the birth of the child, the effect of such evidence will be to rebut the presumption that the husband availed himself of possible opportunities of sexual intercourse with his wife.³ If ever it was held necessary that the husband must be absent from his wife the whole period of gestation, that is, before the child could have been conceived, and after its birth, it is no longer so; and it is enough if the husband returns at such a time anterior to the birth that he could not by the ordinary laws of nature be the father of the child.⁴

Moral
impossibility.

(2) Physical impossibility need not be made out, but the moral impossibility of access of the husband to the wife will have due weight given to it, even to the rebutting of the presumption of the legitimacy of the child born during the lawful wedlock of the husband and wife. By *moral impossibility of access* is meant the conclusion arrived at from the surrounding circumstances of the case that the husband, though having possible opportunities of sexual intercourse with his wife, did not avail himself of them, so as to be the father of his wife's child born amidst such circumstances. This doctrine, implying that the presumption of legitimacy is only a question of fact, and if unsupported, or contradicted by evidence, may be rebutted, was finally and fully established by the answers of the judges and decision of the House of Lords in the important case known as the *Banbury Peerage Case*.⁵ Lord Redesdale, in his judgment,⁶ sums up the

Banbury
Peerage Case.

¹ Nicolas, Ad. Bast. 28.

² *Pendrell v. Pendrell*, 2 Str. 925; *Rea v. Luffe*, 8 East, 193; *Shelley v. —*, 13 Ves. 56.

³ *Morris v. Davies*, 5 Cl. & F. 163; *Atchley v. Sprigg*, 33 L. J. Ch. 345; *Aylesford Peerage Case*, 11 App. Cas. 1.

⁴ *Rea v. Luffe* (*ubi sup.*).

⁵ Nic. Ad. Bast. *passim*; 1 Sim. & St. 153.

⁶ *Ibid.* 462. See 1 Bur. For. & Col. Laws, 79.

law with great force and clearness. He says: "I admit that the law presumed the child of the wife of A, born when A might have had sexual intercourse with her, or in due time after, to be the legitimate child of A; but this was merely considered as a ground of presumption, and might be met by opposing circumstances. *The fact, indeed, that any child is the child of any man, is not capable of direct proof, and can only be the result of presumption;* understanding by presumption, a probable consequence drawn from facts (either certain or proved by credible testimony), by which may be determined the truth of a fact alleged, but of where there is no direct proof. Thus, if A and A* are married, and are in such habits of intercourse that A may be the father of a child born of the body of A*, immediately produced as the child of A, and received as such by A, the child is presumed to be his child, though the fact of sexual intercourse cannot be proved; and if the death of A before the birth of the child prevents its reception by him as his child, yet if the birth happen within a time which in ordinary course is the longest time of pregnancy before birth, the child is presumed to be the child of A. If a child is born of the body of A*, and alleged to be the child of A, *but not so acknowledged by him*, nor produced on its birth as *his child*, yet if circumstances would admit of sexual intercourse, and the non-production of the child as the child of A can be sufficiently accounted for, it will be presumed that the child is the child of A. But in all these cases, the fact that the child is the child of A is a fact presumed and not proved. When, therefore, circumstances occur which may tend to rebut the presumption that a child born of the body of A*, the wife of A, is his child, then, presumption rebutting presumption, the conclusion must be drawn from the whole evidence."

During the course of the investigation in this case, the help of the judges was obtained, and to them were put certain questions. Their answers and the decision of the committee declared the law to be that, notwithstanding opportunities of intercourse between husband and wife, and here they were living in the house, and were even seen in bed together, if the evidence of surrounding circumstances would warrant the clear conclusion of the *moral impossibility* of access or sexual intercourse of the husband with his wife, the legitimacy of children born of the wife amid such surrounding circumstances may be successfully contested.

Some of the answers were as follows:—

The presumption of legitimacy arising from the birth of a child during wedlock, the husband and wife not being proved to be impotent, and having opportunities of access to each other during the period in which a child could be begotten and born in

a Presumption of legitimacy of a child born during wedlock may be rebutted.

the course of nature, may be rebutted by circumstances inducing a contrary presumption.

Child born in lawful wedlock *primâ facie* legitimate.

Primâ facie evidence may be rebutted.

Impotency, &c., may, in questions of legitimacy, be proved as in other cases where its proof is necessary.

After proof of access, no evidence admissible except to contradict it.

Where child born in lawful wedlock, sexual intercourse between husband and wife presumed, until rebutted by conclusive evidence to the contrary.

The question for the jury is, "Was the husband the father of the child?"

The fact of the birth of a child from a woman united to a man by lawful wedlock, is generally, by the law of England, *primâ facie* evidence that such child is legitimate. In every case in which there is *primâ facie* evidence of any right existing in any person, the *onus probandi* is always upon the person or party calling such right in question. Such *primâ facie* evidence of legitimacy may always be lawfully rebutted by satisfactory evidence that such access did not take place between the husband and the wife as by the laws of nature is necessary in order for the man to be, in fact, the father of the child. The physical fact of impotency, or of non-access, or of non-generating access, as the case may be, may always be lawfully proved by means of such legal evidence as is strictly admissible in every other case in which it is necessary, by the law of England, that a physical fact be proved.

After proof given of such access of the husband and wife, by which, according to the laws of nature, he might be the father of a child (by which we understand proof of sexual intercourse between them), no evidence can be received except it tend to falsify the proof that such intercourse had taken place.

In every case where a child is born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, sexual intercourse is presumed to have taken place between the husband and wife, until that presumption is encountered by such evidence as proves, to the satisfaction of those who are to decide the question, that such sexual intercourse did not take place at any time, when by such intercourse, the husband could, according to the laws of nature, be the father of such child.

The presumption of legitimacy of a child born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, can only be legally resisted by evidence of such facts or circumstances as are sufficient to prove to the satisfaction of those who are to decide the question that no sexual intercourse did take place between the husband and wife at any time, when, by such intercourse, the husband could by the laws of nature be the father of such child. Where the legitimacy of a child in such a case is disputed, on the ground that the husband was not the father of such child, the question to be left to the jury is, Whether the husband was the father of such child? And the evidence to prove that he was not the father must be of such facts and circumstances as are sufficient to prove to the satisfaction of a jury that no sexual intercourse took place between the husband and wife at any time, when, by such intercourse, the

husband could by the laws of nature be the father of such child. The non-existence of sexual intercourse is generally expressed by the words "non-access of the husband to the wife"; and we understand those expressions as applied to the present question as meaning the same thing, because in one sense of the word "access" the husband may be said to have access to his wife as being in the same place or the same house, and yet under such circumstances as, instead of proving, tend to disprove that any sexual intercourse took place between them.

The law laid down in this case was followed in subsequent ones, especially in that of *Morris v. Davies*.¹ Here the husband and wife voluntarily separated; but the husband lived only fifteen miles off, visited his wife, and had opportunities of sexual intercourse. She was delivered of a child during the separation, and there was nothing *physically* impossible in the husband being the father; but, looking at the conduct of the wife and the supposed paramour before and after the birth, it was held morally impossible that the husband could have been the father of the child, and the child was declared a bastard. Where husband and wife lived apart, at a distance of only six miles, non-access under the circumstances of the case was rightly presumed.²

The legitimacy of a child is therefore a question of fact, to be decided one way or the other, according to the evidence produced to support or rebut it. The law on the subject has been thus summed up: A child born of a married woman is, in the first instance, presumed to be legitimate. The presumption thus established by law is not to be rebutted by circumstances which only create doubt and suspicion; but it may be wholly removed by proper and sufficient evidence by showing that the husband was (1) incompetent; (2) entirely absent, so as to have had no intercourse or communication of any kind with the mother; (3) entirely absent, at the period during which the child must, in the course of nature, have been begotten; or (4) only present under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse. Such evidence as this puts an end to the question, and establishes the illegitimacy of the child of a married woman.³

According to English law there is no fixed period of utero-gestation, or the length of time which elapses from the conception of the fœtus to the birth of the child; and the question in each case will be determined by the weight of the evidence offered.⁴

¹ 5 Cl. & F. 163. See also *The Barony of Saye and Sele*, 1 Cl. & F. 507; *Hargrave v. Hargrave*, 9 Beav. 552; *Sibbett v. Ainsley*, 3 L. T. 583; and *Gurney v. Gurney*, 8 L. T. 380.

² *Ulverstone Union v. Park*, 53 J. P. 629.

³ Per Lord Langdale in *Hargrave v. Hargrave*, 9 Beav. 552, 555.

⁴ *Gardner Peerage Claim*, cited 5 Cl. & F. 264; *Le Marchant*. See, however, Code

Legitimacy a question of fact.

Summary.

No fixed period of utero-gestation in English law.

Legitimation
per subsequens
matrimonium,

not recognized
by English
law.

Statute of
Merton.

In most countries where the civil or canon law has made its influence felt, the marriage of the parents of children born before marriage and recognized to be their offspring operates to legitimate those children, and places them on an equal footing with those born during wedlock in all respects affecting status and property, and gives a wide effect to the maxim *pater est quem nuptiæ demonstrant*. The law of England has steadily refused to recognize this process of legitimation. As far back as the reign of Henry III., the bishops desired to introduce the canon law rule of legitimation by subsequent marriage, and sought the consent of the great barons to the proposed change, but the latter unanimously refused to permit it, saying, *Quod nolunt leges Angliæ mutare quæ usitate sunt et approbata*.¹ From that day to this the law has never admitted the legitimacy of those born before the marriage of their parents, whether born in England or in a country permitting legitimation by subsequent marriage, so far as succession to English land is affected; in other words, for the purpose of succession to real estate the foreign status of legitimacy by the subsequent marriage of the parents is not recognized by the law of England.² As regards personal property this rule does not hold good under all circumstances.

There seem to be four principles to be extracted from the English law with reference to the effect of the status of legitimacy of children conferred by the after-marriage of parents, and, as usual, they are not conspicuous for their clearness or consistency.

Real property.
Heir to real
property in
England must
be born in law-
ful wedlock.

(1) *As to Real Property*.—Where a person who claims real property as heir was not born in lawful wedlock (*natus ex justis nuptiis*), his status of legitimacy by the after-marriage of his parents in a country conferring such legitimacy upon him, will not be recognized by the law of England.³

Personal
property.
Person illegiti-
mate by law of

(2) *As to Personal Property*.—Where a claim is made to personal property *ab intestato* by a person born before the marriage of his parents in a country whose laws do not recognize legitimation by the after-marriage of his parents, who subse-

Civil, Arts. 312 and 314; *ante*, p. 495. The ordinary period of gestation is deemed to be 270–275 days, and where a child was born 276 days after the last opportunity of sexual intercourse between husband and wife, it was adjudged under the circumstances of the case to be a bastard. *Bosville v. Att.-Gen.*, 12 P. D. 177. No doubt if this child had been born in France, the presumption of its legitimacy would have been deemed irrebuttable.

¹ Stat. Mert. 20 Hen. III. c. 8 (1235). “Ac rogaverunt omnes Episcopi Magnates, ut consentirent, quod nati ante matrimonium essent legitimi, sicut illi qui nati sunt post matrimonium, quantum ad successionem hereditariam, quia ecclesia tales habet pro legitimis. Et omnes Comites et Barones unâ voce responderunt, Quod nolunt leges Angliæ mutare, quæ usitate sunt et approbata.”

² *Re Goodman's Trusts*, 17 Ch. D. 266. Per Lush. L.J., summing up the effect of *Birtwhistle v. Vardill*, 2 Cl. & F. 571; 7 Cl. & F. 895.

³ *Birtwhistle v. Vardill* (*ubi sup.*). See the converse case of *Munro v. Munro*, 7 Cl. & F. 842, which decided that a child illegitimate by English Law, but legitimate by Scotch, took as lawful heir to entailed estates in Scotland.

quently intermarry in a country whose laws do recognize it (whether domiciled or not in the latter country), such claim will be refused, as the law of England does not recognize the legitimacy of the claimant, on the ground that being illegitimate by the law of his domicile of origin, he is to be taken to be illegitimate by the law of this country.¹

domicil of origin not legitimated by subsequent marriage of parents.

(3) Where a claim is made to personal property *ab intestato* by a person born before the marriage of his parents, and his father was domiciled² in a country whose laws recognize legitimation by the after-marriage of his parents both at the date of his birth and at the date of the marriage of his parents, such claim will be acceded to, as the law of England recognizes the legitimacy of the claimant, on the ground that being legitimate by the law of his domicile of origin he is to be taken as legitimate by the law of this country.³

Person born in country permitting legitimation *per subsequens matrimonium* legitimate, if father domiciled and married in that country.

(4) As to real and personal property: Where a claim is made to real or personal property not as heir or *ab intestato*, but under a testamentary disposition by way of specific devise,⁴ or bequest by a person (as for instance by a "son" or "child" of the testator) born before the marriage of his parents, who are domiciled at the date of the birth and subsequent marriage in the father's country, whose laws recognize legitimation by after-marriage of parents, such claim will be acceded to, as the law of England recognizes his status of legitimacy, but not under other circumstances.⁵

Real and personal property. When claim of *antenatus* designated as "child" taking under testamentary disposition acceded to.

There does not, however, seem to be any valid ground for the exclusion of children born in a country not recognizing their legitimation by the after-marriage of their parents, who become domiciled in a country which does so recognize it.

¹ The effect of the cases of *Shedden v. Patrick*, 1 Macq. H. L. Cas. 535, and *Re Wright's Trusts*, 25 L. J. Ch. 621; *Re Goodman's Trusts*, 17 Ch. D. 266, reversing 14 Ch. D. 619. See *Re Grove, Vaucher v. Solicitor to the Treasury*, 40 Ch. D. 216.

² If the parents have different domicils (as may happen when they are not married), the authorities show that the domicile of the father and not that of the mother is to be regarded. See *Munro v. Munro*, 7 Cl. & F. 842; *Udny v. Udny*, L. R. 1 H. L. Sc. 441.

³ *Re Goodman's Trusts (ubi sup.)*; *Re Grove, Vaucher v. Solicitor to the Treasury (ubi sup.)*. These cases appear to have altered the law on this point, and practically to overrule *Boyes v. Bedale*, 1 H. & M. 798. They break the continuity of the authorities with the exception of *Skottow v. Young* (L. R. 11 Eq. 474), which itself is opposed to the principles laid down in *Thompson v. The Advocate-General* (12 Cl. & F. 1), in which case it is put as a general principle that personal property in England follows the law of the domicile of the testator or intestate. But even these decisions do not remove the many inconsistencies yet existing under the present state of the law; for a man may be legitimate in one country and illegitimate in another; and in one and the same country be legitimate or illegitimate, as the property happens to be real or personal; and as to personal property alone, legitimate or illegitimate, where he claims *ab intestato* as personal representative of the intestate (whether as child or not) or under a will in which he is described as a "child" of the testator, or under one by which he can take as "child" of his parents.

⁴ *Re Grey's Trusts*, *Grey v. Stamford*, [1892] 3 Ch. 88.

⁵ *Goodman v. Goodman*, 3 Giff. 643; see *Anderson v. Atkinson*, 21 Ch. D. 100; *Re Goodman's Trusts (ubi sup.)*; *Andros v. Andros*, 24 Ch. D. 637; *Re Grove, Vaucher v. Solicitor to the Treasury (ubi sup.)*; *Re Grey's Trusts. Grey v. Stamford (ubi sup.)*.

The after-marriage must be lawful.

But the after-marriage of the parents, to bring about the legitimization of their *ante-nati* children, must be lawful in its inception by the laws of the country in which, while domiciled, they contract the marriage which so legitimates their offspring.¹

Legitimation by imperial or papal rescript.

There is nothing really analogous to legitimization by imperial (afterwards papal) rescript in the law of England; though Blackstone does mention the possibility of legitimization of bastards by Act of Parliament in cases where the parents have not married subsequently to the birth of their children, as was done in the case of the bastards of John of Gaunt, Duke of Lancaster.²

Domicil of children.

The last point more particularly to be discussed is the domicil of the children. This falls naturally into three sub-divisions—(1) legitimate children; (2) legitimated children; and (3) illegitimate children. The first two only will be here discussed; the third will be reserved for the chapter on illegitimate children.³ In elucidating this question, Mr. Dicey's valuable work on Domicil has been laid under contribution.

Legitimate children. Domicil of origin domicil of father. Domicil of infant changes with domicil of father.

(1) In the case of a legitimate infant born during his father's lifetime, the domicil of origin of the infant is the domicil of the father at the time of the infant's birth.⁴

The domicil of a legitimate infant is, during the lifetime of his father, the same as, and changes with, the domicil of his father.⁵ Thus, under the Divided Parishes Act (a Poor Law statute),⁶ a legitimate infant under sixteen takes and retains its father's settlement until it acquires another for itself when over the age of sixteen.⁷

A child under sixteen cannot acquire for itself a settlement;⁸ but when it has reached the age of sixteen or period of emancipation, for the purpose of acquiring a settlement it can add to the period for irremovability over sixteen the necessary period for irremovability under sixteen.⁹

Domicil of fatherless infant domicil of mother.

The domicil of an infant whose father is dead is, during the lifetime of the infant's mother, the same as, and changes with, the domicil of the mother.¹⁰ Thus, if after the death of the

¹ *Lapsley v. Grierson*, 1 H. L. Cas. 498. A death-bed marriage of a man domiciled in Scotland has by the law of that country the effect of legitimating his offspring. *The Lauderdale Peerage Case*, 10 App. Cas. 692.

² 1 Bl. Com. 459.

³ See *post*, chap. vi.

⁴ Dicey, Dom. 96; *Udny v. Udny*, L. R. 1 Sc. App. 441. See 33 & 34 Vict. c. 14, s. 10 (sub-ss. 3, 4).

⁵ Dicey, Dom. 97; *Somerville v. Somerville*, 5 Ves. 749 (a); *Sharpe v. Crispin*, L. R. 1 P. & D. 611.

⁶ 39 & 40 Vict. c. 61, s. 34.

⁷ See *Guardians of Reigate Union v. Guardians of Croydon Union*, 14 App. Cas. 465.

⁸ *Guardians of Woolwich Union v. Fulham Guardians*, [1905] 2 K. B. 203.

⁹ *Reg. v. Elvet*, 29 L. J. M. C. 17; *Guardians of Highworth and Swindon Union v. Guardians of Westbury-on-Severn Union*, 14 App. Cas. 465; *Guardians of West Ham Union v. Guardians of Holbeach Union*, [1904] 2 K. B. 121.

¹⁰ Dicey, Dom. 97; *Pottinger v. Wightman*, 3 Mer. 67.

father, an unmarried infant lives with its mother, and the mother acquires a new domicile, it is communicated to the infant.¹ This capacity of the mother to change her infant child's domicile is subject to certain exceptions: (i) The domicile of the infant is not changed by the marriage of its mother, so that its domicile should follow that of its stepfather.² But this may be considered too sweeping an assertion; and it may be held that a mother on her second marriage has power to change her infant children's domicile; but the change will not necessarily flow from the fact of her marriage, but as the result of the exercise by her of a power vested in her for the welfare of her infant children;³ therefore, if on her second marriage, which necessitates a change in her own domicile, she abstains from exercising such power, her children will retain the domicile they possessed at the date of her second marriage.⁴ One method of abstaining from exercising such power is by leaving the children not for temporary purposes in their original domicile.⁵ (ii) The change of an infant's home by a mother will not, if made with a fraudulent purpose, change the infant's domicile.⁶

(2) In the case of a legitimated person, the domicile of origin is the domicile which his father had at the time of such person's birth;⁷ and this is so whether the domicile of the father was one acquired by his own choice, or was his domicile of origin.⁸ The domicile of a legitimated infant is, during the lifetime of his father, the same as, and changes with, the domicile of his father,⁹ and if the father changes his domicile during the infancy of his child, the altered domicile does not, it would seem, become the domicile of origin of the infant child.¹⁰

Domicil of origin of legitimated child that of father.

As has already been seen,¹¹ the domicile of the father at the birth of the *antenatus* has a most important effect upon the capacity of such *antenatus* to be legitimated. Thus, if the father's domicile at the birth of the *antenatus* happens to be in a country in which legitimation by after-marriage of parents is recognized, the *antenatus* will, on the after-marriage of his parents, become legitimated.¹² But if the father's domicile at the birth of the *antenatus* be in a country in which legitimation by after-marriage is not

¹ *Johnstone v. Beattie*, 10 Cl. & F. 42; per Lord Campbell.

² *Ryall v. Kennedy*, 40 N. Y. (Supreme Court) 347. It is Mr. Dicey's opinion that this case would probably be followed by the English courts.

³ *Brown v. Lynch*, 2 Bradf. Surrog. Rep. (N. Y.) 214; *Re Beaumont*, [1893] 3 Ch. 490. ⁴ *Re Beaumont (ubi sup.)*. ⁵ *Ibid.*

⁶ This exception is not based on any express decision; but some foreign writers of authority support the contention. See *Pottinger v. Wightman (ubi sup.)*.

⁷ Dicey, Dom. 96. *Udny v. Udny (ubi sup.)*.

⁸ *Re M'Creight, Paxton v. M'Creight*, 30 Ch. D. 165.

⁹ Dicey, Dom. 97. *Somerville v. Somerville (ubi sup.)*; *Sharpe v. Crispin (ubi sup.)*.

¹⁰ Per Chitty, J., in *Re Craignish, Craignish v. Hewett*, [1892] 3 Ch. 180.

¹¹ See *ante*, p. 503.

¹² *Munro v. Munro*, 7 Cl. & F. 891.

recognized, the *antenatus* will always and for all purposes be held illegitimate, though his parents intermarry even in a country recognizing legitimation by such after-marriage.¹

Legitimacy
Declaration
Act, 1858.

In order to afford facilities to persons about whose legitimacy doubts might be entertained, an Act was passed in 1858, called "The Legitimacy Declaration Act,"² by force of which "any natural born subject of the Queen, or any person whose right to be deemed a natural born subject depends wholly or in part on his legitimacy, or on the validity of a marriage, being domiciled in England or Ireland, or claiming any real or personal estate situate in England, may apply by a petition to the Court for Divorce and Matrimonial Causes, praying the court for a decree declaring that the petitioner is the legitimate child of his parents, and that the marriage of his father and mother, or of his grandfather or grandmother, was a valid marriage, or for a decree declaring either of the matters aforesaid; and any such subject or person, being so domiciled or claiming as aforesaid, may in like manner apply to such court for a decree declaring that his marriage was or is a valid marriage, and such court shall have jurisdiction to hear and determine such application, and to make such decree declaratory of the legitimacy or illegitimacy of such person, or of the validity or invalidity of such marriage, as to the court may seem just; and such decree, except as hereinafter mentioned, shall be binding to all intents and purposes, on her Majesty, and on all persons whomsoever."³

The validity of a marriage celebrated abroad may be the subject-matter of a petition under this Act,⁴ and should not as a rule be the subject-matter of an action to perpetuate testimony.⁵

The object of this Act is strictly to obtain a declaration of legitimacy of the petitioner, and not to enable others to bastardize him.⁶ The court will not entertain a petition which is practically for a nullity of marriage,⁷ or investigate or decide upon a claim to a title of honour,⁸ nor will it declare that the petitioner is heir-at-law to another, or that some third person is illegitimate.⁹ If the petitioner is an infant, his guardian must be one who has no interest in his being declared illegitimate.¹⁰ A prayer for a

¹ *Shedden v. Patrick*, 1 Macq. H. L. Cas. 535 : *Strathmore Peerage Case*, 4 Wils. & Sh. Appdx. 5, 89 ; *Ross v. Ross*, 15th May, 1827, reversed 16th July, 1830, 4 Wils. & Sh. 289 ; *Re Goodman's Trust*, 17 Ch. D. 266.

² 21 & 22 Vict. c. 93.

³ Sect. 1. By sect. 6 the Attorney-General is to be made respondent in the proceedings. By sect. 7 the court may cite other persons than the Attorney-General, and by sect. 8 the rights of persons not cited are saved.

⁴ *Gardner v. Gardner*, 60 L. T. 839 (Gretna Green marriage)

⁵ *West v. Lord Sackville*, [1903] 2 Ch. 378.

⁶ *Re Chaplin*, L. R. 1 P. & D. 328.

⁷ *Johnstone v. The Att.-Gen.*, 43 L. J. P. M. & A. 3.

⁸ *Frederick v. The Att.-Gen.*, L. R. 3 P. & D. 196.

⁹ *Mansel v. The Att.-Gen.*, 2 P. D. 265.

¹⁰ *Re Chaplin* (*ubi sup.*).

Object of the
Act is to pro-
tect and not
bastardize the
petitioner.

declaration of legitimacy will not be allowed to be joined in an action for probate.¹ A petition of this sort not being of the nature of proceedings instituted in consequence of adultery, a father would not be allowed to give evidence of non-access so as to bastardize his issue.²

Parents not permitted in a petition to give evidence of non-access.

In proceedings under this Act the Attorney-General must first be cited; then the parties on applying to have the case set down for trial must lay the state of the case by affidavit or otherwise before the Registrar, who will direct whether any, and if so, what other parties shall be cited to see proceedings.³ A person not cited, who has no real interest in opposing the petition for a declaration of legitimacy, will not be allowed to intervene.⁴ The court has jurisdiction to order a person who has been cited and has appeared and opposed the petition to pay the costs of the petitioner, but not those of the Attorney-General.⁵

¹ *Warter v. Warter*, 15 P. D. 35.

² See *Guardians of the Nottingham Union v. Tomkinson*, 4 C. P. D. 343. See *ante*, pp. 496, 497, for a discussion of this point.

³ *Brinkley v. Att.-Gen.*, 14 P. D. 83. This practice is to be followed in proceedings under The Greek Marriages Act, 1884 (47 & 48 Vict. c. 20). *Scaramanga v. Att.-Gen.*, 14 P. D. 83.

⁴ *Upton v. Att.-Gen.*, 32 L. J. P. M. & A. 177.

⁵ *Bain v. Att.-Gen.*, [1892] P. 217, 261.

CHAPTER II.

RIGHTS AND OBLIGATIONS OF PARENTS IN RESPECT OF THE PERSONS OF CHILDREN

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SECTION I.

Rights of Parents.

Right of the Father to the Custody of the Child.—The relationship of parent and child is that of a guardian and his ward; it is a strong and powerful tie. A proper regard for, nay, the sanctity of, this tie is necessary for the cohesion of States as well as of families. It is a natural instinct which impels those who have brought children into the world to shield, nourish, and support them till their early weakness has been changed into mature strength. It is this instinct which has ever assigned children, equally with the other weaker members, to the care and protection of the head of the family, whether their father or their paternal grandfather. The right of the father to the custody of the children was due to his superior position in the family household; he was the strongest person, and could best assert his right to their custody, and he won the means of their support; thus, many reasons combined to assign to him the arbitrament of their destinies.

The power of the English father over his children was never so wide or tyrannous as the *patria potestas* of the Roman father. "The Roman law was distinguished for the stern severity with which it upheld the paternal authority. It gave the father, in fact, absolute power. . . . The atrocious power of putting his children to death, and of selling them three times in open market . . . was recognised by the Twelve Tables, and continued to be the law for many ages. We find, however, that long before the reign of Justinian it had been very considerably modified. Bynkershoek is of opinion that the power of life began to grow into disuse in the reign of the Emperor Hadrian, of whom it is recorded that he banished a man for having, while out hunting, killed his son, who carried on a criminal intercourse with his stepmother; and the reason alleged is, '*quod latronis magis quam patris jure eum interfecisset; nam patria potestas in pietate debet, non atrocitate, consistere.*'" ¹

Difference between English paternal control and the *patria potestas* of Rome.

¹ Forsyth, Cust. Inf. s. 2.

In the time of the Emperor Constantine such an act was visited with the punishment affixed to a *parracidium*; ¹ and by degrees the powers of the father were much modified. "The power of a parent by our English laws, though much more moderate, is still sufficient to keep the child in order and obedience; and it is laid down that a father may lawfully correct him, being under age, in a reasonable manner; for this is for the benefit of his education." ² This right of lawful correction is jealously watched by the courts, and if the parent exceed the bounds of moderation and inflict cruel punishment upon the child, he may be severely punished; if the child in consequence lose its life, he may have to stand his trial for its murder. ³ The American law on this branch of the subject is practically the same as the English. ⁴

Guardianship
by nature.

In popular language, the father or mother is the "natural guardian" of their children; but according to the strict common law meaning, the term "guardian by nature" applied primarily to the father of an heir apparent; ⁵ and this feudal guardianship terminated when the heir (whether male or female) attained the age of fourteen. But this strict common law meaning has for a long period been merged in the wider and more popular sense of the term "natural guardian," namely, that nature marks out the parent as being the rightful person to have the control and custody of his child. ⁶

The control of the parent (father or mother) lasts under ordinary circumstances until, and in all cases ends when, the child attains the age of twenty-one, or marries under that age; ⁷ and a father and now a mother cannot appoint by will a guardian for a child to continue after the latter has attained his majority. ⁸ But if, as will be seen more particularly lower down, ⁹ any dispute arise as to who should retain the custody and control of the child, and the child has attained the age of discretion—not less than fourteen years for a boy and sixteen for a girl ¹⁰—the court may, if it think fit, allow him to exercise a discretion and withdraw himself from the control of his parent. It seems, however, indisputable that unless interfered with by the courts, the *patria potestas* may be exercised by way of legitimate control over infant children; but that on majority they become emancipated by arriving at years of discretion, or the time appointed by law

¹ Cod. ix. tit. 17.

² 1 Bl. Com. 452.

³ See *Reg. v. Coude*, 10 Cox, C. C. 547.

⁴ Sch. Dom. Rel. s. 245.

⁵ The mother and other ancestors could be guardians.

⁶ Co. Litt. 88 b, Harg. notes, 12, 13. See *post*, Part III. c. 11.

⁷ 1 Bl. Com. 453; Co. Litt. 88 b, Harg.; Forsyth, Cust. Inf. s. 5; *Re Agar-Ellis*, *Agar-Ellis v. Lascelles*, 24 Ch. D. 317.

⁸ See 12 Car. II. c. 24, s. 8.

⁹ *Post*, p. 518.

¹⁰ *Reg. v. Howes*, 30 L. J. M. C. 47; S. C. 3 L. T. 467; *Mallinson v. Mallinson*, 1 P. & D. 221.

for the loosing of parental fetters. But this control is not unlimited; thus a parent has no common law right to bind a child as an apprentice;¹ but the child itself must execute the deed.²

The control of a parent over its infant child's marriage is clearly established by legislative sanction in the various Marriage Acts.³ The control is exercised by granting or withholding consent. It is enough here to say that such consent must be honestly given, and no private advantage to the parent or guardian arising out of the marriage will have effect given to it.⁴ A parent or person *in loco parentis* may withdraw his consent; but such retraction must be honestly and not capriciously made.⁵

Control of
parent over
child's
marriage.

By the common law of England the father has the right to the custody of his infant children as against third parties, and even as against the mother,⁶ though the child be an infant at the breast.⁷ The law gives him the custody of his children unless he does something to forfeit it.⁸ If, however, he has agreed to let the mother have access to the child, he will be held bound by his agreement.⁹ This right of the father enables him to delegate his authority over the child to a third person,¹⁰ as to a tutor or schoolmaster, who, as against all the world, the father himself excepted, stands *in loco parentis* to the child committed to his charge and custody.¹¹ The ante-nuptial contract of a father to give up the children of the intended marriage into the control of their mother is deemed to be against public policy, and will not be enforced by the courts.¹² Such contracts and stipulations to be executed in the future are bad, for they not only discount the future, but are mischievous in their operation on family life.¹³ But the father on separating from his wife can enter into an arrangement with her to have the custody of his child or children.¹⁴

Common law
right of father
to custody of
children.

Executory
contract by
father to sur-
render control
and custody of
children not
enforced.

During the lifetime of the father a mother, as such, was

Right of the
mother after
death of the
father.

¹ *Rex v. Annesley*, 3 B. & Ald. 584.

² *Ibid.*; *St. Nicholas v. St. Botolph*, 31 L. J. M. C. 258.

³ 4 Geo. IV. c. 76; 7 Wm. IV. and 1 Vict. c. 22; 3 & 4 Vict. c. 72: 19 & 20 Vict. c. 119. For more ample discussion of this subject, see *ante*, Part I., Husband and Wife, chap. vi.

⁴ *Hamilton v. Mohun*, 2 Vern. 652. See Marriage Brocage Contracts, p. 11.

⁵ *Re Brown, Ingall v. Brown*, [1904] 1 Ch. 120.

⁶ *Ex parte Skinner*, 9 Moo. 278; *Ex parte Hopkins*, 3 P. Wms. 154. "The law makes the father the guardian of his children by nature and nurture."—Per Lord Eldon in *Wellesley v. Duke of Beaufort*, 2 Russ. 1, 21; *Constable v. Constable*, 24 W. R. 649.

⁷ *Rex v. De Manneville*, 5 East, 221; *Re Thomas*, 22 L. J. Ch. 1075; *Ex parte Young*, 26 L. T. 92; see also *Cartledge v. Cartledge*, 31 L. J. P. M. & A. 85.

⁸ *Hunt v. Hunt*, 28 Ch. D. 606.

⁹ See *Ex parte Lytton* (decided by Lord Mansfield), cited in *Rex v. De Manneville* (*ubi sup.*).

¹⁰ *Ex parte McClellan*, 1 Dowl. 81.

¹¹ See *Re Suttor*, 2 Fost. and Fin. 267.

¹² *Re Agar-Ellis, Agar-Ellis v. Lascelles*, 10 Ch. D. 49.

¹³ *Vansittart v. Vansittart*, 27 L. J. Ch. 290.

¹⁴ 36 Vict. c. 12, s. 2. See *post*, p. 527.

entitled to no power, but only to reverence and respect;¹ but on the death of the father, without having appointed a testamentary guardian,² she was entitled to the custody of her infant children, and in this respect was altogether in the place of the father, with all his rights and responsibilities, for she is their guardian by nature and nurture;³ but where a testamentary guardian had been appointed, a mother, as such, had no right to interfere with him,⁴ nor with a guardian appointed by the Court of Chancery.⁵ A mother has now even as against the father a statutory right to the custody of her child under the Divorce Acts,⁶ and the Infants' Custody Act, 1873,⁷ where it is manifestly for the child's benefit that she and not the father should have the care and control of it. Under the Guardianship of Infants Act, 1886,⁸ the mother may apply to the court for an order regarding the custody of her infant child, and the right of access thereto of either parent, having regard to the welfare of the infant and to the conduct of the parents, and to her wishes as well as those of the father; and the court has power to make an order respecting the costs of the mother and the liability of the father for the same or otherwise.⁹

Statutory
rights of the
mother.

Guardianship
of Infants Act,
1886.

Co-ordinate
right of mother
to appoint
testamentary
guardian.

A mother could not legally appoint a testamentary guardian for her children,¹⁰ but if the person sought to be appointed was a proper and fit one, the court was wont not to refuse to pay attention to her wishes.¹¹ But under the Guardianship of Infants Act, 1886, a mother has certain co-ordinate rights of guardianship with the father of her infant children; thus, where the mother survives the father, who has appointed no guardians, she is sole guardian; or if he has appointed a guardian or guardians she is to be joint guardian with him or them;¹² and she may by deed or will appoint a guardian to act after the death of herself and the father of her infant children, or to act jointly with the father if he survives her, and is for any reason shown to be unfit to be the sole guardian of his children.¹³

Removal of
mother.

After the father's death the mother's right to the guardianship

¹ 1 Bl. Com. 453. Under the law of Rome a mother, though entitled to respect, had even fewer privileges than an English mother had up to quite lately; thus, she was not her children's legal natural guardian on the death of their father, nor could she be legally appointed their guardian by will. Cod. viii. tit. 47, s. 4; Dig. xxvi. tit. 2, s. 26.

² 12 Car. II. c. 24. See *post*, Part III., Guardian and Ward, chap. ii.

³ *Eyre v. Countess of Shaftesbury*, 2 P. Wms. 103; 2 W. & T. L. C. 633; *Villareal v. Mellish*, 2 Swanst. 533; *Roach v. Garcan*, 1 Ves. Sen. 158; *Re Race*, 26 L. J. Q. B. 167; S. C. 7 El. & Bl. 186.

⁴ *Reynolds v. Teynham*, 9 Mod. 40.

⁵ See *Waine v. Waine*, cited Chamb. Inf. 36.

⁶ 20 & 21 Vict. c. 85, s. 35; 22 & 23 Vict. c. 61, s. 4; 58 & 59 Vict. c. 39, s. 5 (b), repealing 41 Vict. c. 19, s. 4.

⁷ 36 & 37 Vict. c. 12. See *post*, p. 526.

⁸ 49 & 50 Vict. c. 27.

⁹ *Villareal v. Mellish* (*ubi sup.*).

¹² 49 & 50 Vict. c. 27, s. 2.

⁹ Sect. 5.

¹¹ *Re Kaye*, L. R. 1 Ch. App. 387.

¹³ Sect. 3. See *post*, p. 529.

of her child is uncontestable, and will not be interfered with by the court, except on grounds which affect the interest and welfare of the child.¹

The grounds for superseding her guardianship are improper conduct, such as trying to bring about an unsuitable marriage of her child, a ward of court,² unfitness for her duties,³ immorality,⁴ or disobedience to the decrees and orders of the Court of Chancery.⁵ Her second marriage does not operate as a necessary supersession;⁶ and the old practice of the court to direct a reference for the appointment of a new guardian,⁷ and under such reference to continue her as guardian,⁸ or reappoint her with others,⁹ must be deemed to be no longer in its former force, but altogether modified by her rights under this Act.¹⁰

Parents cannot enter into an agreement legally binding to deprive themselves of the custody and control of their children; and if they elect to do so, can at any moment resume their control over them.¹¹ If, however, as a matter of fact, parents do relinquish their control (whether in pursuance of an agreement or not), and allow others to take charge of and rear them, they will not be permitted, at the hazard of injuring the children, to take them back into their own custody. The interests of the children are the sole guides to the court as to what orders should be made; if the restoration to their parents' custody would be of manifest advantage to them, those in charge of them will be ordered to deliver them up to them, but not otherwise.¹²

Relinquish-
ment of
control by
parents.

The courts re-
gard only the
interests of the
children.

The right of the parents to the custody of their children can only be determined by the children arriving at majority, or by parental conduct which brings about a forfeiture of their privileges; thus, it cannot legally be infringed by the appointment by a stranger of a guardian to them during the father's lifetime;¹³ yet a father may so act as to render such appointment effectual; thus, where a benefit is given to a father on condition of his resigning the management of his children, he will not be permitted to receive the gift without complying with the terms of it, and on his submission a person will be appointed to act as

Forfeiture of
right of control
by parents.

¹ *Re X. X. v. Y.*, [1899] 1 Ch. 526.

² *Rouch v. Garvan (ubi sup.)*.

³ *Heysham v. Heysham*, 1 Cox, Eq. Cas. 179.

⁴ *Re Moore*, 11 Ir. C. L. 1.

⁵ *Re Newbery*, L. R. 1 Ch. App. 263.

⁶ *Villareal v. Mellish (ubi sup.)*.

⁷ *Anon.*, 8 Sim. 346.

⁸ *Re Gurnall*, 1 Beav. 347; *Jones v. Powell*, 9 Beav. 345.

⁹ *Austin v. Austin*, 34 Beav. 257.

¹⁰ *Re X. X. v. Y. (ubi sup.)*. In this case the mere fact of the second marriage of the mother to a husband of a different faith from that of the father of her children was not a ground for interference by the court for the purpose of adding a co-guardian with her.

¹¹ *Reg. v. Barnardo (Tye's Case)*, 23 Q. B. D. 305; *Reg. v. Barnardo (Gossage's Case)*, 24 Q. B. D. 283.

¹² See *Reg. v. Gyngall*, [1893] 2 Q. B. 242.

¹³ *Ex parte Hopkins*, 3 P. Wms. 152. The appointment of such a guardian is in law inoperative.

guardian, although the mere acceptance of the gift by the father will not be considered as an election to abide by the will, and to waive his parental right, unless he knows that he is making the election.¹

Adoption not strictly recognized by the law.

The law of England, strictly speaking, knows nothing of adoption, and does not recognize any rights, claims, or duties arising out of such a relation except as arising out of an express or implied contract. But in so far as the Court of Chancery will, in the interests of the children, enforce the waiver or abandonment of the control of the father (or mother), up to that point it might be said to countenance the claim of the adoptive parent, not on the ground of any right in the latter, but of the material well-being of the infant.²

How right of parent to custody of child enforced.

This right of the father and the mother to the custody of their children is not only recognized, but, if infringed, may be enforced by legal process. There are now two remedies open to them. (1) Writ of *habeas corpus*, and (2) Application to the Court of Chancery.

Habeas corpus. Jurisdiction in *habeas corpus* based upon illegal custody and restraint.

(1) The issue of a writ of *habeas corpus* proceeds on the fact of an illegal restraint, and the person entitled to the legal custody of the infant, whether the father, mother,³ or other guardian,⁴ may sue out this writ without making any previous demand for the possession of the child.⁵ If the custody is found to be illegal, and the applicant is entitled to it, the court will make an order to that effect; but if neither the applicant nor the custodian is entitled to the custody, the writ will not be confirmed; the court will either restore the infant to the custody from which it was taken, or discharge it from that custody, with liberty to return to it. Where the legal custody of the infant is shown to exist, the court must order it to be delivered over to or remain in that custody.⁶ Though the father has at common law *prima facie* the right to the custody of his child, and so is entitled to his writ of *habeas corpus*, yet since the Judicature Act, 1873 (which provides that the rules of equity in relation to the custody of infants shall prevail), and the Infants' Custody Act, 1873,⁷ the court has a discretion to refuse the father this writ in order to remove a child of tender years from the custody of the mother,

¹ Macq. Inf. 135; *Colston v. Morris*, Jac. 257 n; see also *Powell v. Cleaver*, 2 Bro. C. C. 500.

² Adoption played an important part in Roman family life; and many laws were enacted in reference to and in regulation of it. It is to be found in those European systems which have made the law of Rome the basis of their codes.

³ *Reg. v. Barnardo (Tye's Case)*, 23 Q. B. D. 305.

⁴ *Reg. v. Greenhill*, 4 A. & E. 624. In this case Coleridge, J., lays down the principle on which the courts acted in handing over to the parent or guardian an infant too young to make a choice as to its custody. *Re Hakewill*, 12 C. B. 223; *Reg. v. Howes*, 30 L. J. M. C. 47; *Re Andrews*, L. R. 8 Q. B. 153; S. C. 42 L. J. Q. B. 99.

⁵ *Ex parte Witte*, 13 C. B. 680.

⁶ *Re v. Isley*, 5 A. & E. 441.

⁷ 36 & 37 Vict. c. 12, s. 1.

and other relations whose conduct with regard to the child is impeached.¹ The writ is directed to the person who detains another in custody, and orders him to produce the body of such person, with the day and cause of taking and detaining him.² This writ was suable not only out of the common law courts but also out of Chancery,³ and in the latter instance the equity judges exercised the functions of a common law judge, and were limited by the powers and jurisdiction conferred on the latter.⁴ The jurisdiction of both the common law and Chancery judges on *habeas corpus*, so far as the subject-matter under discussion is concerned, is in strict law practically confined to the inquiry as to the legal right of the father, or other guardian, including the mother, to the custody of the child, and to whether the child is in illegal custody without its consent, provided it had attained a certain age. It is no valid excuse for not producing a child in obedience to a writ of *habeas corpus* to state inability to obey, if such inability is the result of illegal conduct antecedent to the issuing of the writ on the part of the person to whom the writ is addressed, and it is not impossible to produce the body of the child.⁵ If a person to whom the custody of a child has been traced has handed over the child to some other person in order to avoid the exigence of a writ of *habeas corpus*, yet if on the issue of the writ the child was likely to be produced, then the writ ought to go.⁶

The common law courts could not, except in flagrant instances of unfitness, control the exercise by the father or the guardian of his legal rights, and refuse the writ.⁷ On the other hand, where a cause dealing with the infant's property was before the Court of Chancery, that is, where the infant was a ward of court, then other considerations than the mere legal right of custody were acted upon, and the custody of the infant might in the discretion of the court be assigned to one who had no legal right to it.⁸

Application to
Court of
Chancery.

In what case
jurisdiction of
equity courts
wider than
common law.

¹ *Re Brown (Ethel)*, 13 Q. B. D. 614.

² Tidd, Pr. 348.

³ "The like writ (*habeas corpus*) is to be granted out of the Court of Chancery, either in the term (as in the King's Bench), or in the vacation; for the Court of Chancery is *officina justitie*, and is ever open, and never adjourned, so as the subject, being wrongfully imprisoned, may have justice for the liberty of his person, as well in the vacation time as in the term."—Co. 2 Inst. 55.

⁴ *Crowley's Case*, 2 Swanst. 1, 73, 75; see also *Re Agar-Ellis*, *Agar-Ellis v. Lascelles*, 24 Ch. D. 317.

⁵ *Reg. v. Barnardo (Tye's Case)*, 23 Q. B. D. 305; *Re Matthews*, 12 Ir. C. L. Rep. 233; and per Esher, M.R., in *Reg. v. Barnardo (Gossage's Case)*, 24 Q. B. D. 283.

⁶ Per Fry, L.J., in *Reg. v. Barnardo (Gossage's Case)*, (*ubi sup.*).

⁷ *Re Andrews*, L. R. 8 Q. B. 153. Personal cruelty towards a child, or manifest injury towards the child's prospects, were really the only grounds on which the common law courts could deprive the father of the custody of his child. See the cases of *Re v. Greenhill*, 4 A. & E. 624, and *Ex parte Skinner*, 9 Moo. 276, where, though the father was of bad character, he was allowed to resume the control of his child, and *Re v. De Manneville*, 5 East, 221; *Re v. Delaval*, 3 Burr. 1436; and *Reg. v. Clarke*, 7 El. & Bl. 186; S. C. 26 L. J. Q. B. 167.

⁸ See *Wellesley v. Duke of Beaufort*, 2 Russ. 1; and *Andrews v. Salt*, L. R. 8 Ch. App. 622.

Since the passing of the Judicature Act,¹ the principles to be applied in dealing with the question of the custody of infants by the King's Bench and Chancery Divisions are those of equity, and the jurisdiction of both divisions is concurrent.² But where the question was simply as to the legality or illegality of the detention of the child, the jurisdiction and power of the Court of Chancery were identical with those of the common law courts.³ But the Court of Chancery allowed itself greater latitude in protecting the interests of the children than did the common law courts; and by the Custody of Children Act, 1891,⁴ both Chancery and Common Law Divisions of the High Court are to administer equitable principles in exercising their jurisdiction in *habeas corpus*.

Application by mother.

Applications by the mother to take children out of their father's custody, except on sufficient ground, have never been successful.⁵

Application to the Court of Chancery for appointment of a guardian.

(2) The parent may obtain relief by application to the Court of Chancery, either by suing out a writ of *habeas corpus*,⁶ which may issue in vacation time,⁷ or by petition,⁸ whether a cause affecting the infant is pending or not.⁹ Where a mother unjustifiably takes her infant child out of the custody of the father, he may petition to have its custody delivered up to him; and in such petition the court has power to make provision for access to the child.¹⁰

Application to Court of Chancery more advantageous than *habeas corpus*.

Where there is no cause pending, in order to give the court more complete power, the infant should be made a ward of court by the parent or some other person constituting himself or herself a trustee for the infant by paying a sum of money (a small amount would suffice) into court, and making an application by summons at chambers for the appointment of a guardian.¹¹ A parent who thus constitutes a child a ward of court does not thereby surrender his or her right of control over the child.¹² Where the infants are wards in Chancery, the court may order them to be delivered up to their guardian, either to remain where they were,¹³ or to go at liberty.¹⁴ There were advantages in applying to the Court of Chancery over proceedings by writ of *habeas corpus*. In proceedings by the latter, the mere question of

¹ 36 & 37 Vict. c. 66, ss. 16, 25, sub-s. 10.

² *Re Goldsworthy*, 2 Q. B. D. 75.

³ Per Brett, M.R., in *Re Agar-Ellis*, *Agar-Ellis v. Lascelles*, 24 Ch. D. 317, 327.

⁴ 54 Vict. c. 3. See *post*, p. 530.

⁵ Macph. Inf. 159. This subject will be found more fully discussed lower down, pp. 525 *et seq.*

⁶ *Re Spence*, 2 Ph. 247.

⁷ *Crowley's Case*, 2 Swanst. 1.

⁸ *Lyons v. Blenkins*, Jac. 245.

⁹ *Re Spence (ubi sup.)*.

¹⁰ *Constable v. Constable*, 24 W. R. 649.

¹¹ *Todd v. Todd*, Set. Dec. 889, cited as *Todd v. Lyne*, in *Simp. Inf.* 145; *Re Lyons*, 22 L. T. 770.

¹² *Per cur.* in *Re Agar-Ellis*, *Agar-Ellis v. Lascelles (ubi sup.)*.

¹³ *Harrison v. Goodall*, Kay, 310 n.

¹⁴ *Re Lyons (ubi sup.)*.

the illegal custody of the child could only be considered, whereas if the infant was made a ward of court, the court had power to inquire into all the surrounding circumstances of the case, the claim of the applicant to the custody, and the interests of the ward. The Court of Chancery also has the power of summoning witnesses whom it has reason to believe are aware of the whereabouts of the infant who is its ward, and can compel them to disclose their knowledge. This power neither the King's Bench Division nor the Chancery Division can exercise on *habeas corpus*. If, therefore, there is any doubt or uncertainty as to where the infant is detained out of the custody of the claimant, the most efficacious step is to make it a ward of court, and apply to the court for the appointment of a guardian to it.

The father, and the mother after his death, have, by the law of England, a general right of control over the person, education, and conduct of their children till they attain majority,¹ and when they come before the court on *habeas corpus*, or an application in Chancery, if not yet arrived at the years of discretion, the court will order them to be delivered without examination into the custody and control of their parents or other guardian. The courts on *habeas corpus* act upon the presumption that where the legal custody is, no restraint exists; but they had a discretion to refuse to restore the infant to the custody of its parent, if the conduct of such was grossly immoral,² or to surrender it up would be to the great detriment of the interests of the child;³ and, where the child is in the hands of a third person, that presumption is in favour of the father or legal guardian.⁴ But where the children are not in the custody of their father or guardian, and he seeks to resume his control by *habeas corpus*, in cases where they are arrived at the age of discretion, and are capable of exercising a choice, they will be permitted to elect whether or not to return to their father's or guardian's control, but their choice must be a wise one, and for their own interests.⁵ This is so because the question before the court upon *habeas corpus* is whether the person detained is in illegal custody without that person's consent; and where the court finds that the infant is no longer a mere child, but is capable of consenting or not consenting, and is consenting to the place where it is detained, then the ground of an application for a writ of *habeas corpus* falls away.⁶

¹ *Re Agar-Ellis, Agar-Ellis v. Lascelles* (*ubi sup.*).

² *Re v. De Manneville*, 5 East. 221.

³ See *Reg. v. Clarke*, 7 El. & Bl. 186; S. C. 26 L. J. Q. B. 167.

⁴ Macph. Inf. 155.

⁵ *Reg. v. Howes*, 30 L. J. M. C. 47. Thus, if a girl over sixteen, but under twenty-one, were voluntarily to consent to remain in a brothel, there is no doubt but that the father would be assisted by the court to resume his parental control over her.

⁶ Per Brett, M.R., in *Re Agar-Ellis, Agar-Ellis v. Lascelles*, 24 Ch. D. 317.

Custody of
Children Act,
1891.

But under the Custody of Children Act, 1891,¹ the powers of the court, on an application for a writ of *habeas corpus*, are enlarged, and the principles which guided the Court of Chancery in refusing to grant the writ have now statutory authority; for where a parent² of a child applies to the High Court for a writ for its production, and the court is of opinion that the parent has abandoned or deserted the child, or has otherwise so conducted himself that the court should refuse to enforce his right to the custody, the court may decline to issue the writ.³ So, too, if the child is being brought up by another person,⁴ or is boarded-out by poor-law guardians, the court may make an order on the parent, if it restores the custody of the child, to pay such remuneration to the person or board for the keep of the child as may be just.⁵ Where a parent has abandoned or deserted his child, or allowed his child to be brought up at some other person's expense, or by poor-law guardians, for such a length of time as to satisfy the court that the parent was unmindful of his parental duties, the court may refuse to order up the child to the parent unless the latter proves he is a fit person to have the custody of the child.⁶ If the court is of opinion that the parent ought not to have the custody of the child, and that the child is being brought up in a different religion to that in which the parent has a legal right to require the child to be brought up, the court may, by order, secure that the child be brought up in such religion.⁷ The court may consult the wishes of the child in considering what order ought to be made, and any right which the child now possesses to exercise its own free choice shall not be diminished.⁸

There is no English case deciding what is the age of discretion for this purpose in male infants, but two Irish cases⁹ have fixed fourteen. In the case of female infants, the courts (guided by the statutes of 4 & 5 Ph. & M. c. 8, and 24 & 25 Vict. c. 100, s. 55) have fixed sixteen as the earliest age at which they will be allowed to exercise this choice, and no amount of precocity in a girl under that age will hasten the period of choice.¹⁰ But apart from the question of *habeas corpus*, the parents' right to the custody and control of their children of both sexes lasts till they have attained their majority, unless they have done something to

¹ 54 Vict. c. 3.

² "Parent" is any person liable at law to maintain such child or entitled to its custody. Sect. 5.

³ Sect. 1.

⁴ "Person" includes any school or institution. Sect. 5.

⁵ Sect. 2.

⁶ Sect. 3.

⁷ Sect. 4.

⁸ *Ibid.*

⁹ *Re Shanahan*, 20 L. T. 183; *Re Connor*, 16 Ir. C. L. 112. The age of fourteen for boys might be adopted on the analogy of the capacity of male infants to choose guardians in socage at that age; for on arriving at that age they were assumed able to exercise a wise and proper discretion.

¹⁰ *Reg v. Hovess*, 30 L. J. M. C. 47. *Re Smythe*, 11 Ir. L. T. Rep. 122; but see *Reg. v. Gynghall*, [1893] 2 Q. B. 242, where the girl was fifteen and not quite sixteen.

disentitle them to that right;¹ for parents have the right to control the marriages of their infant children;² and to appoint guardians to them till they reach majority.³ The Court of Divorce has lately recognized the liability of parents to maintain and support their children till they reach the age of twenty-one.⁴

The common law right of the parents to the control and custody of their children has not been allowed to prevail under all circumstances, but has been seriously interfered with both by the courts administering common law as well as those administering equity, where the interests of the children have called for interference. The Court of Chancery has from time to time exercised the widest powers of interference on behalf of infants who stood in need of its protection. The common law courts, exercising only their innate jurisdiction, could control the rights of the parents only in cases where they were proved to be absolutely unfit to take care of them. But to a considerable extent, however, the same reasons prevailed with those administering the different branches of the law. The Court of Chancery was enabled to exercise wider supervision, because it possessed the delegated powers and jurisdiction of the Crown, as *parens patriæ*, in which was vested a general superintendence and protection over the persons of infants.⁵ The Court of Chancery exercises a general superintendence over infants, but as a rule has not the means of acting, except where it has property to act upon. It is not, however, from any want of jurisdiction that it does not act, but, as a rule, from a want of means to exercise its jurisdiction by applying property for the use and maintenance of the infants.⁶ Since the passing of the Judicature Act,⁷ and the decision of the Queen's Bench Division in *Re Goldsworthy*,⁸ it is no longer necessary to set out minutely the different grounds for interference with the parents' right of custody and control which were acted upon in equity and at common law. The principles upon which the court, whether of common law or equity, professes now to act in regulating the relations of parent and child are those that

Interference by the courts with parents' control and custody.

Concurrent jurisdiction of the Chancery and King's Bench Divisions.

Principles on which the courts now act.

¹ *Re Agar-Ellis*, *Agar-Ellis v. Lascelles* 24 Ch. D. 317; *Thomasset v. Thomasset*, [1894] P. 295; *Todd v. Lyne*, Simp. Inf. 145.

² 4 Geo. IV. c. 76, s. 16.

³ 2 Car. II. c. 23; 49 & 50 Vict. c. 27.

⁴ See *Thomasset v. Thomasset* (*ubi sup.*).

⁵ 2 Fonb. Eq. 224. Mr. Flonblanque here combats the theory put forward by Mr. Hargrave (*Harg. n* 16, Co. Litt. 88 b), who maintains that the Chancery jurisdiction over infants was nothing more nor less than a usurpation by that Court. He also draws a distinction between the Crown's jurisdiction over infants and over lunatics and idiots, in whose persons and estates it had a beneficial interest. See *post*, Part III. ch. ii.

⁶ Per Lord Eldon in *Wellesley v. Duke of Beaufort*, 2 Russ. 21; *Re Spence*, 2 Ph. 247; *Re Fynn*, 2 De G. & Sm. 457; *Brown v. Collins*, 25 Ch. D. 56; *Re Seanlan (Infants)*, 40 Ch. D. 200; *Re Nevin*, [1891] 2 Ch. 299; *Barnado v. M'Hugh*, [1891] App. Cas. 395; *Re M'Grath (Infants)*, [1893] 1 Ch. 143. See *post*, Part IV. c. ii.

⁷ 36 & 37 Vict. c. 66, ss. 16, 25, sub-s. 10.

⁸ 2 Q. B. D. 75.

ought to be found in a "wise, affectionate, and careful parent";¹ and the moral welfare of the child is the dominant matter for the consideration of the court; and the court will act whether the child is under the control of a parent or of some other legal guardian.² Misconduct on the part of the parent is not now necessarily one of the grounds on which the court will act to prevent a parent from recovering the custody of its offspring; but the court now arrogates to itself the right to say that if in its opinion the parent, however free from misconduct, is placed in such a position that would warrant the court in superseding the natural rights of the parent, it will not restore the custody of the child to him.³ The ideal of what is a "wise, affectionate, and careful parent" may, however, vary from time to time with the composition of the court which is to translate that ideal into practice; and it is not impossible for the courts to vary in the application of that ideal as much as in the construction of the terms of a will.

This subject will now be treated on the following lines:—

(1) Interference with the parental control by the Court of Chancery—

(a) Under its general jurisdiction.

(b) Under its statutory jurisdiction.

(2) By the Divorce Court.

(1) *By the Court of Chancery.*

(a) *Under its General Jurisdiction.*—The court will not, as a rule, exercise this jurisdiction except in the case of its wards, however constituted, not because it lacks jurisdiction, but because it will not interfere as regards the custody and tuition of the children where it has not the means of providing for them.⁴ The jurisdiction of the court is limited in such a case to the appointment and removal of guardians, for the children having no property under the control of the court, the court cannot provide any scheme for their maintenance or education.⁵ The grounds for interference by the court are gross misconduct and profligacy on the part of the father, who, by his behaviour, has shown that he is utterly unfit to be trusted with the control and bringing up of his children, who, if they remain within his influence, are more likely to acquire evil habits than to learn what is proper and decent for civilized life.⁶ In deciding this question the

By Court of
Chancery.
Under general
jurisdiction.

¹ Per Esher, M.R., in *Reg. v. Gyngall*, [1893] 2 Q. B. 242.

² *Re M'Grath (Infants)*, [1893] 1 Ch. 143.

³ *Reg. v. Gyngall (ubi sup.)*.

⁴ Per Cotton, L.J., in *Re Agar-Ellis, Agar-Ellis v. Lascelles*, 24 Ch. D. 317, 332.

⁵ *Re M'Grath (Infants) (ubi sup.)*.

⁶ Story, Eq. Juris. s. 1341.

court regards less the interference and suspension of the parents' power than what is essential to the welfare of the children;¹ and "welfare" is now to be construed in the widest possible sense.² But the court did not take upon itself jurisdiction to interfere simply with reference to what is not for the interests of the children.³ Thus, the following have been held to be grounds for interfering: Cruelty combined with general bad character,⁴ constant habits of drunkenness and blasphemy, poisoning the mind of the infant,⁵ cruelty to the children,⁶ or criminally assaulting a daughter,⁷ open habits of profligacy and debauchery, together with his teaching the children low and indecent language,⁸ irregularity of life combined with a second marriage with a person socially much beneath him.⁹ If the court is satisfied that the father of young children has been guilty of an unnatural crime (though not convicted of it), it will not permit any sort of intercourse with his children, and it seems that if the children were with him, it would be the duty of the court to remove them.¹⁰ The court need not wait (in order to found its jurisdiction) until misbehaviour has actually occurred, if it reasonably suspect that its occurrence is imminent, on the principle that "preventing-justice is better than punishing-justice."¹¹ Immoral conduct on the part of the mother tending to corrupt the characters of her children would be a ground for interfering with her rights; if a mother allows her daughter under the age of sixteen to be a prostitute in her own home, the child may be removed from her custody;¹² or where having a trust to maintain and educate her children she does so maintain and educate them, but lives in a state of concubinage with her paramour.¹³

Grounds for interference.
Unfitness of the father.

Unfitness of mother.

The following facts have been held insufficient to warrant the court to interfere with the paternal control: Mere incontinence,¹⁴ or occasional intemperance as opposed to habitual drunkenness;¹⁵ adultery where he is careful not to bring his children in contact

Insufficient grounds for interference.

¹ See *Re Fynn (ubi sup.)*.

² *Reg. v. Gynghall (ubi sup.)*.

³ *Curtis v. Curtis*, 28 L. J. Ch. 458.

⁴ *Ex parte Warner*, 4 Bro. C. C. 101.

⁵ Per Lord Eldon in *De Manneville v. Manneville*, 10 Ves. 61. This was also done in the mother's case by Jessel, M.R., in *Carnegie's Case*, cited in *Re Besant*, 11 Ch. D. 508, 512.

⁶ *Whitfield v. Hayes*, 12 Ves. 492.

⁷ *Swift v. Swift*, 11 Jur. (N.S.) 148, 458.

⁸ *Wellesley v. Duke of Beaufort (ubi sup.)*. This is the leading case on the subject, and the principles upon which the court acts are clearly laid down in it. *Re Goldsworthy*, 2 Q. B. D. 75.

⁹ *Re Cormicks (Minors)*, 2 Ir. Eq. Rep. 264.]

¹⁰ *Anon.*, 2 Sim. Rep. (N.S.) 54.

¹¹ *Duke of Beaufort v. Bertie*, 1 P. Wms. 703.

¹² *Hiscocks v. Jermonson*, 10 Q. B. D. 360.

¹³ *Re G. (Infants)*, [1897] 1 Ch. 719.

¹⁴ *Re Goldsworthy*, 2 Q. B. D. 75.

¹⁵ *Ibid.*; *Re Halliday's Estate*, 17 Jur. 56.

with his paramour or mistress ;¹ occasional acts of harshness,² or inconsiderate enforcement of his paternal rights or severity arising from giving way to a passionate temper ;³ or his conduct, which prevents his wife living with him, but which does not lead to the corruption of the morals of his children.⁴ Again, mere poverty and insolvency by themselves are no grounds for interference ;⁵ though coupled with desertion,⁶ or an improper application of his child's fortune to his own use,⁷ they may be urged as reasons for putting an end to the father's control. There is no case in the books which decides that a father may be deprived of the control of his child because of his professing certain religious principles, though they might be described by the majority of people as peculiar.⁸ In all the cases in which the custody has been interfered with, the religious principles have manifested themselves in acts which have been stamped by the law as vicious and immoral.⁹ In *Lyons v. Blenkin*,¹⁰ Lord Eldon laid down the following general rule : " With the religious tenets of either party I have nothing to do, except so far as the law of the country calls upon me to look upon some religious opinions as dangerous to society." The nearest approach to an interference on this ground was in *Mrs. Besant's Case*.¹¹

Abdication of
parental
authority.

Another ground for interference by the court is the abdication by the parent of parental authority in such a way that the court will not allow the parent to interfere and resume it. Where a stranger thinks fit to provide a fund for the maintenance and education of children, and the parent permits their maintenance to be supplied from that source, allowing them to be brought up with expectations founded upon a particular species of maintenance and education, which he or she cannot afford to give, the parent is not, according to the principles of the Court of Chancery, at liberty to say that the children shall be taken from the course of education which they have hitherto pursued.¹²

¹ *Ball v. Ball*, 2 Sim. 35 ; *March v. March and Palumbo*, L. R. 1 P. & D. 437. But it is otherwise where the father, after obtaining a decree dissolving his marriage, is shown to be leading a notoriously dissolute life.

² *Blake v. Wallscourt*, 7 L. T. (O.S.) 545. But persistent spitefulness and cruelty on the part of the father would seem to be sufficient to give the court occasion to remove the children. See *Re Agar-Ellis*, *Agar-Ellis v. Lascelles*, 24 Ch. D. 317.

³ *Curtis v. Curtis*, 28 L. J. Ch. 458.

⁴ *Re Spence*, 2 Ph. 247.

⁵ *Curtis v. Curtis* (*ubi sup.*).

⁶ *Creuze v. Hunter*, 2 Cox, Eq. Cas. 242.

⁷ *Ex parte Mountford*, 15 Ves. 445.

⁸ *Curtis v. Curtis* (*ubi sup.*). But see *Thomas v. Roberts*, 19 L. J. Ch. 506.

⁹ *Shelley v. Westbrook*, Jac. 266 ; *Thomas v. Roberts* (*ubi sup.*).

¹⁰ Jac. 245.

¹¹ 11 Ch. D. 508. In this case Mrs. Besant had the custody of her daughter under a deed of separation ; she professed no religious principles, and prevented her daughter from being educated in any. She was convicted of having published a book calculated to deprave public morals, and on this ground and on that of refusing to educate her child in religious principles, the court removed her from her mother.

¹² *Lyons v. Blenkin*, Jac. 245.

In such a case the interests of the children being at stake, the court will not hesitate to interfere on their behalf, and will consider that as their parent has permitted them to be educated and reared in a manner which he or she could not have afforded from his or her personal means, it was intended to abdicate the parental functions in favour and on behalf of the children, and when it is desired to resume parental control over them, which would result not only in bringing down their mode of life to a lower level, but also in depriving them of their legitimate expectations, such desire will be restrained.

Resumption of parental control must act detrimentally to the interests of the children.

It would appear from the case of *Lyons v. Blenkin*,¹ which is the leading authority on this particular point, that the children need not be wards of court to give the court jurisdiction to interfere; and that in such a case a writ of *habeas corpus* is not the proper remedy for the parent, but a petition praying that the custody of the children should be restored to him or her.

Where the child is very young its own "wishes" will not be taken into consideration; but where it has arrived at a reasonable age, the practice of the judges was to see the child, not for the purpose of obtaining its consent, which it could not give, but for the purpose of determining what was really for the welfare of the child.² "Custody" and "control" include the direction of the religious education of the infant."³

A third ground for interference by the court is where the father has agreed with the mother or third persons to part with the control of his child. As has been seen,⁴ a father cannot legally bind himself under all circumstances to deprive himself of the custody and control of his child; and where he has not by his own bad conduct disentitled himself to enforce his rights, the court would not enforce an agreement to abnegate his paternal rights.

Agreement to abnegate control,

A father may now, on separation, agree with the mother to give up the control of his children.⁵

The father may also agree with third parties to surrender the control of his child; and if he has agreed to receive a benefit on condition of resigning the management of his child, he will not be permitted to receive the benefit without complying with the terms of it.⁶ If a father has not so acted as to alter the expectations and fortunes of his child, he will be allowed to rescind and abandon any agreement for surrendering the custody of his child that he may have made.⁷ If a legacy has been left on condition that a father surrender the custody of his child to guardians

with third parties.

¹ Jac. 245.

² See *Reg. v. Gyngall*, [1893] 2 Q. B. 251.

³ *Condon v. Vollum*, 57 L. T. 154.

⁴ *Ante*, p. 513.

⁵ 36 & 37 Vict. c. 12. See *post*, pp. 527, 528.

⁶ *Colston v. Morris*, Jac. 257 n.

⁷ See *Hill v. Gomme*, 8 L. J. Ch. 350.

appointed by the testator, he must, if he insist upon retaining the infant in his own care, renounce the legacy.¹ But if a father intrust the care and custody of his infant children to another, who by will amply provides for their maintenance and education and appoints a guardian for them, and has allowed them to be brought up with expectations founded upon a particular species of maintenance and education, he will not be permitted to remove them from the control of the guardian, if a fit and proper person.² The court will not in general permit the father to disappoint the expectations of his children³ in those cases where he has waived his parental right.⁴ From the foregoing cases it will be seen that the interference of the court does not proceed upon the ground that the parent has made an election, and must abide by it, but upon the true interests of the children.⁵ These principles will also be acted upon in the case of the mother after the death of the father.

A fourth ground for interference by the court is where the infant is a ward of court and the parent intends to remove him out of the jurisdiction.⁶ To remove a ward out of the jurisdiction is a gross contempt of court, and the privilege of Parliament will not protect the contemnor from attachment.⁷ The courts were formerly much more reluctant in granting leave to parents and guardians to take wards abroad and out of the jurisdiction than they are now,⁸ and were wont to impose terms and conditions on those who desired to remove them.⁹ But in more recent years wards have been allowed to go abroad in order to travel,¹⁰ to visit,¹¹ on account of health,¹² to attend sick parents.¹³ This liberty applies not only to male but female wards,¹⁴ whenever it can be exercised for their benefit.¹⁵ If the father be compelled to reside abroad, he will in general be permitted to have his children with him.¹⁶ A mother also who goes abroad for health will be allowed to take her infant child with her;¹⁷ and she

¹ See *Potts v. Norton* 2 P. Wms. 110 n.

² *Lyons v. Blenkin*, Jac. 245. This is a very important case on the subject, and in it Lord Eldon lays down very clearly the rules on which the Court of Chancery should proceed in interfering with parental control.

³ *Anon.*, Jac. 254 n.

⁴ *Blake v. Leigh*, Amb. 306.

⁵ *De Manneville v. De Manneville*, 10 Ves. 52; see also *Andrews v. Salt*, L. R. 8 Ch. App. 622.

⁶ *Creuze v. Hunter*, Jac. 250 n; *Re Plomley*, 47 L. T. 283.

⁷ *Long Wellesley's Case*, 2 R. & M. 639.

⁸ *Maeph. Inf.* 129.

⁹ *Johnson v. Hankey*, Jac. 265 n; *Stephens v. James*, 1 M. & K. 627.

¹⁰ *Talbot v. Earl of Shrewsbury*, 4 Myl. & Cr. 672.

¹¹ *Ex parte M'Key*, 1 Ba. & B. 405.

¹² *Wyndham v. Lord Ennismore*, 1 Ke. 467.

¹³ *Biggs v. Terry*, 1 Myl. & Cr. 675.

¹⁴ *Jeffreys v. Wantesearstwarth*, Barn. Ch. 141; *Campbell v. Campbell*, cited *Chamb. Inf.* 30; *Clogstoun v. Walcott*, 9 Jur. 649.

¹⁵ *Re Callaghan, Elliott v. Lambert*, 28 Ch. D. 186.

¹⁶ *Re Thomas*, 22 L. J. Ch. 1075.

¹⁷ *Lyon v. Watson*, cited *Chamb. Inf.* 32.

has been allowed to take her children with her to India.¹ The court, would, however, restrain the mother who was the guardian of a ward of court from taking it out of the jurisdiction without leave. Leave is now given to take a ward out of the jurisdiction without a case of necessity being shown; but the court must be satisfied that it is for the benefit of the infant, and that future orders will be obeyed. Security in this respect is generally obtained by appointing a guardian in this country to act jointly with the parent.² This power of the court to supersede the parent will be further discussed in Part IV., Infants.³

(b) *Under its Statutory Jurisdiction.*—The statutory jurisdiction has been conferred upon the court for the purpose of enabling it to recognize in a fuller manner than formerly the rights of the mother, which under the old law were kept in the background, and acknowledged only when the outrageous conduct of the father and the imperative interests of the children demanded that she and not her husband ought to have their custody and control. To give the court freer power to recognize the rights of the mother and the interests of her child the Infants' Custody Act, 1839,⁴ known as Talfourd's Act, was passed after considerable opposition. It provided that the Lord Chancellor and the Master of the Rolls both in England and Ireland,⁵ upon hearing the petition of the mother of a child who was in the custody or control of the father, or any other guardian, might make an order for the access of the mother to such child, subject to such regulations as might be deemed convenient and just; *and if the child were under the age of seven, might order that the mother might have the custody of it until it reached that age.* But no order for such access or custody was to be made if the mother was proved to have been guilty of adultery. The object of the Act was that the mother ought to have the protection of the law with respect to her children up to a certain age, and that she should be at liberty to assert her rights as a wife, without the risk of any injury being done to her feelings as a mother,⁶ also to connect the paternal right with the marital duty, and imposed the marital duty as the condition of recognizing the paternal right; and lastly, to preserve the interests of the child.⁷ In order to carry out this object it gave the court an absolute discretion in the

Statutory jurisdiction in favour of the mother.

Curtailment of father's rights, increase of mother's rights.

Talfourd's Act, 1839.

Absolute discretion of court in the case of infants under seven.

¹ *Re England*, 1 R. & M. 499.

² *Re Callaghan*, *Elliott v. Lambert* (*ubi sup.*).

³ *Post*, chap. v.

⁴ 2 & 3 Vict. c. 54. It is said that the passing of this Act was hastened by the decision of the King's Bench in *Re v. Greenhill*, 4 A. & E. 624.

⁵ Also the Vice-Chancellors. *Re Taylor*, 10 Sim, 291.

⁶ *Warde v. Warde*, 2 Ph. 786. In this case Lord Cottenham said the object of passing Talfourd's Act was: (1) To obviate the improper and illegitimate use of the husband's rights and authority to put pressure upon the wife; (2) to give the court a widened discretion on behalf of the innocent wife and the interests of the children.

⁷ *Re Halliday's Estate*, 17 Jur. 56.

case of children under the age of seven years, and a wide discretion in the case of those over that age, and if it were proved that the husband had grossly violated his marital duty, his paternal rights could be controlled, and his children placed in their mother's custody on her petition. If the mother is living apart from her husband without any justification, her petition will be unsuccessful,¹ though it will be otherwise where she is justified in separating from him.² Where the mother applies for the custody of her children, the court will take great care that the father does not insist on his paternal rights as a means of compelling her to forego her remedies against him for marital misconduct.³ The jurisdiction of the court extends to children of English parents born abroad.⁴

Infants' Custody Act, 1873.

In 1873 the Infants' Custody Act of that year⁵ was passed, repealing the above-mentioned Act. Its first section provides :—

“From and after the passing of this Act, it shall be lawful for the High Court of Chancery in England or in Ireland respectively, upon hearing the petition by her next friend of the mother of any infant or infants under sixteen years of age, to order that the petitioner shall have access to such infant or infants at such times and subject to such regulations as the court shall deem proper, or to order that such infant or infants shall be delivered to the mother, and remain in or under her custody or control, or shall, if already in her custody or under her control, remain therein until such infant or infants shall attain such age, not exceeding sixteen, as the court shall direct ; and further, to order that such custody or control shall be subject to such regulations as regards access by the father or guardian of such infant or infants, and otherwise, as the said court shall deem proper.”

By this section the age to which the mother's rights are to extend is increased from seven to sixteen, and the mother may retain the care of those children already in her custody until they attain the age of sixteen.

Litigation affected by the Infants' Custody Acts.

It has been held that the only alteration in the law effected by the Acts of 1839 and 1873 was that the wife acquired new rights, for the court had the power on her petition alone to order that she should have the custody of her children, where their interests and benefit demanded it; for whereas the courts had refused to deprive the father of the custody of the child except in a very extreme case of misconduct, in future, where the wife was innocent, the court was to exercise a wider discretion, and consider other reasons besides ;⁶ in other words, that which was the

¹ *Re Taylor*, 10 Sim. 291.

² *Re Bartlett*, 2 Coll. 661.

³ *Warde v. Warde*, 2 Ph. 786.

⁴ *Hope v. Hope*, 26 L. J. Ch. 417.

⁵ 36 & 37 Vict. c. 12.

⁶ *Re Taylor (an Infant)*, 4 Ch. D. 157.

absolute right of the father was now subject to the discretionary power of the judge. Thus, where a husband having abandoned his wife, and kidnapped the only child of the marriage, a boy three years of age, and being a co-respondent in a pending divorce action charging him with adultery, the court, upon the wife's petition under the Infants' Custody Act, 1873, ordered immediate delivery of the child to her, with liberty of access by the father and paternal grandparents, and also liberty to apply as to the maintenance and education of the child on his attaining seven years of age.¹ The paternal right, the marital duty, the conduct of the parents,² and the interest of the child are taken into consideration whether the custody ought to be given to or retained by the mother.³ Where the child is above the age of sixteen, this Act does not give the court jurisdiction.⁴

Grounds for interference.

The second section enacts:—

“No agreement contained in any separation deed made between the father and mother of an infant or infants shall be held to be invalid by reason only of its providing that the father of such infant or infants shall give up the custody or control thereof to the mother: Provided always, that no court shall enforce any such agreement if the court shall be of opinion that it will not be for the benefit of the infant or infants to give effect thereto.”

Provision for custody of child in separation deed.

It has been already seen⁵ that an ante-nuptial agreement by a father to surrender the control and custody of his children never was and is not now binding on him. Formerly he was not allowed to forego this right in a separation deed, and the court would not enforce such a covenant in a separation deed even where the father had been guilty of adultery and cruelty.⁶ But the courts in time did enforce such agreements, as, for instance, an agreement in a separation deed that the mother might have access to the children at reasonable times, the father retaining generally the custody and control of the children,⁷ and an agreement to give up the custody of the children to the mother, if the father's conduct had been such that the courts would have deprived him of them, *e.g.*, gross immorality.⁸ Since the passing of the Act under discussion, no such agreement is *per se* invalid and not enforceable, or renders the deed of

¹ *Re Taylor (an Infant) (ubi sup.)*. See also *Re Goldsworthy*, 2 Q. B. D. 75.

² *Re Brown (Ethel)*, 13 Q. B. D. 614.

³ *Re Elderton (Infants)*, 25 Ch. D. 220.

⁴ *Re Agar-Ellis, Agar-Ellis v. Lascelles*, 24 Ch. D. 317.

⁵ *Ante*, p. 511.

⁶ *Hope v. Hope*, 26 L. J. Ch. 417. Separation deeds were for a long while looked upon by the courts of equity as contrary to public policy. See *ante*, Part I. chap. xvii.

⁷ *Hamilton v. Hector*, L. R. 6 Ch. App. 701.

⁸ *Swift v. Swift*, 11 Jur. (N.S.) 148, 458.

separation null and void, but, on the contrary, many deeds of arrangement entered into between husband and wife may now be upheld which formerly would have been treated as of no effect.¹ But an arrangement of this kind does not amount in law to a substitution or delegation of his rights and powers by the husband to his wife, and he can, it seems, resume the exercise of them when he thinks proper. The touchstone of the validity of such an agreement is the benefit of the infant; and if the agreement is found not to be beneficial to the infant, the court will set it aside, and restore the child to the custody of the father.² Thus, where a father and mother executed a separation deed, in which the former covenanted that the latter should keep their child for eleven months in the year, the mother held and promulgated atheistical opinions, published an obscene book, and refused to allow the child to be religiously educated, the court, on a petition under this Act, held that it would not be for the child's benefit to remain with her mother, and ordered her to be restored to the custody of her father.³

Criminal Law
Amendment
Act, 1885.

Under the Criminal Law Amendment Act, 1885,⁴ the court before which the offence of seducing or prostituting a girl under sixteen years of age is proved may divest the father or mother of such girl of all authority over her, if it appear that such parent caused or encouraged or favoured such seduction or prostitution.⁵ The court may appoint any person or persons willing to take charge of the girl till she reaches the age of twenty-one.⁶ The High Court may afterwards rescind or vary such order, by appointing any other person as guardian, or in any other respect.⁷

Guardianship
of Infants
Act, 1886.
Enlarged
powers of
mother.

Under the Guardianship of Infants Act, 1886,⁸ the Legislature has conferred largely increased powers on the court to deprive a father of the control and custody of his children, and at the same time has greatly enlarged the rights and powers of the mother, both in her lifetime and after her death, in respect of the guardianship of her infant children. Now, on the death of the father, who has not appointed a guardian, she succeeds to the sole guardianship of her infant offspring; and if the father has nominated a guardian, she is co-guardian with such nominee.⁹ But where no guardian has been appointed by the father, or if a guardian has been so appointed who dies or refuses to act, and the mother resides out of the jurisdiction, the court would seem to have jurisdiction to appoint a guardian jointly with her;¹⁰ and

¹ *Condon v. Vollum*, 57 L. T. 154.

³ *Ibid.*

⁵ See *Hiscocks v. Jermonson*, 10 Q. B. D. 360.

⁷ *Ibid.* ⁸ 49 & 50 Vict. c. 27.

¹⁰ *Ibid.* For the practice under this section, see Rule 3 of the Rules under the Act,

² *Re Besant*, 11 Ch. D. 508.

⁴ 48 & 49 Vict. c. 69.

⁶ Sect. 12.

⁹ Sect. 2.

the court clearly has jurisdiction for good cause to remove her from her statutory guardianship, or to appoint a co-guardian or co-guardians to act with her.¹

The mother's disability to appoint testamentary guardians to her children, under 12 Car. II. c. 24, has now been removed, and she has the power to appoint by deed or will guardians to her infant children who are unmarried, such guardianship to take effect after the death of herself and the father.² Guardians appointed by both parents are to act jointly.³ The court has jurisdiction to remove a guardian appointed by the mother after the father's death, under section 3, if such removal was called for in the interests of the children.⁴ A mother may also provisionally nominate a person to act as guardian of her infant children after her death jointly with the father.⁵ This provisional appointment should be in form an appointment of a guardian to act jointly with the father.⁶ If after the mother's death the father is found to be unfitted to be the sole guardian of his children, this provisional appointment may be confirmed by the court, who may displace the father altogether.⁷ The court may, upon the application by petition of the mother of any infant (who may apply without next friend), make such order as it may think fit regarding the custody of the infant and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father,⁸ and may alter, vary, or discharge such order on the application of either parent, or after the death of either parent, of any guardian under the Act.⁹ The court need not fix the limit of age at which the custody of the mother shall cease.¹⁰ Under this Act¹¹ the court has ample jurisdiction to over-ride the common law rights of a father where the mother is concerned in relation to the custody of his infant children.¹²

Mother may appoint testamentary guardian.

Under the Poor Law Act, 1889,¹³ where a child deserted by its parent¹⁴ is maintained by the guardians of any union, the latter may by resolution vest the control of a boy up to sixteen, and of a girl up to eighteen years of age in their body, as though they

Poor Law Act, 1889.

¹ 49 & 50 Vict. c. 27, s. 2. See *Re Scanlan (Infants)*, 40 Ch. D. 200; *Re M'Grath (Infants)*, [1892] 2 Ch. 496, 510.

² Sect. 3 (1).

³ *Ibid.*

⁴ *Re M'Grath (Infants)*, [1893] 1 Ch. 143.

⁵ Sect. 3 (2).

⁶ *Re G. (an Infant)*, [1892] 1 Ch. 292.

⁷ Sect. 3 (2). *Re G. (an Infant) (ubi sup.)*. For the practice under this section see Rule 4 (a).

⁸ Sect. 5. *Re Witten (an Infant)*, 57 L. T. 336; *Re A. and B. (Infants)*, [1897] 1 Ch. 786.

⁹ Sect. 5. For the practice under this Act, see Rule 5. The County Court of the district in which any respondent resides has concurrent jurisdiction with the High Court. Sect. 9.

¹⁰ *Re Witten (an Infant) (ubi sup.)*.

¹¹ Sect. 5.

¹² *Re A. & B. (Infants) (ubi sup.)*.

¹³ 52 & 53 Vict. c. 56.

¹⁴ See sect. 4.

were the parents of the infant.¹ The parent is not thereby relieved from liability to contribute to the maintenance of his child.² Such control may be terminated by the order of a Court of Summary Jurisdiction on the complaint of the parent that the child has neither been maintained by the guardians nor deserted by him.³ This right of control of the person of the child does not empower the guardians to educate the child in any other religious faith than that in which it would have been educated but for the resolution to vest its control in themselves.⁴

Custody of
Children Act,
1891.
Jurisdiction
of court to
refuse parent
writ of
habeas corpus.

Again, under the Custody of Children Act, 1891,⁵ where a parent,⁶ applying to the court for the production of a child, is deemed by the court to have abandoned or deserted the child, or has so misconducted himself that the court ought to refuse to enforce his right to the custody, the court may decline to issue the writ.⁷ If a child, whose production is applied for by writ, has been brought up by another person, or has been boarded out by poor-law guardians, the court, if it orders the child to be given up to the parent, may order him to pay such person or guardian the whole or part of the costs incurred in bringing up the child.⁸ Where a parent has abandoned or deserted his child, or allowed it to be brought up at another person's or poor-law guardians' expense, for so long and under such circumstances as to satisfy the court that he was unmindful of his parental duties, the child shall not be delivered up to him unless the court is satisfied that, having regard to the welfare of the child, he is a fit person to have its custody.⁹ Though the court may refuse to order the child to be delivered up to the parent, yet if it is being brought up in a religion different to that in which the person has a legal right to require it to be brought up, the court may, if it think fit, require it to be brought up in the parent's religion. But the court may consult the wishes of the child; and any right which a child now has to exercise its own free choice is not to be diminished.¹⁰

(2) *By the Divorce Court.*

Jurisdiction
of the Divorce
Court.

The Divorce Court derives its jurisdiction over the control and custody of children from the different statutes passed constituting it, and enlarging its powers; but can only exercise it where a petition for dissolution of marriage or for judicial separation has been filed, and both parties are before the court; ¹¹ and by a recent Act in suits for restitution of conjugal

¹ Sect. 1.

³ Sect. 1 (2).

⁶ See sect. 5.

⁹ Sect. 3.

¹¹ *Stacey v. Stacey*, 29 L. J. P. M. & F. 63.

² Sect. 1 (5).

⁴ Sect. 1 (6).

⁷ Sect. 1.

¹⁰ Sect. 4.

⁵ 54 Vict. c. 3.

⁸ Sect. 2.

rights.¹ It cannot exercise it where such a petition has been dismissed.²

Section 35 of the Matrimonial Causes Act, 1857,³ enacts:—

Matrimonial
Causes Act,
1857.

“In any suit or other proceeding for obtaining a judicial separation, or a decree of nullity of marriage, and on any petition for dissolving a marriage, the court may, from time to time, before making its final decree, make such interim orders, and may make such provision in its final decree as it may deem just and proper with respect to the custody, maintenance, and education of the children, the marriage of whose parents is the subject of such suit or other proceeding, and may, if it shall think fit, direct proper proceedings to be taken for placing such children under the protection of the Court of Chancery.”

It has been held that the words in this section, “just and proper,” give to the Divorce Court a discretionary power exceeding that which had been previously exercised by courts of law and equity.⁴ Though the court will consider the interests of the parents,⁵ yet its chief aim is to do what is best for the interests of the children, and will use every means for furthering that end.⁶ The court has power to make orders as to the custody of children until they attain the age of sixteen years;⁷ but not as to those who have exceeded that age.⁸ In the interval between a decree *nisi* for dissolution of marriage being pronounced and its being made absolute, the only order the court can make as to the custody of children is an interim order under this section.⁹ The court has jurisdiction to make provision for the child of a marriage which is pronounced invalid in a suit for nullity.¹⁰ The father’s common law right to their custody will be regarded as far as possible,¹¹ but the court will carefully look at all the actual circumstances, the age of the children, and their position in relation to the other members of their family.¹² If it be to their interest, the elder children will be ordered to be kept at school, and the younger handed over to the care of their mother, with reasonable access allowed to the father.¹³

Custody of
children pend-
ing suit.

¹ 47 & 48 Vict. c. 68.

² *Seddon v. Seddon*, 31 L. J. P. M. & A. 101.

³ This was the Act that constituted the Divorce Court, which, with the Probate and Admiralty Courts, now forms the Divorce, Probate, and Admiralty Division of the High Court.

⁴ *Marsh v. Marsh*, 28 L. J. P. M. & A. 13.

⁵ *Suggate v. Suggate*, 29 L. J. P. M. & A. 167.

⁶ *Ryder v. Ryder*, 30 L. J. P. M. & A. 44; *Spratt v. Spratt*, 1 Sw. and Tr. 215; Macq. Div. 156–163.

⁷ *Mallinson v. Mallinson*, L. R. 1 P. & D. 221.

⁸ *Ryder v. Ryder* (*ubi sup.*).

⁹ *Cubley v. Cubley*, 30 L. J. P. M. & A. 161.

¹⁰ *Langworthy v. Langworthy*, 11 P. D. 83. But the words of section 35 are not absolutely clear on the subject, and it is not very logical to construe the terms “marriage” and “no marriage” as synonymous.

¹¹ *Cartledge v. Cartledge*, 31 L. J. P. M. & A. 85.

¹² *Ryder v. Ryder* (*ubi sup.*).

¹³ *Curtis v. Curtis*, 27 L. J. P. M. & A. 16. See the cases collected in Pritchard, Div. 72.

Custody of children after suit.

The thirty-fifth section of the Act of 1857 did not give the court jurisdiction over the custody of children after a final decree of judicial separation, nullity of marriage, or dissolution of marriage; but section 4 of the Act of 1859¹ did confer upon the court the power to make orders after a final decree with respect to the custody, the maintenance, and education of the children of the parents whose matrimonial proceedings had been before it. The same principles apply to orders made after final decree as to interim orders, namely, the consideration of the children's interests. The statutory powers of the court in relation to the maintenance and education of children after a decree of judicial separation, or of dissolution of marriage, are not affected by any previous agreement between the parents.² As a general rule the innocent party has a *prima facie* right to the custody of the children;³ in the case of the mother, because a wife ought not to be deprived of the comfort and society of her children by her husband's wrong;⁴ but it (the court) will depart from the rule when it is for the interest of the children that their education should be free from her control.⁵ So, too, where the father is not likely to use his children harshly.⁶ The court will not interfere more than is necessary in the exercise by the father of his parental judgment and discrimination in regard to his children.⁷ The court can order either party to deliver up the children into the custody of the other;⁸ and, where neither party is fit to have their custody, to order either or both to hand over the children to other persons under its supervision.⁹ But this jurisdiction would seem to be limited to the lifetime of the parents.¹⁰ It is practically impossible to lay down any general rules on this subject.¹¹ The court can restrain a party to a suit for judicial separation or dissolution of marriage from removing a child of the marriage out of the jurisdiction.¹² The court can enforce obedience to its orders by attachment.¹³

Innocent party *prima facie* entitled to custody.

The court has like power over the custody of children under

¹ 22 & 23 Vict. c. 61.

² *Bishop v. Bishop, Judkins v. Judkins*, [1897] P. 138; *Barry v. Barry*, [1901] P. 87.

³ *Martin v. Martin*, 29 L. J. P. M. & A. 106.

⁴ *Suggate v. Suggate*, 29 L. J. P. M. & A. 167; *Boynton v. Boynton*, 30 L. J. P. M. & A. 156.

⁵ See *D'Alton v. D'Alton*, 4 P. D. 87.

⁶ *Martin v. Martin* (*ubi sup.*).

⁷ See *Maudslay v. Maudslay*, 2 P. D. 260.

⁸ *Hyde v. Hyde*, 29 L. J. P. M. & A. 150; *March v. March and Palumbo*, L. R. 1 P. & D. 437 (father); *Boyd v. Boyd*, 29 L. J. P. M. & A. 79 (mother).

⁹ *Chetwynd v. Chetwynd*, L. R. 1 P. & D. 39; and see *March v. March and Palumbo* (*ubi sup.*).

¹⁰ See *Davis v. Davis*, 14 P. D. 162.

¹¹ Per Cairns, L.C., in *Synington v. Synington*, L. R. 2 H. L. Sc. App. 415, 420.

¹² *Harris v. Harris*, 63 L. T. 262.

¹³ *Brown v. Brown*, 62 J. P. 568.

the provisions of the Matrimonial Causes Act, 1884;¹ and at any time before final decree any application for restitution of conjugal rights or after final decree if the respondent has failed to comply therewith to make orders with respect to the custody, education and maintenance of the children of the parties.²

The court has power to order access to the children by the parents not possessing their custody not only after final decree,³ but *pendente lite*;⁴ and in this case the court is mainly influenced by considerations for the health of the child.⁵ Access, like custody, is in the discretion of the court; and though the court rarely exercises it to grant to the guilty party access to the children after final decree,⁶ yet if it refuses to do so, the Court of Chancery, whether it possesses such discretionary power or not under the Guardianship of Infants Act, 1886, will not exercise it.⁷

Under the Guardianship of Infants Act, 1886,⁸ in any case where a decree for a judicial separation or a decree, either *nisi* or absolute, for divorce shall be pronounced, the court pronouncing such decree may thereby declare the parent, by reason of whose misconduct such decree is made, to be a person unfit to have the custody of the children of the marriage; and in such case, the parent so declared to be unfit shall not, upon the death of the other parent, be entitled as of right to the custody or guardianship of such children;⁹ but the conduct of the parent must have been of an aggravated nature.¹⁰ The court will postpone making the decree to enable the petitioner to prove the unfitness of the respondent.¹¹ Gross acts of cruelty towards the mother and the child are grounds for declaring that the husband and father is unfit to have the custody of the child.¹² If the order is made, the parent against whom it is made has, on the death of the petitioner, the *onus* of proof that he or she has since become a person who is fit to be entrusted with the care of the children.¹³

The court has power to vary the order for the custody of children after decree absolute, and remove them from the custody of the originally innocent party, if subsequently found to be unfit

¹ 47 & 48 Vict. c. 68.

² Sect. 6.

³ *Handley v. Handley*, [1891] P. 124.

⁴ *Thompson v. Thompson*, 31 L. J. P. M. & A. 213.

⁵ *Philip v. Philip*, 41 L. J. P. M. & A. 89. For what is reasonable access, and how it is to be carried out, see Prit. Div. Pr. 75-77.

⁶ *Handley v. Handley* (*ubi sup.*).

⁷ *Manders v. Manders*, 63 L. T. 627.

⁸ 49 & 50 Vict. c. 27.

⁹ Sect. 7. *Skinner v. Skinner*, 13 P. D. 90.

¹⁰ See *Woolnoth v. Woolnoth*, 86 L. T. 598.

¹¹ *Robinson v. Robinson*, 57 L. T. 118.

¹² *Handford v. Handford*, 63 L. T. 256.

¹³ *Webley v. Webley*, 64 L. T. 839; *Hitchings v. Hitchings*, 67 L. T. 530.

to have their custody, and may make an order for their transference to the custody of the original respondent, if deemed to be a fit and proper person to have the control.¹ But under section 4 of the Matrimonial Causes Act, 1859,² upon the death of a parent of a child who was entitled to its custody under a decree for judicial separation, the court has no jurisdiction to entertain an application for its custody by a stranger.³

Intervention of
third parties.

Parties who are strangers to the suit will be allowed to intervene in the interests of children, and plead upon the question of their custody, maintenance, or education; ⁴ but such intervention will be at the peril of the interveners in the matter of costs.⁵

This court, though possessing jurisdiction in the matter of maintenance and education of children of parties before it, has not the same jurisdiction as the Court of Chancery over wards of court ⁶ so as to be able to compel persons to attend and be examined as to the whereabouts of the children.⁷

Summary
Jurisdiction
(Married
Women) Act,
1895.

By other Courts.—Under the Summary Jurisdiction (Married Women) Act, 1895,⁸ a married woman, whose husband has been convicted summarily of an aggravated assault, or on an indictment of an assault upon her, and sentenced to pay a fine of more than £5, or to a term of imprisonment exceeding two months, or who has deserted her, or has been guilty of persistent cruelty to her, or has wilfully neglected to provide reasonable maintenance for her or her infant children whom he is legally liable to maintain, and has by such cruelty or neglect caused her to leave and live separately and apart from him,⁹ may obtain from the Court of Summary Jurisdiction an order providing that the legal custody of any children of the marriage while under sixteen years of age may be committed to her.¹⁰ Subsequent voluntary resumption of cohabitation or adultery on her part shall cause the order of the court to be discharged.¹¹ The court has power to order the restoration of the children to the custody of the father on the divorce of the mother for adultery; though the father had agreed by the terms of a separation deed to permit the mother to have the custody of them.¹²

Liability of
parent for
offence by
child under
Youthful
Offenders Act,
1901.

An alteration of some importance has been recently effected in the law dealing with responsibilities and liabilities of parents towards their young children; and they are now liable to be made

¹ *Witt v. Witt*, [1891] P. 163; see *Symington v. Symington*, L. R. 2 H. L. Sc. App. 415. ² 22 & 23 Vict. c. 61.

³ *Davis v. Davis*, 14 P. D. 162.

⁴ *Chetwynd v. Chetwynd*, L. R. 1 P. & D. 39; *Godrich v. Godrich*, L. R. 3 P. & D. 134.

⁵ *March v. March and Palumbo*, L. R. 1 P. & D. 437.

⁶ See *Rosenberg v. Lindo*, 48 L. T. 478; and *post*, Part IV. chap. v.

⁷ *Hyde v. Hyde*, 13 P. D. 166.

⁸ 58 & 59 Vict. c. 39, repealing 41 Vict. c. 19, s. 4 (Matrimonial Causes Act, 1878). ⁹ Sect. 4. ¹⁰ Sect. 5 (b).

¹¹ Sect. 7.

¹² *Jump v. Jump*, 8 P. D. 159.

personally responsible for wrongs committed by children led up to or caused by their own neglect of duty. Thus, where a parent after being summoned before a Court of Summary Jurisdiction for the purpose is shown to have conduced to the commission of an offence by his child, either by wilful default or habitual neglect to exercise due care of him, such parent may be ordered to pay any fine, damages, or costs imposed upon the child, and to find security for its good behaviour.¹

Under the Licensing Act, 1902,² where the husband of a married woman is a habitual drunkard, the married woman shall be entitled to apply for an order under the Summary Jurisdiction (Married Women) Act, 1895; and that Act shall apply which gives a Court of Summary Jurisdiction power to make an order providing, *inter alia*, for the legal custody of any children of the marriage,³ and where the wife of a married man is a habitual drunkard, the married man shall be entitled under this Act to make an application for relief, to which application the Summary Jurisdiction (Married Women) Act, 1895, shall apply, thereby enabling a Court of Summary Jurisdiction to make an order providing, *inter alia*, for the legal custody of any children of the marriage.⁴

Under Licensing Act, 1902.

The jurisdiction of the High Court and Courts of Quarter Sessions and Petty Sessions to interfere with the guardianship and control of parents convicted of an offence against their children under the Prevention of Cruelty to Children Act, 1904,⁵ will be found more fully set out in Part IV. chap. vi., which deals with the Remedies for the Protection of Infants.

Under Prevention of Cruelty to Children Act, 1904.

(2) *Obligations of Parents.*

Protection.—The first obligation or duty laid upon parents is to protect and shield their offspring. This duty is suggested by the dictates and necessities of Nature itself. This duty the stronger owes to the weaker, and especially does the father owe it to his child, so long as the latter remains comparatively helpless. This obligation may be shifted in time, as age adds to the strength of the one and the infirmities of the other.⁶ Blackstone speaks of this duty as being a natural one, “but rather permitted than enjoined by our municipal law; Nature, in this respect, working so strongly as to need rather a check than a spur. It is, however, distinctly recognized in the English jurisprudence; it being laid down, in particular, that a parent may maintain and

Protection. Moral and natural obligation to protect children.

¹ 1 Edw. VII. c. 20, s. 2, sub-ss. (1), (4).

² 2 Edw. VII. c. 28.

⁴ *Ibid.*

⁶ Sch. Dom. Rel. s. 234.

³ Sect. 5.

⁵ 2 & 3 Edw. VII. c. 15.

uphold his children in their lawsuits, without being guilty of the offence of maintaining quarrels; and that he may also justify an assault and battery in defence of their persons.”¹

Maintenance.

Liability of
the father
under the
Poor Law
Statute 43
Eliz. c. 2.

*Maintenance.*²—The next duty of parents is to maintain and support their children till the latter reach an age at which they can by their own work and industry support themselves. It is a natural obligation, and “except under the operation of the Poor Law, there is no legal obligation on the part of the father to maintain his child, unless indeed the neglect to do so should bring the case within the criminal law. Civilly there is no such obligation.”³ The first statutory enactment that cast this burden of support upon parents was the Poor Law Act of 43 Eliz. c. 2, which by its sixth section provided that “the father and grandfather, and the mother and grandmother, and the children of every poor, old, blind, lame, and impotent person, or other poor person not able to work, being of sufficient ability, shall at their own charges relieve and maintain such poor person in that manner, and according to that rate, *as by the justices of peace of that county where such sufficient persons dwell, or the greater number of them, at their general quarter sessions, shall be assessed, upon pain that every one of them shall forfeit twenty shillings for every month which they shall fail therein.*” The words in italics are repealed by 31 & 32 Vict. c. 122;⁴ and now justices in petty sessions have the power of making orders of maintenance under the provisions of 11 & 12 Vict. c. 43. It is not unimportant to notice the words “of sufficient ability,” for unless the parent is able to maintain his child, he is not within the penal provisions of the Poor Law Statutes;⁵ nor is he liable at common law for neglecting to furnish proper food and clothing.⁶

31 & 32 Vict.
c. 122.

43 Eliz. c. 2,
s. 6, extended
to natural relations only.

Alteration by
4 & 5 Wm. IV.
c. 76, s. 57.

The statute of Elizabeth extended only to natural relations and not relations in law; therefore a husband was not bound to maintain his wife's children by a former marriage.⁷ But an alteration has been effected by the Poor Law Amendment Act, 1834,⁸ which enacts

“that every man who, from and after the passing of this Act, shall marry a woman having a child or children at the time of such marriage, whether such child or children be legitimate or illegitimate, shall be liable to main-

¹ 1 Hawk. P. C. 131; 1 Bl. Com. 450.

² The word “maintenance” in this sense has much the same meaning as the civil law term “aliment.”

³ Per Cockburn, C.J., in *Bazeley v. Forder*, L. R. 3 Q. B. 559.

⁴ Poor Law Amendment Act, 1868.

⁵ *St. Andrew's Undershaft v. de Breta*, 1 Ld. Raym. 699.

⁶ See *Reg. v. Rugg*, 24 L. T. 192.

⁷ *Rea v. Munday*, 1 Stra. 190; *Tubb v. Harrison*, 4 T. R. 118; *Cooper v. Martin*, 4 East, 76; and see *Rea v. Kempson*, 2 Stra. 955; *Bott*, Sess. Cas. 230.

⁸ 4 & 5 Wm. IV. c. 76.

tain such child or children as a part of his family, and shall be chargeable with all relief, or the cost price thereof, granted to or on account of such child or children, until such child or children shall respectively attain the age of sixteen, or until the death of the mother of such child or children, and such child or children shall, for the purposes of this Act, be deemed a part of such husband's family accordingly."¹

While grandparents may be called upon to maintain a pauper grandchild not able to work,² there is no corresponding liability upon a grandchild to maintain its grandparent.³ Liability of grandparents.

There is now a statutory duty on parents to provide adequate food, clothing, medical aid, or lodging for their children in their custody under the age of fourteen years for boys, and sixteen for girls. The wilful neglect of this duty, which is likely to cause children unnecessary suffering, is a misdemeanour punishable either on indictment or on summary conviction.⁴ It is an indictable offence for any parent to refuse or neglect to provide sufficient food or other necessities for any infant of tender years, unable to provide for and take care of itself, so as thereby to injure its health.⁵ Parents may be convicted of ill-treatment of a lunatic child over age, as persons having the care of it.⁶ Parents neglecting their children liable to punishment.

There is a difference between the liability of a civilian and that of a soldier in respect of the maintenance of his child, whether legitimate or bastard; for though a soldier is liable for its maintenance as though he were a civilian, yet execution in respect of any order or decree for such maintenance is not to issue against his person, pay, arms, ammunition, equipments, instruments, regimental necessities, or clothing; nor is he liable to be punished for deserting his family or leaving it chargeable.⁷ When an order or decree for maintenance has been made on a soldier, it is to be sent to a Secretary of State, who may order a certain portion of his pay, according to his rank, to be deducted and appropriated towards the maintenance of his family.⁸ Liability of soldiers.

At common law there was even less liability on the part of the mother or grandmother to support and maintain their children or grandchildren; and it was only the statute of Elizabeth⁹ that imposed the burden of supporting their children till they had Liability of the mother.

¹ Sect. 57. See *Hill v. Hill*, [1902] P. 140, a decision under the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 4.

² *Bevan v. M'Mahon*, 28 L. J. P. M. & A. 127.

³ *Maunder v. Mason*, L. R. 9 Q. B. 254.

⁴ 4 Edw. VII. c. 15, s. 1. See *post*, Part IV., Infancy, chap. vi.

⁵ *Rex v. Friend et uxorem*, cited 1 Russ. Cr. 949.

⁶ *Buchanan v. Hardy*, 18 Q. B. D. 486. This was a conviction under 16 & 17 Vict. c. 96, s. 9.

⁷ 44 & 45 Vict. c. 58, s. 145 (1).

⁹ 43 Eliz. c. 2, s. 6.

⁸ *Ibid.* (2).

attained the age of sixteen years upon the mothers as well as upon the fathers. This provision did not affect the primary liability of the father and grandfather; but recently there has been an important modification. This liability was never enforced against a *feme covert*, whether mother or grandmother.¹ But by the Married Women's Property Act, 1870,² a new liability was imposed upon a married woman with separate estate; for after the passing of that Act a married woman with separate estate was liable for the maintenance of her children as a widow was then by law subject to the maintenance of her children. This section was held not to include grandmothers possessing separate property, but was limited to mothers only.³ But by the Married Women's Property Act, 1882,⁴ it is provided that "a married woman having separate property shall be subject to all such liability for the maintenance of her children and *grand-children* as the husband is now by law subject to for the maintenance of her children and grandchildren." The mother may be indicted for refusing or neglecting to provide sufficient food or other necessities for her infant child, unable to provide for and take care of itself, whereby its health is injured.⁵

Under the Youthful Offenders Act, 1901,⁶ if a young child is ordered to be remanded or committed for trial by a Court of Summary Jurisdiction, he may be ordered into the custody of some suitable person; but the parent may be ordered to contribute towards the cost of maintenance a weekly sum not exceeding five shillings during the whole or any part of the time of his custody.⁷ Again, where a child is sent to a reformatory or industrial school, the court so sending him may at the same time order the parent to contribute to his support and maintenance.⁸

The statutory liability of the parents to support their *own* children ceases when the latter attain sixteen, unless they are blind, or deaf and dumb, or impotent, or otherwise unable to work for themselves.⁹ If the parent retains the custody of the child, the liability to support and maintain it will extend to majority,¹⁰ and the Court of Divorce has jurisdiction to make orders respecting the custody of children till they attain their majority.¹¹ The statutory liability to support their *step*-children

¹ *Custodes v. Jinks*, Sty. 283.

² 33 & 34 Vict. c. 93, s. 14.

³ *Coleman v. The Overseers of Birmingham*, 6 Q. B. D. 615.

⁴ 45 & 46 Vict. c. 75, s. 21. Whether this section will be held to render a married woman liable for the support and maintenance of her *step-grandchildren* remains to be decided; the words seem almost wide enough to render her so liable.

⁵ See *Reg. v. Phillpot*, Dears. C. C. R. 179.

⁶ 1 Edw. VII. c. 20.

⁷ Sect. (7).

⁸ Sect. 6 (1). There is a power of appeal against this order. Sect. 7.

⁹ 43 Eliz. c. 2, s. 6; 4 & 5 Wm. IV. c. 76, s. 56.

¹⁰ *Thomasset v. Thomasset*, [1894] P. 295.

¹¹ *Ibid.*

Liability under
Youthful
Offenders Act,
1901.

Age at which
liability of
parents ceases.

ceases when they attain the age of sixteen years, irrespectively of their becoming chargeable or not.¹

It now becomes important to consider the liability of parents for the necessities supplied to their children. This liability is *prima facie* on the father, though by recent legislation a mother during coverture, who is possessed of separate property, may have this burden cast upon her. As has been seen, there is no legal obligation apart from the Poor Laws on the parent to support his children, or to pay their debts unless he contract to do so.² The law on the subject has been thus laid down. "In point of law, a father who gives no authority, and enters into no contract, is no more liable for goods supplied to his son than a brother, or an uncle, or a mere stranger would be. From the moral obligation a parent is under to provide for his children, a jury are, not unnaturally, disposed to infer against him an admission of a liability in respect of claims upon his son, on grounds which warrant no such inference in point of law, and . . . if a father does any specific act, from which it may reasonably be inferred that he has authorized his son to contract a debt, he may be liable in respect of the debt so contracted; but the mere moral obligation on the father to maintain his child affords no inference of a legal promise to pay his debts";³ and this is so even where the debts contracted are for necessities supplied to the son, whose only resource in the absence of anything to show a contract on the father's part, is to apply to the parish, and then the proper steps will be taken to enforce the performance of the parent's legal duty.⁴ If goods, then, are supplied to an infant child without the knowledge of the father, he is not bound to pay for them, for he cannot be made liable for them except by way of contract.⁵ Since the case of *Mortimore v. Wright*,⁶ it cannot be held to be law that the mere knowledge on the part of the father that his child was being maintained and supported by a stranger would fix him with the liability to pay for the necessities supplied by the stranger. The law, it seems, would only imply a liability to repay another for the support of his child, where he has deserted it, and it was in a destitute state.⁷ A parent's authority to a stranger to supply goods to a child may be inferred from letters.⁸

Liability of
parents for
necessaries
supplied to
their children.

The above point has not yet been fully decided; and it would

¹ 4 & 5 Wm. IV. c. 76, s. 57; 45 & 46 Vict. c. 75, s. 21.

² *Cooper v. Martin*, 4 East, 84.

³ Per Lord Abinger, C.B., in *Mortimore v. Wright*, 6 M. & W. 482.

⁴ *Shelton v. Springett*, 11 C. B. 452.

⁵ *Fluck v. Tollemache*, 1 C. & P. 5; *Urnston v. Newcomen*, 4 A. & E. 899.

⁶ 6 M. & W. 482, overruling the cases of *Nichole v. Allen*, 3 C. & P. 96, and *Law v. Wilkin*, 6 A. & E. 718.

⁷ *Urnston v. Newcomen* (*ubi sup.*).

⁸ *Andrews v. Garratt*, 6 C. B. (N.S.) 262.

be hazardous to venture on a confident opinion as to what the decision will be; but the fact that the parents are by statute responsible for the maintenance of the child to the parish in which it is left deserted, is not without some force in favour of the contention that they ought not, in the absence of express contract, to be held liable to the stranger voluntarily providing that which they are by statute bound to provide. It is further submitted that no difference would be made between things which were necessities and things which were not necessities. The child having an allowance would negative the theory of the implied contract on the part of the parents.¹

But where the child dwells with the mother, who is living apart from the father, a different class of questions arises depending upon the fact whether or not she is living apart voluntarily, or because of the misconduct of the husband. It is a question for the jury whether a husband, living apart from his wife, and allowing the children to remain with her, does not constitute her his agent, and authorize her to contract debts for clothing and necessities for them.² Where the mother, of her own free will, separates herself from the father and against his will, and takes the child with her, she will be liable for necessities supplied to the child, and not the father; and since the passing of the Married Women's Property Acts, 1882 and 1893, her liability has become more marked; for she now *primâ facie* contracts, unless she proves agency, so as to render herself liable;³ and she would find it difficult, except by implication, to set up successfully that she contracted as the agent of her husband so as to bind him. So, too, when divorced, whether for her own or her husband's misconduct, a wife loses this capacity of an agent.

Where the wife voluntarily separates herself from her husband on account of his misconduct, and carries their child with her by virtue of an order of court⁴ giving her the custody, she has the power to pledge her husband's credit for necessities supplied to the child.⁵ This is a strong case, and one that extends the liability of the father in the face of the ordinary presumption that the award of the child to the mother would carry with it a transfer of parental duties, as well as of parental rights. But where the mother takes the child without an order of court

¹ *Crantz v. Gell*, 2 Esp. 471.

² Per Lord Eldon, in *Rawlins v. Vandyke*, 3 Esp. 252.

³ 56 & 57 Vict. c. 63, s. 1. An important fact in rebutting this *primâ facie* liability would be the restraint upon anticipation affecting the whole of her property. See *ante*, Part I. chap. xv. p. 392.

⁴ Under 36 Vict. c. 12.

⁵ *Bazeley v. Forder*, L. R. 3 Q. B. 559. In this case, Cockburn, C.J., differed from Blackburn, Mellor, and Lush, J.J.; and his ruling was approved by the majority of the Irish Exchequer Chamber in *Meccredy v. Taylor*, 1 R. 7 C. L. 256.

Liability of
father when
mother lives
apart volunt-
arily;

because of
father's mis-
conduct.

giving her the custody, the question whether she had or had not the authority to pledge the father's credit would be for the jury; and if she has separate estate, the presumption that she contracts in respect of and to bind that estate would, it is submitted, under such circumstances, render it very difficult for her to prove that she was acting as agent for her husband. If a father allowed his children to live with and be brought up by one of his servants, he no doubt would be held liable on contracts entered into by such servant as his agent.¹

The Divorce Court has the power to order the father to contribute to the maintenance of his children on his divorce or separation,² and to apply a part of the mother's income under a settlement for that purpose when she is in fault.³ The court has also control over the marriage settlements (ante-nuptial or post-nuptial) of the parties whose marriages are annulled or dissolved, and may apply the whole or a portion of the property so settled for the benefit of the children of the marriage.⁴ The object of the variation of the provisions of the settlement should be to prevent so far as may be just and practicable the innocent party from being pecuniarily damaged by the dissolution of the marriage.⁵ The court has power to limit,⁶ or take away altogether,⁷ the right to exercise a power of appointment over the settled fund which might have existed in the guilty party.⁸

Maintenance ordered by the Divorce Court.

Owing to the liability of parents under the poor laws to support the offspring of their children, the former have sufficient interest to bring a suit for annulling the marriage of a child which is alleged to be void, as they may become liable for the support of the issue of such marriage.⁹

Suits by parents to annul void marriage of child.

What is technically known as Maintenance, or the amount advanced out of a trust fund belonging to infants for their education and benefit, where their parents' means are insufficient, will be treated of under the head of "Maintenance" in Part III., Guardian and Ward.¹⁰ It may, however, suffice to say that equity recognized the moral liability of a father to support and maintain his children, if of ability to do so, and even to provide for them

Maintenance in equity.

¹ *Cooper v. Phillips*, 4 C. & P. 581.

² 22 & 23 Vict. c. 61, ss. 4, 5; *Milford v. Milford*, L. R. 1 P. & D. 715.

³ *Seattle v. Seattle*, 30 L. J. P. M. & A. 216.

⁴ 22 & 23 Vict. c. 61, s. 5.

⁵ *Maudslay v. Maudslay*, 2 P. D. 256.

⁶ *Boscile v. Bosrile and Craven*, 13 P. D. 76.

⁶ *Noel v. Noel*, 10 P. D. 179.

⁸ See *ante*, Part I. chap. viii. pp. 165 *et seq.*

⁹ *Ray v. Sherwood*, 1 Moo. P. C. 396; *Beran v. McMahon* (f. c. *McMahon*) 28 L. J. P. & M. 127; *Wells v. Cottam* (f. c. *Wells*) 322 L. J. P. & M. 41; 45 & 46 Vict. c. 75, s. 21.

¹⁰ *Post*, chap. vi.

according to their expectations,¹ and an allowance was ordered out of a lunatic father's estate for the maintenance of his children, though they were illegitimate.² As a consequence of this recognition of the paternal duty, maintenance will not generally be allowed to a father for the support of his children.³ But now, under the Conveyancing and Law of Property Act, 1881,⁴ trustees who hold property in trust for infant children, whether for life or a larger interest, may at their sole discretion pay to the parent the income of that property for their maintenance, education, or benefit unless the instrument of donation expressly forbids such payment.

Education.

Education.—The next and now one of the most important duties cast upon parents is the education of their children. Modern views with respect to it differ much from those prevailing in former times. For facility of treatment, the subject will be divided into (a) Secular; (b) Religious. Under this latter head will be discussed the rights of the father to have his children educated in his own faith, and how such rights may be modified.

Secular.

Education of children formerly moral and not legal obligation. Elementary Education Act, 1870.

Elementary Education Act 1876.

(a) *Secular.*—In former times, and until recently, a parent was not legally compelled to educate his child; the duty of education fell within the category of moral and not legal obligations. In 1870 facilities for affording elementary education were provided by the Elementary Education Act, 1870;⁵ and school boards erected under its provisions could make by-laws enforcing the attendance of children at school, and punishing for the breach of such by-laws. But not until the passing of the Elementary Education Act, 1876,⁶ was there any express statutory declaration as to the duty of a parent to cause his child to receive efficient elementary education. Section 4 of that Act provides that "it shall be the duty of the parent⁷ of every child to cause such child to receive efficient elementary education in reading, writing, and arithmetic; and if such parent fail to perform such duty, he shall be liable to such orders and penalties as are provided by the Act"; but these will not be enforced if he has a reasonable excuse for not sending his child to school.⁸ What

¹ See *Wellesley v. Duke of Beaufort*, 2 Russ. 28.

² *Ex parte Haycock*, 5 Russ. 154.

³ See *post*, Part III. chap. v.

⁴ 44 & 45 Vict. c. 41, s. 43.

⁵ 33 & 34 Vict. c. 75.

⁶ 39 & 40 Vict. c. 79.

⁷ "Parent" includes guardian, and every person who is liable to maintain, or has the actual custody of any child (33 & 34 Vict. c. 75, s. 3), *i.e.*, father and grandfather, mother and grandmother of a child, who by 43 Eliz. c. 2, s. 7, are liable to maintain it. A married woman having property of her own would clearly be liable under this fourth section; so, too, where the father is away, and the mother is left in charge of the child. *Hance v. Burnett*, 45 J. P. 54; see also *London School Board v. Jackson*, 7 Q. B. D. 502.

⁸ *Belper School Board v. Bailey*, 9 Q. B. D. 259.

amounts to a reasonable excuse will depend upon the circumstances of each case.¹

A parent is liable to a penalty if the child is not sent to school, though it may be in the actual custody and control of some third person.² Where a parent is able to pay the school fees, but sends the child without them, so sending the child is not a compliance with the Education Act.³ It is true that under the Elementary Education Act, 1891,⁴ public elementary education of children is made gratuitous, if the managers of a school (Board or Voluntary) accept a fee grant of ten shillings a year for each child of the number of children over three and under fifteen years of age in average attendance at any public elementary school in England and Wales; but such managers are not compelled to accept the grant, and may charge the usual fees. A great majority of the schools have abolished their fees, but where the fees have not been abolished, the parents must comply with the requirements of the Elementary Education Act, 1870.

The compliance with the terms of this Act must be *bonâ fide*, and not colourable, as by sending a child to the doors of the school without the school fees (not having had them remitted), knowing that the child will be refused admission.⁵ The ages Ages of school attendance. between which the child must attend school are five and fourteen,⁶ unless, being over twelve,⁷ it has received a certificate of its efficiency in reading, writing, and elementary arithmetic, or of previous due attendance at a certified efficient school, in which case the child may be employed in labour;⁸ and the Factory Act, 1878,⁹ has not altered the age up to which school attendance is compulsory in the case of a child, whether taken into employment or not, from fourteen to thirteen.¹⁰ Where a father keeps an uncertificated child at home to enable the mother to go out and earn money, he does not take such child into his employment under section 47 of the Elementary Education Act, 1876, so as to render himself liable to the penalty imposed by section 6 of that Act.¹¹

¹ *London School Board v. Duggan*, 13 Q. B. D. 176.

² *London School Board v. Jackson*, 7 Q. B. D. 502.

³ *London School Board v. Wood*, 15 Q. B. D. 415.

⁴ 54 & 55 Vict. c. 56.

⁵ *Saunders v. Richardson*, 7 Q. B. D. 388, dissenting from *Richardson v. Saunders*, 6 Q. B. D. 313. If the parent falls in arrear with respect to the school fees of his child, the education authority cannot maintain an action for them. *School Board of London v. Wright*, 12 Q. B. D. 568.

⁶ 39 & 40 Vict. c. 79, s. 48.

⁷ 56 & 57 Vict. c. 51, s. 1 (Elementary Education (School Attendance) Act, 1893); and 62 & 63 Vict. c. 13, s. 1 (Elementary Education (School Attendance) Act (1893) Amendment Act, 1899). For the further protection of young children, see *post*, Part IV. chap. vi.

⁸ *Ibid.* sect. 5.

⁹ 41 Vict. c. 16, s. 107.

¹⁰ *Winyard v. Toogood*, 10 Q. B. D. 218, dissenting from *Saunders v. Crawford*, 9 Q. B. D. 612.

¹¹ *Mather v. Lawrence*, [1899] 1 Q. B. 1000.

Legal obligation on parent only to give the child an elementary education.

As long as the father causes his child to receive what may be called a statutory elementary education, his duties towards his child from a legal point of view are complete. A rich man is not more bound (and indeed is not bound at all) to send his son to an expensive public school, or employ a governess for his daughter, than a poor man is bound to afford elementary education to his offspring. Education by the parent according to station in life is yet a moral and not a legal obligation. Thus, as Lord Kenyon has it, "a father was bound by every social tie to give his children an education suitable to their rank, but it was a duty of imperfect obligation, and could not be enforced by a court of law. The richest man in the kingdom might say to his heir-apparent, 'Go and earn your daily bread by your daily labour,' and the law could not interfere. There is no further obligation than that which Nature has implanted in his breast. The law obliged him to nothing but nurture."¹

Otherwise in the case of guardians.

Father must not interrupt education sanctioned by him.

This moderate obligation on the part of the father is considerably increased when the child is under the custody of guardians, who are bound to educate their wards in a manner becoming their rank and status in society.² So, also, where the father has permitted the maintenance and education of his children to be supplied from a strange source, and has allowed them to be brought up with expectations founded on such maintenance and education which he himself could not have afforded, he will not be at liberty to deprive them of that source of education, the effect of which has been materially to alter their expectations.³

Religious.

(b) *Religious*.—There is no duty imposed upon the parents to educate their children in a particular line of religious opinion, or to instil any religious views at all into them. The following remarks suppose that the children have been, or are intended to be, brought up with some religious belief.

Child *primâ facie* to be educated in father's religious faith.

It is now clearly established that except under special circumstances, the father during his life has the right to choose in what religion his children are to be brought up,⁴ even where the children are illegitimate; and if the court in its discretion thinks that it will not be for their benefit that their religious education should be disturbed, it will refuse to deliver them up after the father's death out of the custody of the persons chosen by him to that of their mother.⁵ He cannot after his death directly prescribe in what religion they shall be brought up, but he can indirectly do so by appointing a testamentary guardian of that faith in which

¹ *Hodges v. Hodges*, Peake, Add. Cas. 79.

² See *post*, Guardian and Ward, chap. v.

³ Macph. Inf. 136, citing *Colston v. Morris*, Jac. 257 n, and other cases.

⁴ *Hawksworth v. Hawksworth*, L. R. 6 Ch. App. 539; *Re Agar-Ellis*, *Agar-Ellis v. Lascelles*, 10 Ch. D. 49; *Re Scanlan (Infants)*, 40 Ch. D. 200.

⁵ *Re Ullee*, 54 L. T. 286.

he desires they should be reared and educated.¹ This right to have his children brought up in his own religion the father cannot release; nor can he bind himself conclusively by contract to exercise in all events in a particular way rights which the law gives him for the benefit of his children, and not for his own.² Thus, an ante-nuptial agreement between a husband and wife of different religious opinions, that the children should be brought up in a faith other than that of the father, is not binding in law or in equity;³ it is a mere consent on the part of the father, and may be revoked by him.⁴ This right of the father to have his children educated in his own religion is recognized after his death, even though he die intestate, and without having left any directions as to the religion in which they are to be educated; the court presumes that the father intended their religious training should be continued in his faith.⁵ Though the Guardianship of Infants Act, 1886, makes the mother on the death of the father the legal guardian of her children where the father has not appointed a guardian, she does not possess any greater power or control over the religious education of their child than that possessed by an ordinary guardian at the time of the passing of the Act; and except for any special circumstances she is bound to bring up the child in the religious faith of the father though of a different faith herself.⁶ So, too, if the child be a ward of court, it is the duty of the court to take care that its fatherless ward is brought up in the religion of the father. This rule of law is enforced even where it might lead to the creation of a barrier between mother and child, causing pain and grief to both.⁷ But the mere fact that the mother professes a faith differing from that in which her child, being of tender years, is to be brought up, forms no ground for separating them,⁸ unless the child has reached the age of intelligence, and has conceived such strong and fixed religious ideas that to change and disturb them would be to the child's detriment.⁹ Such an agreement between husband and wife (whether ante-nuptial or post-nuptial) does not amount in law to a delegation or substitution of the paternal rights, and though a separation deed is not rendered

Contract of father to bring up child in a particular faith not binding.

Guardianship of Infants Act, 1886.

¹ *Talbot v. Earl of Shrewsbury*, 4 M. & C. 672; *Witty v. Marshall*, 1 Y. & C. C. C. 68; *Austin v. Austin*, 34 L. J. Ch. 192, 499.

² *Andrews v. Salt*, L. R. 8 Ch. App. 622; *Re Meades*, 5 Ir. Eq. 98.

³ *Andrews v. Salt* (*ubi sup.*); *Re Agar-Ellis*, *Agar-Ellis v. Lascelles* (*ubi sup.*).

⁴ *Reg. v. Smith*, 22 L. J. Q. B. 116.

⁵ *Austin v. Austin* (*ubi sup.*); *Hawksworth v. Hawksworth* (*ubi sup.*); *Skinner v. Orde*, L. R. 4 P. C. 60; *Re Newbery*, L. R. 1 Eq. 431; 1 Ch. App. 263. In these last two cases the mother had changed her religion. See *F. v. F.*, [1902] 1 Ch. 688.

⁶ *Re Scanlan* (*Infants*), 40 Ch. D. 200; *Re McGrath* (*Infants*), [1893] 1 Ch. 143.

⁷ *Per Wickens V.C.* of Duchy of Lancaster, in *Hawksworth v. Hawksworth*, L. R. 6 Ch. App. 539.

⁸ *Corbett v. Tottenham*, 1 Ba. & B. 59; *Re Browne*, 2 Ir. Ch. Rep. 151; *Austin v. Austin* (*ubi sup.*).

⁹ *Re Besant*, 11 Ch. D. 508, 519.

invalid which provides for the father giving up the custody of his child, yet he may "resile" from it, and the court will not enforce it against the interests of the child.¹ But if a father by a separation deed has agreed that the mother shall have the absolute custody and control of his infant child, and has delegated to her the right of directing the child's religious education, and if it is for the infant's benefit that effect should be given to the agreement, the court will enforce it under section 2 of the Infants' Custody Act, 1873.² So, too, in the case of an infant orphan the court looks altogether to the benefit of the child, and though the father may have agreed that his child should be brought up in a faith not his own, yet if his conduct shows that he has changed his mind, and it is for the infant's benefit and interest that it should be brought up in the father's faith, the court will appoint guardians for the purpose of its being brought up in the father's religion.³

The principles applicable to the right of a father to control the religious education of his child are the same in the case of a widowed mother whose dead husband has not directed any particular religious education for his child. She has the right to pronounce in what faith her offspring should be educated; and where she changes her mind as to the school in which the infant is being brought up, and desires to remove him from that school, she can enforce her right by *habeas corpus* unless detriment to the morals of the child would result.⁴ Where a mother whose husband was not known to be dead or alive has put her infant child to a school of a particular religious faith, and afterwards changes her views and desires to remove him, she is entitled to her writ of *habeas corpus* to regain control of her child, if the manager of the school refuses to deliver him up, unless its interests would be injuriously affected.⁵ It must, however, be borne in mind that under the Guardianship of Infants Act, 1886, a mother who survives the father of her children is now their legal guardian, either alone when no guardian has been appointed by the father, or jointly with any guardian appointed by him; but she has no greater powers as regards the religious education of her children than those which any guardian appointed by will or otherwise had at the passing of the Act; and except for special reasons she is bound to educate her children in the religion of their father.⁶ Thus, where the dead father was a Protestant and the surviving mother was a Roman Catholic, the court appointed

Rights of
widowed
mother.

¹ *Re Besant*, 11 Ch. D. 508, 519. 36 Vict. c. 12, s. 2.

² *Condon v. Vollum*, 57 L. T. 154.

³ *Re Nevin (an Infant)*, [1891] 2 Ch. 299.

⁴ *Reg. v. Williams*, 58 L. J. Q. B. 176.

⁵ *Reg. v. Barnardo (Brookes' Case)*, 58 L. J. Q. B. 552.

⁶ *Re Scanlan (Infants)*, 40 Ch. D. 200.

under section 2 of the Guardianship of Infants Act, 1886, two Protestants to act jointly with her as co-guardians of her infant children, and directed that they should be brought up as members of the Church of England.¹

This right of the parent to prescribe in what religious faith the child is to be educated is one that is most clearly recognized, for even where the parent is deemed unworthy by reason of misconduct to have the custody of the child, the Court of Chancery, under the Custody of Children Act, 1891,² if it is shown that the child is being brought up in a different religion to that in which the parent has a legal right to have him brought up, may secure that the child be brought up in the parent's religion; though in such a case the court may consult the wishes of the child.³

Custody of Children Act, 1891.

But under special circumstances the courts have power to interfere with and control this parental right. Where the parent by his conduct, evidenced by his assent or non-dissent, has abandoned, forfeited, or waived this right, whether in pursuance of an agreement or not, and allowed the child to be reared in a faith not his own, the court will consider only the happiness and benefit of the child, though it may not have imbibed so thoroughly the doctrines in which it has been raised up as to make it dangerous to change its religious training.⁴ So where the acts of a deceased Protestant father indicated that he had not only abandoned his right to have his child brought up in his own faith, but that he intended that it should be brought up in the Roman Catholic faith, and the court was of opinion that it would be most for the benefit of the child to be brought up in the latter faith, its education in it was continued.⁵ But where the parent has not abandoned or forfeited his rights, the court has no power to inquire whether the enforcement of his rights would or would not be for the happiness and benefit of his child.⁶ No definition can be framed of what is a forfeiture or abandonment by the parent; but it is a question on which the court must pronounce from the facts proved in evidence before it.⁷ It may be seen from the cases cited below that the court has frequently applied the rule where the father is dead, but where he is alive, even though he had apparently waived his rights, it would hesitate long before it acted upon the waiver, if it did not altogether refuse to do so,⁸

Interference by court where parent has abandoned, forfeited, or waived rights.

¹ *Re Scanlan (Infants) (ubi sup.)*.

² 54 Vict. c. 3.

³ Sect. 4. See *Reg. v. Gyngall*, 9 Times L. R. 422.

⁴ *Andrews v. Salt*, L. R. 8 Ch. App. 622.

⁵ *Re Clarke*, 21 Ch. D. 817.

⁶ *Andrews v. Salt (ubi sup.)*.

⁷ *Hill v. Hill*, 31 L. J. Ch. 505; *Re Meades*, 5 Ir. Eq. 98; *Re O'Malleys*, 8 Ir. Ch. Rep. 162; *Re Garnett*, 20 W. R. 222; *Andrews v. Salt (ubi sup.)*; *Re Agar-Ellis, Agar-Ellis v. Lascelles*, 10 Ch. D. 49.

⁸ *Re Meades (ubi sup.)*. See *Re Besant*, 11 Ch. D. 508.

except where manifest injury to the child would result.¹ But if he has allowed the child to reach such an age that it has imbibed strong religious opinions, the court would refuse to sanction the alteration of the religious views of its ward.² An ante-nuptial agreement by a father waiving his rights, which had been acted upon by him, would after his death, though legally not binding on him, be taken into consideration as affording evidence of such abandonment and waiver,³ and if the child has imbibed strong religious opinions so that to alter its religious views might be to imperil them altogether, the court will refuse to decree such change.⁴ The court would apply these principles to the case of a child whose widowed mother had for a long time abdicated her right to control its religious education.⁵

Examination
of child by the
court.

The court, in former days, if it thought fit, was wont to examine the child privately, to ascertain whether or not it had received such definite impressions as would render a change dangerous.⁶ The more recent practice was certainly to discountenance such private examination as not being conducive to the child's welfare, for it might tend to inculcate controversial opinions in its mind, especially where the father is alive;⁷ yet under the Custody of Children Act,⁸ the court has power to inquire into the religious opinions of the child itself; and the court will take upon itself to interview a young child of fifteen for the purpose of ascertaining its religious views.⁹ The court will, however, disregard the opinions of a mere child of eight years old or thereabouts.¹⁰

Summary.

To sum up this branch of the subject. (1) The father cannot make a binding contract to bring up or not to bring up his children in a particular faith. (2) Where the parent has not abandoned, or forfeited, or waived his rights, the court has no power to inquire whether the enforcement of the parental rights would or would not be for the happiness and benefit of the child. (3) If, on the contrary, he has abandoned or forfeited his rights (whether in pursuance of an agreement or not), the court will consider only the happiness and benefit of the child, and order it to be continued to be educated in the religion in which it had been

¹ *Thomas v. Roberts*, 19 L. J. Ch. 506. See *Re Newton (Infants)*, [1896] 1 Ch. 740.

² *Re Newton (Infants) (ubi sup.)*.

³ *Andrews v. Salt*, L. R. 8 Ch. App. 622.

⁴ *Stourton v. Stourton*, 26 L. J. Ch. 354; *Re Newton (Infants) (ubi sup.)*.

⁵ See *Reg. v. Williams*, 58 L. J. Q. B. 176.

⁶ *Stourton v. Stourton (ubi sup.)*; *Re Hunt*, 2 Cod. & Law, 373.

⁷ *Hawksworth v. Hawksworth*, L. R. 6 Ch. App. 539; *Re Agar-Ellis, Agar-Ellis v. Lascelles*, 10 Ch. D. 49.

⁸ 54 Vict. c. 3, s. 4.

⁹ *Reg. v. Gynghall*, [1893] 2 Q. B. 242. See *Re Newton (Infants) (ubi sup.)*; and *F. v. F.*, [1902] 1 Ch. 688.

¹⁰ *Witty v. Marshall*, 1 Y. & C. C. C. 68; *Davies v. Davies*, 10 W. R. 245; *Re Hunt (ubi sup.)* (girl fifteen years old); *Re Newbury*, L. R. 1 Eq. 431 and 1 Ch. App. 263; *Hawksworth v. Hawksworth (ubi sup.)*.

brought up, and the child need not have imbibed so thoroughly the doctrines inculcated into it as to make it dangerous to change its religious training. (4) Where a father has died leaving no directions for the religious education of his children, who since his death have been thoroughly educated in opinions other than the father's, and who have arrived at such an age that to alter their course of teaching would be perilous to their religious faith, the court will not decree that they should be educated in their father's religion. (5) An agreement by a father to surrender his control over the custody and education of his children will be taken into consideration by the court after his death, as to whether or no he has abandoned his right to educate his children in his own religion. (6) The court will examine the children for the purpose of eliciting their religious opinions, but will disregard those of infants of tender age.

CHAPTER III.

RIGHTS AND OBLIGATIONS OF PARENTS WITH RESPECT TO THE PROPERTY OF CHILDREN.

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THIS chapter will deal with the rights of parents as far as they extend over the property of their children; and the duties and obligations laid upon them to protect and safeguard it, and not in any way to use their position to prejudice the interests or fortunes of their offspring. The chapter according to its subject-matter is divided into three sections. (1) Rights of Parents over Child's Property; (2) Gifts and Transactions between Parent and Child; (3) Transactions in Fraud of Parental Rights.

(1) Rights of Parents over Child's Property.

As to Real Estate.—The rights of a father over the realty accruing to his infant child by *purchase* have not been defined with

much clearness or at any length, both because the father was by the common law guardian in socage of any socage land which came to his child by *descent*, and so had superintendence of it;¹ and because before the Statute of Wills,² which gave for the first time a power of testamentary alienation over real estate, there must have been very few instances of an infant being enfeoffed by deed *inter vivos* of land which he could not manage.³ Blackstone, citing Coke, says:⁴ "If an estate be left to an infant, the father is by common law the guardian, and must account to his child for the profits";⁵ and "a father has no other power over his son's estate than as his trustee or guardian, for though he may receive the profits during the child's minority, yet he must account for them when he comes of age."⁶ Fitzherbert⁷ also says that where the father occupies the land of the infant which the infant has by purchase, the infant shall have an account against him as bailiff of his lands. It may, then, be taken to be the law that where a father enters on the estate of his infant children, he is presumed to do so as bailiff or guardian, and in a fiduciary position;⁸ and a decree ordering an account of the profits will be made against him,⁹ though such an account may be presumed to have been settled where the child has lived for many years with the father, and the rents have been applied in maintaining the common establishment.¹⁰ The Statute of Limitations will not run in favour of the parent as against the child until the latter has reached majority.¹¹

The father acquires no legal or beneficial interest in the real estate by reason of his control and superintendence as natural guardian.¹² A father who is tenant for life of his children's property will be in no better position than an ordinary tenant for life, and as tenant by the curtesy he may be restrained from committing waste.¹³ When a child becomes entitled to an estate, and dies intestate and without issue in its father's lifetime, the latter succeeds to the property as the nearest lineal ancestor entitled to take.¹⁴

Where a mother enters upon the land of her children, her position, with respect to them, is, like the father's, that of a trustee, and she will be accountable as such, and all the rights of a *cestui que trust* will be enforced against her in favour of her children.¹⁵ On the death of a child intestate, and without issue,

¹ See *post*, Part III. chap. ii.² Macph. Inf. 65.³ Co. Litt. 88.⁴ 32 Hen. VIII. c. 1.⁵ 1 Com. 461.⁶ *Ibid.* 453.⁷ F. N. B. 117.⁸ *Re Hobbs, Hobbs v. Wade*, 36 Ch. D. 553.⁹ *Morgan v. Morgan*, 1 Atk. 489.¹⁰ *Smith v. Smith*, 23 Beav. 554.¹¹ *Re Hobbs, Hobbs v. Wade (ubi sup.)*; *Wall v. Stanwick*, 34 Ch. D. 763; *Tinker v. Rodwell*, 69 L. T. 591.¹² *Rex v. Sherrington*, 3 B. & A. 714.¹³ *Roberts v. Roberts*, Hardre, 96.¹⁴ 3 & 4 Wm. IV. c. 106, s. 6.¹⁵ *Wall v. Stanwick (ubi sup.)*.

entitled in fee, and on the exhaustion of all paternal heirs whatsoever, the mother will be entitled to succeed to her child as the nearest lineal ancestor entitled to take.¹

Personal Property.—As a rule, the parent has no rights over the child's general property of a personal nature, and property which comes to a child under age will (unless there is a direction to the contrary) vest in him as though he were an adult. When property comes to an infant child, and the instrument of donation does not so provide, the proper step is to have a guardian appointed to receive and manage the property; in such a case the parent will usually be appointed as guardian. Where parents hold personal property belonging to their children, they are only trustees for them, and are bound to conform to the general duties and obligations imposed upon persons in a fiduciary position. Though parents are the natural guardians of their children, yet, owing to the possible abuse of that office, they are not under ordinary circumstances the proper persons to receive legacies left to their infant children; but the executors or administrators charged with their payment should retain them in their own hands till the infants come of age. Parents cannot, in consequence, give a valid receipt for the legacies, so as to discharge the executors. The latter can no more justify paying a legacy to the parents of an infant than to the infant himself, unless the testator has marked out the parents as the proper persons to receive the legacies,² or they act under the sanction of the Court of Chancery;³ and payment to the father of a child who has not attained majority is not good, even where the child after age ratifies the payment by his course of conduct.⁴ Where the parent is the person marked out to receive the legacy, he is deemed to be a trustee for the child, and entitled to receive the money, and his receipt will be a good discharge to the executor.⁵ The goods of an infant son living with his father are not in the order and disposition of the latter so as to pass to his trustee in bankruptcy.⁶

It is a doubtful point whether or not the father is entitled to the earnings of his child. He certainly cannot claim them legally after the child has reached the age of sixteen. The parents among the artizan classes do, it is well known, take their children's earnings and throw them into the common stock for the support of the family. If the father once reduces the wages of the child

¹ *Wall v. Stanwick*, 34 Ch. D. 763.

² *Cooper v. Thornton*, 3 B. C. C. 96, 186. See *post*, Part III. chap. vi.

³ *Dagley v. Tolferry*, 1 P. Wms. 285; *S. C. Doyley v. Tolferry*, 1 Eq. Cas. Abr. 300, pl. 2; *S. C. Dawley v. Ballfrey*, Gilb. Eq. Rep. 103; *Hill v. Chapman*, 2 Bro. C. C. 612.

⁴ *Cooper v. Thornton* (*ubi sup.*).

⁵ *Fane v. Fane*, 1 Vern. 30; *Cooper v. Thornton* (*ubi sup.*).

⁶ *Viner v. Cudell*, 3 Esp. 88.

into his possession, there cannot be any doubt that the child will be unable to recover them. Blackstone says: "He (the father) may indeed have the benefit of his children's labour while they live with him, and are maintained by him; but this is no more than he is entitled to from his apprentices or servants."¹ This proposition must be limited to children who are living with, and being reared and nurtured by, the parent, and not to those who are emancipated and are supporting themselves; and must mean that if a child work for its parent, it cannot afterwards recover on an implied contract to pay wages.² But if a child enters, as he can do,³ into a valid contract of service with his parent for the payment of wages, the parent will not be entitled to retain such wages, but the child will be able to maintain an action for them against his parent. If the father emancipates the child from his control, any right to his earnings would at once cease to exist. The following remarks of an American writer⁴ would seem to express rightly the law of the matter: "If a child, after arriving at the age of twenty-one years, then continues to live, labour, and render service in the father's family, with his knowledge and consent, but without any agreement or understanding as to compensation, the law raises no presumption of a promise to enable the child to maintain an action against the father to recover compensation. The presumption here is, that the parties do not contemplate a payment of wages for services on the one hand, or a claim for board and lodging on the other; for where the relation of parent and child exists, the law will not readily assume that of debtor and creditor likewise. But this presumption may be overthrown, and the reverse established, by proof of an express or implied contract; an implied contract being proven by facts and circumstances which show that both parties, at the time the services were performed, contemplated or intended pecuniary recompense." But such intention would need to be clearly shown; and in one case⁵ a son who was placed by his father in business, accounting to his father for all the profits, deducting only the expense of his board, having made no demand for wages during his father's life, was held not entitled as a creditor after his father's death.

If the father has the right to take his child's earnings, the mother would likewise have the right to do so in a modified

Right of the
mother.

¹ Com. 453; Wood, Inst. Laws. Eng. 65.

² There is a case of *Ex parte Macklin*, 2 Ves. Sen. 675, which very nearly touches this point, but the report is obscure. See *Duckworth v. Johnson*, 4 H. & N. 653.

³ *Rea v. Chillesford*, 4 B. & C. 94.

⁴ Sch. Dom. Rel. s. 269, and the cases there cited.

⁵ *Plume v. Plume*, 7 Ves. 258. It is true in this case that the father had left his son a legacy to a greater amount than his claim, but the Lord Chancellor (Eldon) was of opinion that apart from that circumstance the father had never looked upon his son in the relation of a creditor.

As a widow.

manner. Her right would not exist in cases where the father was supporting and maintaining his children, for she is then under no obligation to provide for their sustenance, and reciprocally could not legally claim to be indemnified for her toil and trouble. Where she is a widow, and her children are under sixteen, she is bound to support them, and her right to their wages and earnings would be established on the same foundation as that of the father. Again, under the Married Women's Property Act, 1882,¹ if she has any property she is liable for the support of her children and grandchildren (though the primary liability of the husband still exists); it would, therefore, follow that in a case where she was bound to support her children, she would be entitled to the earnings of any child under the age of sixteen living with and supported by her.

Relations
between step-
father and
step-children.

Whatever right and title there may be in the parents to take the earnings of their children would extend in the case of a step-father to the earnings of his step-children, at any rate up to the age of sixteen; for by law he is now bound to support them till they reach that age.² The step-father is *in loco parentis* to the step-child; and neither can he ask for compensation out of the fortune of the child for affording means of subsistence, nor can the child, if it has rendered services, claim compensation for them, as though their mutual position had been that of master and servant, unless the child, being of age, has stipulated to be rewarded for his services.³

American law.

In the United States of America it is now settled law that as long as the period of the child's nurture continues, the right in the father to its earnings exists.⁴ "In consideration of this obligation on the part of the father to maintain his children, the law gives him a right to all their earnings; and in case of his death the mother has the right."⁵ "Whether this right remains absolute in the father until the child has attained full age is apparently a matter of doubt; it is certainly perfect while the period of the child's nurture continues. But if this is all it can be of little consequence, because the child's labour and services are for that period of little or no value; nor could compensation be thus afforded for the many years when the child was entirely helpless. All will admit that the father's right continues until the child reaches fourteen."⁶ Thus, the right of action to recover for the services of a minor is presumed to be in the parent; and a father has recovered the wages due to his son, who was a sailor

¹ 45 & 46 Vict. c. 75, s. 21.

² See *ante*, p. 553.

³ Whether up to full age is a matter of doubt. Reeve (Dom. Rel. s. 290) thinks the right exists. Chancellor Kent (2 Com. 193) does not appear to have a strong opinion that it does.

⁴ Story, Cont. s. 142.

⁵ 4 & 5 Wm. IV. c. 76, s. 57.

⁶ Sch. Dom. Rel. s. 152.

and under age, in a suit in the Admiralty.¹ A father may also charge for his services rendered by his child, and consider it his own work.² Payment to the minor of his wages does not discharge the liability of the employer, and the parent may bring an action for them against him, if he had no knowledge of the hiring until after the wages were earned.³ But where a father has discharged himself of the obligation to support the child, by emancipating him, or has obliged the child to support himself, the American courts are reluctant to admit his right to the child's services.⁴

Where a child, minor or adult, dies unmarried and intestate possessed of personal property, the father takes the whole of it to the exclusion of the mother and brothers and sisters, and other next of kin; and if there is no nearer relation than the grandfather, then the grandfather takes the whole. If the child were to leave a widow, but no children, the father and the widow would share his property equally.

Rights of the
parents on the
death of the
child.
Father.

The right of the mother to succeed under the Statute of Distributions⁵ to her child's personal estate, in the event of its dying intestate, is somewhat complicated; and the amount of her interest in the property depends altogether upon the number and propinquity in blood of the next of kin. If the child dies intestate and leaves no child, father, brother, sister, nephew, or niece, then the mother takes the whole; if the child leaves a widow, but no child, father, brother, sister, nephew, or niece, then the mother and the widow would share his property equally. If the child leaves a brother or sister, or a brother and sister, the property is divided equally between the mother and her other child or children as the case may be. If the child leaves a widow, and brothers and sisters, the mother shares in equal proportion with the brothers and sisters in half of the intestate's property. If the child leaves a widow and nephews and nieces, the mother gets a fourth of his property.

Mother;
Statute of Dis-
tributions.

Grandparents, paternal and maternal, take in equal shares, and where the grandmother is the sole surviving nearest relation she would take the whole; thus, a grandmother would take in preference to an uncle or an aunt. Posthumous and half-blood relatives are in the same position as those born in the lifetime of both their parents, and as those of the whole blood.

In the English legal system there is no indefeasible right of inheritance in a child to its parent's property, whether real or personal. There is no provision in the English jurisprudence

Succession of
child *ab*
intestato to
parent's realty:

¹ *Gifford v. Kollock*, 3 Ware, 45 (Amer.).

² Sch. Dom. Rel. s. 252.

³ *White v. Henry*, 24 Me. 521 (Amer.).

⁴ Sch. Dom. Rel. s. 252 (a); *Wilson v. M'Millan*, 62 Ga. 16 (Amer.).

⁵ 22 & 23 Car. II. c. 10.

against an "undutiful will" (*inofficiosum testamentum*); and if a parent choose to cut his child or children out of his will, he is free to do so; and the terms of his will will be enforced. If a parent die intestate seised of real property in fee simple and leave an only son, that son will take that realty (subject to any dower or curtesy right that may be enforceable by his surviving parent; if such parent die intestate leaving more than one son, the eldest son takes the realty to the exclusion of his brothers and sisters. If such parent die intestate and leave an only daughter she will take the realty (subject to the above rights); if such parent die intestate and leave more than one daughter, all the daughters will take as coparceners, or joint owners, any one of whom can sever her joint interest without the consent of the other or others.

to personalty,
under the
Statute of
Distributions.

If a parent die intestate leaving personalty and an only child (but no widow or husband) such child takes the whole of the property; if leaving more than one child, then the children take the property in equal shares under the Statute of Distributions;¹ but the descendants of children who have died in the intestate's lifetime shall stand in the place of their parents or ancestors.² Children are not "next of kin" to their parents within the meaning of the Statute of Distributions; thus in a settlement of property on a spinster containing an ultimate trust for her statutory next of kin as if she had died intestate and "without ever having been married," her children by any husband would be *prima facie* excluded.³

Child not
"next of kin"
to parent.

Right of
parent to
insure life of
child.

A father has no insurable interest in the life of his child on the mere ground of ties of blood or affection.⁴ The interest must arise out of some subsisting right of property, which may be prejudicially affected by the occurrence of the event assured against, and which whether in possession, in reversion, or contingent, would give the assured a standing in a court of equity if the title were in question.⁵ If the father has a pecuniary interest in his son's life, as where property is divested from him on the death of his son, or even where the son is his debtor, he may effect an insurance on his life; and if a father (and after his death possibly the mother) wishes to give his child some property to dispose of, he may make an insurance on his child's life in his (the child's) name, not for his own (the father's) benefit, but for the benefit of his child, and there is no law to prevent him doing so.⁶ Though a policy may be void as between the contracting

¹ 22 & 23 Car. II. c. 10, s. 5.

² See *Ross' Trusts*, 20 W. R. 231.

³ *Re Smith's Settlement*, *Wilkins v. Smith*, [1903] 1 Ch. 373; *Re Brydson's Settlement*, *Cobb v. Blackburne*, [1903] 2 Ch. 84. In these cases *Re Ball's Trusts*, 11 Ch. D. 270, was not followed.

⁴ Under 14 Geo. III. c. 48, s. 3.

⁵ *Halford v. Kymer*, 10 B. & C. 724; *Worthington v. Curtis*, 1 Ch. D. 419.

⁶ *Halford v. Kymer* (*ubi sup.*).

parties for want of insurable interest, yet if the father receive the money from the insuring office, he can retain it as against the child's creditors.¹ An adult child has no greater insurable interest in the life of his parent, as such, than the parent has in the life of the child; but a like pecuniary interest is necessary to make the assurance valid.²

(2) *Gifts and Transactions between Parent and Child.*

A gift of property by an infant to its parent would, as in the case of a gift to a stranger, be voidable by the infant, and might be recalled by him within a reasonable time after attaining his majority. A gift from an adult child to its parent is as perfect and valid a transaction as a gift from him to a stranger; but where the transfer to the parent is by way of gift or improvident contract soon after the child has reached majority, then the suspicions of the courts administering equity are aroused. The principle upon which a court of equity acts in such a case, is to presume that where a transaction takes place between parent and child just after the latter has attained twenty-one, and prior to what may be called a complete emancipation, without any benefit moving to the child, an undue influence has been exercised to procure that liability on the part of the child, and a party who seeks to maintain such a transaction must show that the presumption is adequately rebutted.³ Undue influence is the sense of power and authority on the one side, and dependence on the other, that tempts the stronger to ply his opportunity and exceed his duty.

Gifts and transactions between parent and child. Gifts from child to parent.

The law on this subject is well laid down by Lord Justice Turner in *Wright v. Vanderplank*,⁴ who said: "A child may make a gift to a parent, and such a gift is good if it is not tainted by parental influence. A child is presumed to be under the exercise of parental influence as long as the dominion of the parent lasts. Whilst that dominion lasts, it lies on the parent maintaining the gift to disprove the exercise of parental influence by showing that the child had independent advice, or in some other way. When the parental influence is disproved; or that influence has ceased, a gift from a child stands on the same footing as any other gift; and the question to be determined is whether there was a deliberate, unbiassed intention on the part of the child to give to the parent." Thus, when a son, soon after attaining his majority, makes over property to his father without consideration, or for an inadequate consideration, equity will require the father to show that the son was a free agent, and had adequate and independent

When gift valid

¹ *Worthington v. Curtis* (*ubi sup.*).

² *Howard v. Refuge Friendly Society*, 54 L. T. 644.

³ *Archer v. Hudson*, 7 Beav. 551.

⁴ 27 L. T. (O.S.) 91.

advice.¹ But, on the other hand, if the child can be proved to be a free agent, the gift from the child to the parent will be maintained;² thus, in a case where about six months after a daughter came of age, the creditor of her father obtained from her securities for his debt, it was held that as the creditor had not used any undue or fraudulent means, or availed himself of the fraud of any other party to procure payment, the mere fact of a daughter voluntarily paying the debt of her father who was in difficulties, was not, in itself, ground for imputing undue influence to the father.³ The circumstances of the case are to be taken into consideration in judging of the fairness of an arrangement between parent and child, and the mere fact that it was for the advantage of the parent is insufficient to set it aside, though the child executed it soon after coming of age.⁴ But where a father, tenant for life, takes advantage of his son's (tenant in tail) necessities to draw him in to join in any conveyance which would destroy his remainder, the court, upon very slender evidence of such a practice, would relieve the son;⁵ and where a child living under the influence of a parent executes a settlement under which the parent derives an advantage, the child ought to be separately advised;⁶ for in such a case the jealousy of the court is aroused; but the taking of the benefit by the parent does not necessarily become unfair, and if unfair does not vitiate the whole of the arrangement.⁷ This interference on the part of equity is exercised in virtue of the jurisdiction of the Court of Chancery in watching over and protecting those who are placed in a situation to require protection as against the acts of those who have influence over them, by which acts the person having such influence obtains any benefit to himself. The court interferes "upon the ground of the close attention, the strictness, and the jealousy with which, upon principles of natural justice, and upon consideration important to the interests of society, the law of this country examines, scrutinizes, and if I may borrow an old expression, weighs in golden scales every transaction between a guardian and his ward, or between a parent and his child, which, including or consisting of a gift from the younger to the elder, takes place so soon after the termination of the legal authority, as that the ward or child may, in consequence, probably be—not in the largest or amplest sense of the term—not, in mind as well as in person, an entirely free agent."⁸ This jealousy is more than ever evinced where the inception of the transaction was during the

¹ *Savery v. King*, 5 H. L. Cas. 627.

² *Blackburn v. Edgeley*, 1 P. Wms. 600.

³ *Thornber v. Sheard*, 12 Beav. 588; and see *Firmin v. Pulham*, 2 De G. & S. 99.

⁴ *Bellamy v. Sabine*, 17 L. J. Ch. 105.

⁵ *Wallace v. Wallace*, 2 Dr. & W. 452; see *Rhodes v. Cook*, 4 L. J. Ch. 147.

⁶ *Tucker v. Bennett*, 38 Ch. D. 1.

⁷ *Hoblyn v. Hoblyn*, 41 Ch. D. 200.

⁸ Per Knight Bruce, L.J., in *Wright v. Vanderplank*, 27 L. T. (O.S.) 137. See also *Turner v. Collins*, L. R. 12 Eq. 438.

minority of the child. A mortgage and subsequent sale of property executed by a son a very short while after attaining majority under the influence of his father was set aside as being prejudicial.¹ Where a parent sets up a deed under such circumstances, two things are required of him: (a) that the deed was the real and actual deed of the child, and was intended by the child to have the operation that it has; (b) and that the intention was fairly produced. The legitimate influence brought to bear by a parent on the child is not discountenanced by the court; but it must be exercised for the benefit of the child subjected to it, and not of the parent possessing it. Undue influence is not necessarily presumed;² and where it can be shown that the child was a free agent, the gift will be upheld.³ But where a son gives all his property to his father, the latter undertaking to pay the son's debts, the presumption is that the surplus (if any) belongs to the son in the absence of proof to the contrary.⁴ Again, where a deed conferring a benefit on a father is executed by a child who is not emancipated from the father's control (though of age), if the deed is subsequently impeached by the child, the *onus* is on the father to show that the child had independent advice, and had executed the deed with full knowledge of its contents and with the free intention of giving the father the benefit conferred. If this *onus* is not discharged the deed will be set aside. This *onus* extends to a volunteer claiming through the father and to any person taking with notice of the circumstances which raise the equity, but no further.⁵

Parental influence must be exercised for the benefit of the child.

The above rules apply where the recipient of the gift, or person taking a benefit under the contract, is *in loco parentis* to the person acting under his influence,⁶ as, for instance, an uncle and a niece brought up in his house,⁷ also, an elder brother who has had the care and superintendence of his younger brother and sisters. If a stranger, knowing of the circumstances of the transaction, takes a benefit under it, it will be set aside as against him;⁸ but not if he is ignorant of the real nature of the transaction.⁹ The law to be applied is clear, but when and in what manner depends upon the circumstances of each case. It would be impossible to give an exhaustive list of what facts are to be taken into consideration in arriving at a conclusion, because each case must be determined according to its own merits and surroundings: but there are some which would always be common in every instance brought before the court for investigation on

Persons *in loco parentis*.

When transaction set aside as against strangers.

¹ *Savery v. King*, 5 H. L. Cas. 627.

² *Rhodes v. Cook* (*ubi sup.*); *Thornber v. Sheard* (*ubi sup.*).

³ *Blackburn v. Edgeley*, 1 P. Wms. 609.

⁴ *May v. May*, 33 Beav. 81.

⁵ *Bainbrige v. Brown*, 18 Ch. D. 188.

⁶ *Beasley v. Magrath*, 2 Sch. & L. 31.

⁷ *Archer v. Hudson*, 7 Beav. 551.

⁸ *Ibid.*

⁹ *Thornber v. Sheard* (*ubi sup.*); *Bainbrige v. Brown* (*ubi sup.*).

an application to set aside the transaction, such as what was the age of the child at the time of making the gift, whether just past or considerably over majority; whether living with the parent, and so directly under his control and influence, or apart from him, when the possible influence would not be so strong; also the strength or weakness of the mind and will of the child.

Family
arrangements.

Parental influence allowed if arrangement is advantageous for the family.

There are, however, some conditions under which the parental influence is allowed to have greater force and weight than under others, and a broad distinction is drawn between them if family arrangements are carried out, or family disputes settled by the agreement between parent and child, and the latter afterwards complains of the influence brought to bear upon him by the former; yet if the agreement be reasonable, the court will not set it aside, on the ground that the arrangement was to the advantage of the family.¹ "If the settlement of the property be one in which the father acquires no benefit not already possessed by him, and if the settlement be a reasonable and proper one, the court will support it, even though it may appear that some influence was exerted by him to induce the son to execute it; and provided also that there was no suppression of what is true, or suggestion of what is false";² and it is not essential that the child should have independent advice, and the court will not inquire whether the influence of the parent was exerted with more or less force.³ Where family lands are settled in strict settlement, of which the father is tenant for life, and the eldest son is tenant in tail in remainder, it is a most common arrangement for the eldest son, on attaining majority, either on marriage or in consideration of a present advance, or some other consideration, to agree to reduce himself to a tenant for life, with remainder to his eldest son and other sons in tail; an arrangement of this kind is upheld, though the son gives up some of his rights, as being for the benefit of the family in preserving the estates.⁴ Again, where there is a family dispute, an arrangement based on a compromise will be upheld;⁵ or where there is a mutual benefit accruing to father and child.⁶ But the son must have a reasonable knowledge and appreciation of what he is doing,⁷ and the father must not alone take a benefit under the arrangement, otherwise it will be set aside.⁸ The court must be satisfied by clear and unequivocal evidence that the nature of the transaction was understood, if it is to stand.⁹

Arrangement may be set aside as against third person.

A transaction vitiated by undue parental influence will be set aside, as against a third person, if he take a benefit under it

¹ *Cory v. Cory*, 1 Ves. Sen. 19; *Stapleton v. Stapleton*, 1 Atk. 2.

² *Per Romilly, M.R.*, in *Hoghton v. Hoghton*, 21 L. J. Ch. 482.

³ *Hoblyn v. Hoblyn*, 41 Ch. D. 200.

⁴ *Hoghton v. Hoghton* (*ubi sup.*).

⁵ *Partridge v. Smith*, 9 Jur. (N.S.) 742.

⁶ *Bosville v. Middleton*, 29 L. T. 4 (O.S.) 742.

⁷ *Meadows v. Meadows*, 16 Beav. 301.

⁸ *Pulmer v. Wheeler*, 2 Ba. & B. 18.

⁹ *Davies v. Davies*, 4 Giff. 417.

knowing of the circumstances existing between parent and child;¹ but such knowledge on his part must be actual and not merely constructive.² These gifts or transactions, which might have been set aside within a reasonable time of their taking place, may become confirmed and binding by acquiescence,³ or by the persons who had the right to set them aside acting on them,⁴ or recognizing them as valid,⁵ or allowing third persons to acquire rights under them.⁶

Confirmation
by acquies-
cence, &c.

A gift from a parent to a child is as valid and perfect as from one stranger to another. When a father parts with property in favour of his son, it becomes as between them the exclusive property of the son as much as if it had been given to him for valuable consideration.⁷ The parent must have an intention of making an immediate present gift, and not a gift to take effect in the future.⁸ A voluntary settlement is binding on the parent and may be enforced by the children.⁹

Gifts from
parent to
child.

Some of the more important donations from parents to children are portions which are to be divided among younger children, whether to be raised out of realty by a power reserved to the parents by the settlement of the land, or out of personalty in accordance with a power of appointing a particular fund among their children, and legacies from parents to children; for a legacy coming from a parent to a child must be understood as a portion, though not described in the will.¹⁰ It is generally reserved to the parents to revoke any appointment made by them on behalf of their child or children; but where for valuable or other consideration the appointment is declared to be irrevocable, the interest of the appointee in the property appointed is indefeasible. Where portions are given by parents or persons *in loco parentis* to younger children whose interest in them is contingent in so far as such portions are not raisable till they are wanted, though the settlement creating the portions contains no provision for the maintenance of the children, yet interest by way of maintenance will be allowed during minority or the period before the complete vesting of the portions.¹¹ The amount to be allowed is in the discretion of the court.¹²

Portions
among younger
children.

¹ *Archer v. Hudson*, 7 Beav. 551; *Savery v. King*, 5 H. L. Cas. 627; see also *Pulmer v. Wheeler* (*ubi sup.*). In *Hannah v. Hodgson* (9 W. R. 729), the court refused to assist a purchaser in getting in the outstanding legal estate of a property which a father and son had concurred in selling, the father getting the whole of the purchase-money.

² *Macqueen v. Farquhar*, 11 Ves. 467.

³ *Turner v. Collins*, L. R. 7 Ch. App. 329.

⁴ *Rogers v. Bruce*, Beatt. 486.

⁵ *Wright v. Vanderplank*, 27 L. T. (O.S.) 91.

⁶ *Jarratt v. Aldam*, L. R. 9 Eq. 463.

⁷ Per Sir J. Romilly, M.R., in *May v. May*, 33 Beav. 81, 87.

⁸ *Re Ridgway, Ex parte Ridgway*, 15 Q. B. D. 447.

⁹ See *Langdon v. Blake*, 12 L. T. 202.

¹⁰ *Ex parte Pye*, 18 Ves. 140; 2 W. & T. L. C. 366.

¹¹ *Re Greaves' Settled Estates, Jones v. Greaves*, [1900] 2 Ch. D. 683; Lewin on Trusts, 483.

¹² *Ibid.*

Object of portions to secure competency for younger children.

The aim and object of portions is to secure a competency for the younger children of the marriage;¹ and the guiding principle of the law in reference to them is to secure an equality of division, so that while no child shall be excluded, no one shall take a double share. It not infrequently happens that a child will have a portion appointed to it, and a legacy left it by the parent, or has a legacy left it and subsequently has a portion appointed to it, and the question may then arise whether the legacy or appointed portion is to be held as an additional sum in favour of the appointee or legatee, or as a satisfaction of the portion, or an ademption of the legacy. If the intention of the parent is clearly expressed no doubt can arise, but in cases where such expression of intention is absent then difficulties do arise.

Equity leaning against double portions.

The Court of Chancery, as administering equity, ever leans strongly against double portions, and endeavours to secure equality of division among younger children, so that one child shall not be unduly favoured at the expense of the others;² and it is immaterial how the inequality in favour of one or more of the children arises. Where a parent has left a legacy, and afterwards appoints a portion to that child under a power in the settlement, the legacy, unless there are reasons to the contrary, is presumed to be *adeemed*, *i.e.*, cancelled or taken out of the will.³ As between parent and child the presumption arises that a parent does not intend to give double portions to his children. The mere fact that the trusts of the legacy and those of the settled portion are not identical does not affect the operation of ademption.⁴ When a parent by will gives a benefit to a child and afterwards on marriage or some other event makes a settlement upon the child, the later provision is considered as an ademption of the previous gift by will unless it can be seen either by parol testimony as to the intention of the parent, or by something appearing on the documents that the child is intended to have both.⁵ A gift of a share of residue by a parent's will may be adeemed by a gift by deed of his business (part of the residue); and the mere fact that the parent retains some advantage for himself under the deed does not prevent the rule against double portions applying.⁶ The gift subsequent to the legacy (to effect an ademption) must be of the nature of a bounty on the

Ademption.

¹ Younger children are children other than the child who has succeeded to the family estate. *Re Bayley's Settlement*, L. R. Ch. 6 App. 590.

² *Ex parte Pye*, 18 Ves. 140; *Hartopp v. Hartopp*, 19 Ves. 184; *Re Fitzgerald's Settled Estates*, *Saunders v. Boyd*, [1891] 3 Ch. 394; *Montague v. Sandwich (Earl of)*, 32 Ch. D. 525.

³ *Lord Chichester v. Coventry*, L. R. 2 H. L. 71. A residuary bequest has the same effect. *Lady Thynne v. Earl of Glengall*, 2 H. L. Cas. 131.

⁴ See *Re Furness*, *Furness v. Stalkartt*, [1901] 2 Ch. 346.

Montague v. Sandwich (Earl of) (*ubi sup.*).

⁶ *Re Vickers*, *Vickers v. Vickers*, 37 Ch. D. 525.

part of a parent, such as the payment of the debts or relief from temporary embarrassments of the legatee;¹ and if it can be shown that the subsequent gift was made in consideration and remuneration of the services of the child, the presumption against double portions is rebutted, even where it may be presumed that the subsequent gift was made by way of portion.² This presumption does not prevail where the testamentary portion and subsequent advancement are not *ejusdem generis*.³ The duty of making provision for a child *prima facie* falls on the father; but the duty may fall on the mother; but the *onus* of proof that it does so fall lies on those who assert it.⁴

Where a parent appoints a portion to a child, and afterwards gives a legacy (whether certain in amount or residuary) to the same child, the presumption is, unless there are reasons to the contrary, that the portion is *satisfied* by the legacy, on the assumption that the maker of the second instrument supposed himself to be substantially satisfying the obligation of the first.⁵ Thus, if a father has made a provision by way of covenant in favour of his child before the date of his will; then, unless it appears upon the will or by parol testimony that he intends to give the benefit conferred by the will in addition to that which is already secured to the child by covenant, then the child will not take both.⁶ To sum up these two rules, it may be said that a portion *adeems* a legacy or residuary bequest; and a legacy or residuary bequest *satisfies* a portion. Satisfaction.

There are marked distinctions between ademption and satisfaction. In cases of satisfaction the persons intended to be benefited by the covenant, and the persons intended to be benefited by the bequest or devise, must be the same; in cases of ademption they may be and frequently are different. Another distinction is that in the case of satisfaction the person doubly benefited must elect to take either under the covenant or the will. Difficult and intricate questions frequently arise in construing these transactions, and much depends upon the evidence of intention on the part of the donor of the benefits. The rule is much easier of application when the first provision is made by will, and the second by deed, than where the first provision is by settlement, and the will follows.⁷ In the former case the provision by Distinction between satisfaction and ademption.

¹ *Re Scott, Langton v. Scott*, [1903] 1 Ch. 1.

² *Re Lacon, Lacon v. Lacon*, [1891] 2 Ch. 482.

³ *Holmes v. Holmes*, 1 Bro. C. C. 555; and see *Re Jaques, Hodgson v. Braisy*, [1903] 1 Ch. 267.

⁴ *Re Ashton, Ingram v. Papillon*, [1897] 2 Ch. 574.

⁵ *Ex parte Pye* (*ubi sup.*); *Earl of Durham v. Wharton*, 6 L. J. Ch. 17. "Satisfaction" may be defined to be the donation of a thing, with the intention, either express or implied, that it is to be taken wholly or in part, in extinguishment of some prior claim of the donee.

⁶ *Montague v. Sandwich (Earl of)* (*ubi sup.*).

⁷ See *Re Lacon, Lacon v. Lacon* (*ubi sup.*).

will is under the absolute control of the person making it up to the time of his death. But where a parent provides for a child by a settlement binding upon him, and afterwards makes provision for him by will, he cannot substitute the legacy for the benefit conferred by the settlement without the consent of those benefited by the settlement, and thus the difficult question of what was the intention of the testator is raised.¹ A legacy by a parent is not, however, deemed to be satisfied by occasional small gifts in the testator's lifetime,² or by such gifts as a sum of money presented by a father to his daughter for her wedding outfit and the honeymoon.³ The presumption of satisfaction is only one of law, and may be rebutted; as where the two provisions by the different instruments are of a different nature;⁴ but merely slight differences between the limitations of the will and the settlement, as, for instance, different powers of investment, different trustees, and variation in the power of appointment, will not, if the two provisions are substantially of the same nature, negative the rule against double portions.⁵ There must be strong evidence on the second instrument that the child was intended to get a double portion.⁶ This is really a question of the intention of the donor as to whether the child benefited is to be put to his election or not.⁷ In the case of the satisfaction of the portion previously secured by will, slighter circumstances are adequate to repel the presumption than they are in the case in which the gift by way of settlement follows the will.⁸ This rule does not extend to a gift made to a child before the date of the will, for there is no presumption of law that the payment of a sum of money to a child by a parent before the date of the will is to go against a legacy to that child.⁹

It is now settled (though formerly controverted) that when the adeeming or satisfying amount is less than the original sum (whether covenanted to be paid, or left as a legacy), such smaller sum is only a *pro tanto* and not total ademption or satisfaction.¹⁰

Where a parent owes a debt to a child, a subsequent legacy will not, in the absence of intention, express or implied, be considered a satisfaction of the debt unless it be either equal to or greater than the debt in amount; and the presumption of satis-

Presumption
not rebutted
by slight varia-
tion between
the two
provisions.

Parent
indebted to
child.

¹ Per Cranworth, L.C., in *Lord Chichester v. Corentry* L. R. 2 H. L. 71. For a full discussion of this subject see *Ex parte Pye*, 18 Ves. 140; 2 W. & T. L. C. 366.

² *Re Peacock's Estate*, L. R. 14 Eq. 236; S. C. 24 L. T. 472.

³ *Ravenscroft v. Jones*, 33 L. J. Ch. 482.

⁴ See *Lord Chichester v. Corentry* (*ubi sup.*); and see *Cartwright v. Cartwright*, [1903] 2 Ch. 306.

⁵ See *Mayd v. Field*, 3 Ch. D. 587.

⁶ Per Turner, L.J., in *Lord Chichester v. Corentry* (*ubi sup.*).

⁷ *Re Battersby's Estate*, 19 L. R. Ir. 359.

⁸ *Lord Chichester v. Corentry* (*ubi sup.*); *Tussaud v. Tussaud*, 9 Ch. D. 363.

⁹ See *Taylor v. Cartwright*, L. R. 11 Eq. 167.

¹⁰ *Pym v. Lockyer*, 5 Myl. & Cr. 29; *Lady Thynne v. Earl of Glengall*, H. L. Cas. 131; *Re Pollock, Pollock v. Worrall*, 28 Ch. D. 552.

faction will not be repelled by any of those slight circumstances which will take a bequest of such amount to a stranger out of the general rule.¹ Where a parent is indebted to a child, and makes in his lifetime an advancement to the child, as upon marriage, or some other occasion, of a portion equal to or exceeding the debt, it will *prima facie* be considered a satisfaction, and it is immaterial whether the portion be given in consideration of natural love or affection, or whether property be settled by the other party in consideration of it, or whether, in the case of a father to a daughter, the husband be ignorant of the debt.² But this presumption may be rebutted, as where a parent by a breach of trust becomes indebted to a child in respect of the trust funds, and on the marriage of the child settles an equal or larger amount than the debt and the child is ignorant that a breach of trust had been committed.³

This rule against double portions extends to the case of persons not actually parents, but who stand *in loco parentis*; and where such a person gives a legacy for a particular purpose, and afterwards advances money for the same purpose, a presumption arises that it was intended, and it will accordingly be held as an ademption of it;⁴ but a mere general legacy does not disclose any such particular purpose.⁵ Where the person does not stand in such a relation, or the facts do not disclose any intention of satisfaction, the presumption will not arise.⁶ This doctrine of ademption of legacies founded on parental or *quasi*-parental relations, applies also to cases where a moral obligation other than parental or *quasi*-parental is recognized in the will, though without reference to any special application of the money.⁷ Interest is not payable on a portion until it is raisable, though the right to it may be vested;⁸ and so maintenance cannot be allowed out of it; but if the portion is raisable then the income may be applied by way of maintenance.⁹

Where a parent has made advances to a child "by way of portion," and dies intestate, the child so advanced is not entitled to a share under the Statutes of Distributions¹⁰ in the residue of the intestate's property unless it brings into hotchpot the sum or sums so advanced to it in order to equalize the share taken by each child of the deceased intestate parent.¹¹ An advancement

Persons *in loco parentis*.

Advances by parent by way of portion.

Hotchpot.

What are advancements.

¹ *Tolson v. Collins*, 4 Ves. 483. The rule is *Debitor non presumitur donare*.

² *Wood v. Briant*, 2 Atk. 521; *Plunkett v. Lewis*, 3 Ha. 316.

³ *Crichton v. Crichton*, [1896] 1 Ch. 870.

⁴ *Monck v. Monck*, 1 B. & B. 303; *Fowkes v. Pascoe*, L. R. 10 Ch. App. 343.

⁵ *Re Smythies, Weyman v. Smythies*, [1903] 1 Ch. 259.

⁶ *Pankhurst v. Howell*, L. R. 6 Ch. App. 136; *Re Smythies, Weyman v. Smythies* (*ubi sup.*).

⁷ *Re Pollock, Pollock v. Worrall* (*ubi sup.*).

⁸ *Wilcox v. Brown*, 2 W. R. 153.

⁹ *Knapp v. Knapp*, L. R. 12 Eq. 238.

¹⁰ 22 & 23 Car. II. c. 10; 1 Jac. II. c. 17, s. 7.

¹¹ 22 & 23 Car. II. c. 10, s. 5.

by way of portion has been defined by Jessel, M.R., in *Taylor v. Taylor*,¹ to be "something given by the parent to establish the child in life, or to make what is called a provision for him," but this opinion was disapproved of by Pearson, J., in *Re Blockley*, *Blockley v. Blockley*;² and in *Boyd v. Boyd*³ Wood, V.C., said: "Whenever a sum is paid for a particular purpose, which is thought good and right by the father, and which the son himself desires, if it be money which is drawn out in considerable amount, and not a small sum, it must be treated as an advance. The payment of the money is the important thing; the court does not look to the application." But the view of Jessel, M.R., in *Taylor v. Taylor*,⁴ has been preferred by the Court of Appeal.⁵ The legal presumption that a gift in the lifetime of a testator was intended as a portion may be rebutted by the circumstances of the gift.⁶ And where the gift is of the nature of remuneration for the child's services, then the child is not bound to account for, or bring into hotchpot, such advance.⁷ Sums given for the following objects have been held advancements: Payment of admission to one of the Inns of Court in the case of a son intended for the Bar;⁸ purchase of a commission (in the days of army purchase),⁹ and an outfit of a son entering the army;¹⁰ the price of plant and machinery and other payments for starting a child in business;¹¹ provision for a son on marriage, including the limitations for his wife and children,¹² and if such son die in the parent's lifetime his issue cannot claim his distributive share without bringing his advancement into hotchpot;¹³ a gift to a child to pay a debt.¹⁴ The following have been held not to be advances: Mere casual payments made at odd times without the definite purpose of establishing the child in life, even though necessary to maintain him in the position acquired by a previous advancement;¹⁵ or annuities paid by a father to his daughter pursuant to his covenant in a separation deed;¹⁶ these are rather allowances in the nature of maintenance. A liability by a parent as surety for a child which is afterwards enforced against the executors of the parent is not an advancement;¹⁷ so, too, the payment by a father of a son's debts may not be deemed to be an advancement requiring the sum to be brought into account.¹⁸

What are not
advances.

¹ L. R. 20 Eq. 157.

² 29 Ch. D. 250.

³ L. R. 4 Eq. 305.

⁴ *Ubi sup.*

⁵ *Re Scott, Langton v. Scott*, [1903] 1 Ch. 2.

⁶ *Ibid.*

⁷ *Re Lacon, Lacon v. Lacon*, [1891] 2 Ch. 482.

⁸ *Taylor v. Taylor (ubi sup.)*.

⁹ *Ibid.* See *Rowles v. Rowles*, 7 Jur. 665.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Weyland v. Weyland*, 2 Atk. 635.

¹³ *Proud v. Turner*, 2 P. Wms. 560

¹⁴ *Re Blockley. Blockley v. Blockley*, 29 Ch. D. 250; *Re Whitehouse, Whitehouse v. Edwards*, 37 Ch. D. 683.

¹⁵ *Boyd v. Boyd*, L. R. 4 Eq. 305; *Taylor v. Taylor (ubi sup.)*. See *Pusey v. Deshouverie*, 3 P. Wms. 317, note o; *Watson v. Watson*, 33 Beav. 574.

¹⁶ *Hatfield v. Minet*, 8 Ch. D. 136.

¹⁷ *Re Whitehouse, Whitehouse v. Edwards (ubi sup.)*.

¹⁸ *Re Scott, Langton v. Scott (ubi sup.)*.

The like necessity of bringing advancements into hotchpot arises where the parent leaves a will with a hotchpot clause; and the effect of that clause is to prevent the child advanced (without bringing into hotchpot the sum advanced to him) from taking any further part of the disposable fund, and to give to the other objects of the will that portion of the fund which, but for the hotchpot clause, he would have taken.¹ Interest will be chargeable on the advances, if necessary, to equalize the shares of the advanced and unadvanced children;² but in the absence of any direction by a testator to the contrary, advancement to children on account of their portions bear no interest up to his death; but from his death they bear interest at the rate of 4 per cent.³ In the case of a partial intestacy, advances must be brought into hotchpot.⁴ The combined effect of a gift clause and a hotchpot clause in a will is primarily to pass the amount of the gift absolutely to the donee, and to take it out of the testator's estate.⁵ Money paid by the testator under a guarantee, and purchase-money of a business sold by the testator to a child, would be an advancement,⁶ but not money which the testator was never entitled to receive during his life,⁷ nor money advanced before the date of the will, nor small sums whether before or after that date.⁸ The heir-at-law is not bound to bring into hotchpot any land which he takes by descent or otherwise from the intestate.⁹

Sums transferred by a parent into the name of a child will, in the absence of rebutting evidence, be presumed to be advancements, and not to create a resulting trust for the transferor.¹⁰ If it is proved in evidence that no benefit was intended, then the presumption is rebutted, and there will be a resulting trust for the parent,¹¹ and where the parent continues in possession of the fund, the intended benefit must be a present one, and not a purchase with a view to an ultimate one; and where a present benefit is intended, it is of course inconsistent with the reservation of any beneficial interest.¹² When a transfer is made to a child, the burden is thrown upon those who deny that it was an absolute gift to prove there was no intention on the part of the parent to make an advancement or provision for the child.¹³ "Where a

Transfer into
name of child.

¹ See *Warde v. Firmin*, 11 Sim. 235.

² *Re Rees, Rees v. George*, 17 Ch. D. 701; but see *Re Dallmeyer, Dallmeyer v. Dallmeyer*, [1896] 1 Ch. 372.

³ *Stewart v. Stewart*, 15 Ch. D. 539.

⁴ Under the combined effect of 22 & 23 Car. II. c. 10, s. 5, and 11 Geo. IV. and 1 Wm. IV. c. 40, s. 1; *Stewart v. Stewart* (*ubi sup.*).

⁵ *Re Cosier, Humphreys v. Gadsden*, 76 L. T. 31.

⁶ *Auster v. Powell*, 1 De G. J. & S. 99.

⁷ *Ibid.*

⁸ *Re Peacock's Estate*, L. R. 14 Eq. 236; S. C. 27 L. T. 472; *Re Orme, Evans v. Maxwell*, 50 L. T. 51.

⁹ See *Lutwyche v. Lutwyche*, Cas. temp. Talb. 276.

¹⁰ *Grey v. Grey*, 1 Ch. Cas. 296; *Dyer v. Dyer*, 2 Cox, Eq. Cas. 92; *Sayre v. Hughes*, L. R. 5 Eq. 376; *Fowkes v. Pascoe*, L. R. 10 Ch. App. 343.

¹¹ *Dumper v. Dumper*, 3 Giff. 503.

¹² *Ibid.*

¹³ *Hepworth v. Hepworth*, L. R. 11 Eq. 10.

father purchases property in the name of his son, without making any formal declaration of trust, it is either a gift to the son absolutely or he is a trustee for his father. If the son is a trustee at all, he is wholly a trustee; but the strong presumption of law is that he is not a trustee. It is said that the taking possession by the father at the time of the purchase is insufficient in general to rebut the presumption, but this does not, I conceive, apply where there is a formal and unmistakable act of taking possession. Suppose a man bought a shop, and put his own name over the door, that would be an ostensible taking possession, sufficient to show ownership in the father and trusteeship in the son."¹ But where a parent advances money for the purpose of qualifying the child for a particular position, and with no intention of making an absolute gift of the money so advanced, there is no presumption of advancement, but the child will hold, if necessary, the qualifying property as trustee.² This presumption holds good in the case of the purchase of real estate.³

Presumption extends to persons *in loco parentis*.

This presumption is not limited to the case of father and child, but arises in the case of those who put themselves *in loco parentis* to the child advanced, as grandfather and grandchild,⁴ mother and child,⁵ uncle or aunt and nephew and niece,⁶ and parents and their bastard children.⁷ Where a mother makes a purchase or investment in the name of her child, or jointly in the names of herself and her child, that fact of itself does not afford the presumption of advancement, for there is no such obligation on her part to provide for her child as on the part of the father.⁸ In these cases the intention to advance is a question of evidence.⁹ It is not necessary that the person advanced should assent to the gift.¹⁰

Fraud on powers by parents.

Parents that are donees of powers of appointment under settlements must exercise them straightforwardly and honestly. A power to appoint among children is a power in the nature of a trust created and intended to be exercised with a view to the benefit of the objects of the power as a class and as individuals.¹¹ Where the power is not honestly exercised, the person improperly appointing is said to commit a fraud on the power.¹² A fraud is committed on the power when exercised by the appointor with an absence of good faith and sincerity, and with an ulterior and

¹ Per Wickens, V.C., in *Stack v. M'Avoy*, L. R. 15 Eq. 55, 58.

² *Re Gooch*, *Gooch v. Gooch*, 62 L. T. 384.

³ *Dyer v. Dyer*, 2 Cox, Eq. Cas. 92.

⁴ *Ebrand v. Dancer*, 2 Ch. Cas. 26; but see *Tucker v. Burrow*, 11 Jur. (N.S.) 525.

⁵ *Sayre v. Hughes*, L. R. 5 Eq. 376; *Batstone v. Salter*, L. R. 10 Ch. App. 431; *Re Orme*, *Evans v. Maxwell*, 50 L. T. 51.

⁶ *Curran v. Jago*, 8 Jur. 610.

⁷ *Beckford v. Beckford*, Lofft, 490.

⁸ *Bennet v. Bennet*, 10 Ch. D. 474.

⁹ *Ibid.*

¹⁰ See *Standing v. Bowring*, 31 Ch. D. 282.

¹¹ Per Kindersley, V.C., in *Coffin v. Cooper*, 2 Dr. & Sm. 373.

¹² Farwell, Pow. pp. 404 *et seq.*

sinister motive for the exercise.¹ Thus a power was held to have been fraudulently executed in the following instance, in which the father appointing deliberately intended a benefit to result to himself: By a power in a settlement a father could raise a portion for a younger child at such time as he should direct; he directed it to be raised when the child was fourteen, who shortly afterwards died; the father, as her administrator, afterwards filed a bill to have the portion raised for his own benefit, but the bill was dismissed.² This decision was based upon the ground that the appointment by the father, under the circumstances, was a fraud upon the power. There is no such rule of law (as is stated in that case) that a charge on behalf of children cannot be raised till the children actually live to want it.³ So, where a father had a power of charging portions, for younger children on real estate under a settlement, which gave him in the clearest terms power to fix the ages and times at which the portions should vest, and contained no provision for raising portions in default of appointment, and accordingly he appointed a sum in favour of his three younger children, their shares to vest immediately on the execution of the deed, and two of the children died a few years after, minors, their father, who survived them, taking their shares, it was held that the amount of their shares was raisable in favour of a person to whom he had assigned it by way of mortgage or security; and that where a donee of such a power has clear authority to fix the times at which portions shall vest, and appoints a portion to vest immediately, there is no rule of law which prohibits its being raised in the event of the child dying under twenty-one and unmarried; and that the appointment, so far as it made the portions vest immediately, was not a fraud on the power, as being made with a view to secure a benefit to the appointor; for that having regard to the fact that if the father had died without making any appointment,

Charge may be raised before child actually wants it.

¹ See *Duke of Portland v. Topham*, 11 H. L. C. 32.

² *Lord Hinchinbroke v. Seymour*, 1 B. C. C. 395. This case, as reported by Brown, must be taken to be inaccurately reported; the facts are thus stated by Jessel, M.R., in *Henty v. Wrey* (21 Ch. D. 332, 341). Lord Hinchinbroke married the daughter of the Earl of Halifax; on the marriage the Earl settled the Halifax estate on himself for life, then to Lord Hinchinbroke, his son-in-law, for life; and then it would have gone to the first and other sons of the marriage (if any), and in default it went over to a nephew or cousin of Lord Hinchinbroke, the infant defendant Montagu. Then there was the clause shortly stated in Brown's report, providing the £10,000 for the portioning of younger children; but an important limitation is omitted in the report, namely, that in default of appointment the £10,000 would have gone to the daughter on her attaining the age of twenty-one or marrying, with a provision for her maintenance in the meantime. At the time of the appointment the daughter was in a consumption, and died the following year; the father was aware of her state. The facts, as above stated, show that a gross fraud on the power was contemplated, and the bill was dismissed on that ground. See remarks of Lord Eldon in *M^{rs} Queen v. Farquhar*, 11 Ves. 467, 479, and *Case of the Queensberry Leases*, 1 Bli. 339, 397, and of Sir Edward Sugden in *Keily v. Keily*, 2 Dr. & War. 38, 55. But see *Wellesley v. Lord Mornington*, 2 K. & J. 143.

³ *Henty v. Wrey*, 21 Ch. D. 332, reversing 19 Ch. D. 492.

the children would have been unprovided for, it was manifestly for the benefit of the children that the father should make an appointment; and that as there was nothing to lead to the conclusion that when the appointments were made the children were likely to die young, and as in the event of the early death of the appointor the children might have derived a benefit from the absolute vesting of their portions, there was no ground for attributing to him an intention to benefit himself by making the portions vest immediately.¹ The same principles seem applicable where a parent is authorized to appoint interest; and where a parent so authorized appoints interest in favour of infant children to be made payable to himself as their guardian, such appointment is not invalidated by the mere fact that he has means to support them, if, on the whole, the appointment is advantageous to the children.²

Powers to appoint portions charged on land ought, if their language is doubtful, to be construed so as not to authorize appointments vesting those portions in the appointees before they want them, that is, before they attain twenty-one, or (if daughters) marry; where the language of the power is clear and unambiguous, effect must be given to it. Where upon the true construction of the power and the appointment the portion has not vested in the lifetime of the appointee, the portion is not raisable but sinks into the inheritance. Where upon the true construction of both instruments the portion has vested in the appointee the portion is raisable even although the appointee dies under twenty-one or (if a daughter) unmarried. Appointments vesting portions charged on land in children of tender years who die soon afterwards are looked at with suspicion; and very little additional evidence of improper motive or object will induce the court to set aside the appointment or treat it as invalid, but without some additional evidence the court cannot do so.³

A parent cannot bargain with his children on executing a power of appointment in their favour for the purchase of other expectant shares belonging to them;⁴ nor can he stipulate for any advantage for himself or on behalf of a stranger. It is the fact of bargaining that renders the appointment consequential upon the bargain invalid and of no effect. But the mere fact that the donee of the power derives some benefit from the exercise of the power does not necessarily render the appointment invalid.⁵

¹ *Henty v. Wrey*, 21 Ch. D. 332. See *Re De Hoghton*, *De Hoghton v. De Hoghton*, [1896] 2 Ch. 385.

² *Re De Hoghton*, *De Hoghton v. De Hoghton* (*ubi sup.*).

³ Per Lindley, L.J., in *Henty v. Wrey*, 21 Ch. D. 359.

⁴ Farwell, Pow. 407, citing *Cunningham v. Anstruther*, L. R. 2 Sc. & D. App. 223.

⁵ *Re Huish's Charity*, L. R. 10 Eq. 5; *Cooper v. Cooper*, L. R. 5 Ch. App. 203.

A person to whom any power, whether coupled with an interest or not, is given, may release the power under the Conveyancing Act, 1881;¹ and the fact that a release of a limited power of appointment will result in a benefit to the donee of the power is not sufficient to make the release fraudulent and void.² A father who possesses a power over a fund in favour of his children with a life interest in it may, if he becomes entitled in right of a deceased child, call upon the trustees of the fund to transfer that portion of it to which he has become entitled on his releasing his power of appointment and surrendering his life interest in such portion.³ The surrender of the life interest in such a case renders the fund of which the father claims the transfer liable to the debts of the deceased child, and the father takes the fund subject to the payment of any debts as sole personal representative of his child.⁴ A power coupled with a duty cannot be so released;⁵ but the doctrines applicable to the fraudulent exercise of a power do not apply to the release of a power not coupled with a duty.⁶

Transfer to parent of fund over which power exercisable.

It sometimes happens that the donee of a power fails to comply with all the directions for the execution of the power, whereby it becomes defective; and in cases where the defects are not of the essence of the power, equity will interpose and remedy the defect and carry out the intention of the donee for the benefit of those intended to take an interest under it. The rule has been stated to be that "whenever a man having power over an estate, whether ownership or not, in discharge of a moral or natural obligation, shows an intention to execute such power, the court will operate upon the conscience of the heir (or of the persons entitled in default), to make him perfect this intention."⁷ Thus, where there is a defective execution of a power for the provision of a wife or a child, the court will supply the defect;⁸ but not for the provision of a grandchild.⁹ Where parents under a marriage settlement are the joint donees of a power of appointment among the children of the marriage, and one of the parents becomes a lunatic, the Judge in Lunacy has no power under section 128 of the Lunacy Act, 1890¹⁰ to authorize the committee of the alleged lunatic to concur on his or her behalf in exercising the joint power.¹¹

Defective execution of powers. Relief in equity.

¹ 44 & 45 Vict. c. 41, s. 52. See *Smith v. Houblon*, 26 Beav. 482; and see *Re Somes*, *Smith v. Somes*, [1896] 1 Ch. 250.

² *Re Somes*, *Smith v. Somes* (ubi sup.).

³ *Smith v. Houblon* (ubi sup.); *Re Radcliffe*, *Radcliffe v. Bewes*, [1892] 1 Ch. 227.

⁴ *Re Radcliffe*, *Radcliffe v. Bewes* (ubi sup.).

⁵ *Re Eyre*, *Eyre v. Eyre*, 49 L. T. 259; *Saul v. Pattinson*, 34 W. R. 561.

⁶ *Re Somes*, *Smith v. Somes* (ubi sup.).

⁷ Per Lord Alvanley in *Chapman v. Gibson*, 3 Bro. C. C. 228.

⁸ *Tollet v. Tollet*, 2 P. Wms. 489. For a full discussion of this subject see Farwell pp. 335 et seq.

⁹ See *Rodgers v. Marshall*, 17 Ves. 294.

¹⁰ 53 & 54 Vict. c. 5.

¹¹ *Re A.*, [1904] 2 Ch. 328.

(3) *Transactions in Fraud of Parental Rights.*

Transactions
in fraud of
parental
rights.
When set
aside.

Equity of the
heir the
ground of
relief.

Parental rights are said to be defrauded when heirs or expectant heirs have made such extravagant bargains induced by fraud or pressure of desperate circumstances, that their parents or those *in loco parentis* to them are misled and seduced to leave their estates, not to their heirs or families, but to a set of artful persons who have divided the spoil beforehand.¹ Equity has always relieved against catching and unconscionable bargains whereby those who from their inexperience or indiscretion are unable fully to protect themselves, and are the victims of the fraud or duress of others who have availed themselves of the opportunity to enrich themselves at the expense of the improvident. The true view of these transactions is to regard them less as frauds on the parental rights than matters against which equity ought to relieve on the ground of the personal equity of the heir or expectant heir.²

This view has not prevailed uninterruptedly, for it has been laid down "that the extraordinary protection given in the general case must be withdrawn, if it shall appear that the transaction was known to the father or other person standing *in loco parentis*—the person, for example, from whom the *spes successionis* was entertained, or after whom the reversionary interest was to become vested in possession—even although such parent or other person took no active part in the negotiation, provided the transaction was not opposed by him, and so carried through in spite of him. Secondly, that if the heir flies off from the transaction, and becomes opposed to him with whom he has been dealing, and repudiates the whole bargain, he must not, in any respect, act upon it so as to alter the situation of the other party or his property; at least, if he does so, the proof lies upon him of showing that he did so under the continuing pressure of the same distress which gave rise to the original dealing. Still more fatal to his claim of relief will it be if the father or person *in loco parentis* shall be found to have concurred in this adoption of the repudiated contract."³ The accuracy of these remarks has been disputed by Lord St. Leonards,⁴ who said: "Now the first of these rules is supported by no previous authority, and as a general rule cannot, it is submitted, be maintained. The knowledge of the parent *may*, under some circumstances, remove

¹ See *Earl of Chesterfield v. Janssen*, 2 Ves. Sen. 125, 157. See *Woodhouse v. Shepley*, 2 Atk. 535; *Twistleton v. Griffith*, 1 P. Wms. 310; *Cole v. Gibbons*, 3 P. Wms. 393.

² See the more modern case of *Heap v. Marris*, 2 Q. B. D. 630. The point in this case was one only of pleading, but the defence involved the equitable right stated in the case.

³ Per Brougham, L.C., in *King v. Hamlet*, 2 M. & K. 456, 473.

⁴ Law of Property, 69. At the time of writing this work he was Sir E. Sugden.

one of the objections to such a transaction, but the others might still remain. The son is entitled to be relieved, though the father may witness his ruin with indifference. It is the son's equity, though partly grounded upon public policy. In many cases the person standing *in loco parentis*, or from whom the *spes successionis* is entertained, or after whom the reversionary property is to become vested in possession, may be more than indifferent about the worldly prospects of the expectant heir."

This first rule has also been commented upon by Page Wood, V.C., in *Talbot v. Staniforth*,¹ who in the course of his judgment remarked: "Lord Brougham's doctrine . . . at the most, I think, cannot go beyond this, that if a father, being unable himself to supply his son's necessities, assists and protects him in raising money from strangers—the son in such case having the best security for obtaining the fair market value of what he sells—the court may, perhaps, assume that a bargain made under such circumstances was fair and for full value. The only meaning I can attribute to Lord Brougham's words, consistently with the established doctrine, is that a person who deals with the assistance of the best advice and protection may be supposed to get a fair market price. To the doctrine so laid down I see nothing to object, assuming that the protection is full and ample, for the purpose of preventing any advantage being taken of the heir." The true and proper nature of these transactions has been recognized and described by Lord Selborne in the important case of the *Earl of Aylesford v. Morris*,² in which he said: "In the cases of catching bargains with expectant heirs, one peculiar feature has been almost universally present; indeed, its presence was considered by Lord Brougham to be an indispensable condition of equitable relief, though Lord St. Leonards, with good reason, dissents from that opinion. Its victim comes to the snare (for this system of dealing does set snares, not perhaps for one prodigal more than another, but for prodigals generally as a class) excluded, and known to be excluded, by the very motives and circumstances which attract him, from the help and advice of his natural guardians and protectors, and from that professional aid which would be accessible to him if he did not feel compelled to secrecy. He comes in the dark, and in fetters, without either the will or the power to take care of himself, and with nobody else to take care of him. Great judges have said that there is a principle of public policy in restraining this; that this system of undermining and blasting, as it were, in the bud the fortunes of families, is a public as well as a private mischief; that it is a sort of indirect fraud upon the heads of families from whom

Talbot v. Staniforth.

Earl of Aylesford v. Morris

these transactions are concealed, and who may be thereby induced to dispose of their means for the profit and advantage of strangers and usurers, when they suppose themselves to be fulfilling the moral obligation of providing for their own descendants. Whatever weight there may be in any such collateral considerations, they could hardly prevail if they did not connect themselves with an equity more strictly and directly personal to the plaintiff in such particular case. But the real truth is that the ordinary effect of all the circumstances by which these considerations are introduced is to deliver over the prodigal helpless into the hands of those interested in taking advantage of his weakness; and we so arrive in every case at the substance of the conditions which throw the burden of justifying the righteousness of the bargain upon the party who claims the benefit of it." These observations put the matter on the true basis.

Where there is a sale of his reversionary interest by a young man soon after reaching majority great care must be exercised in the bargain; and though mere undervalue in the bargain is not conclusive proof of fraud or unconscientiousness in the bargain, it may entitle the expectant heir to relief in a court of equity; and the *onus* of proving the transaction fair and the price sufficient is on the purchaser.¹ The mere fact of the relationship of parent and child existing between a tenant for life and a remainder-man does not rebut the presumption that a tenant for life paying off a charge on the inheritance intends to keep the charge alive for his own benefit.²

¹ See *O'Rorke v. Bolingbroke*, 2 App. Cas. 814.

² *Re Harvey, Harvey v. Hobday*, [1896] 1 Ch. 137.

CHAPTER IV.

DUTIES AND RIGHTS OF CHILDREN IN RESPECT OF THEIR PARENTS.

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In this chapter will be briefly pointed out the corresponding duties and rights of children in respect of their parents, both as regards their persons and property. The duties of the parent towards the child of necessity involve the corresponding rights of the child, which it is entitled to have fulfilled. In the present chapter only the rights and *quasi*-rights of the child, which do not correspond with any duties of the parent already discussed, will be treated of; thus, the right of a child to be supported and educated by its parents having been already discussed will not be further mentioned.

Duties and rights of children.

The duty of children to support and maintain their parents is one that is pointed out by Nature, and is based upon the sentiment that is implanted in right-thinking minds, that the care and trouble expended by parents in rearing and educating their children, should by the latter be recompensed when they themselves are strong and able to work, while their parents are old and feeble, and little capable of earning their daily bread. But, as in the case of the duty of the parent to support the child, this duty to support and maintain father or mother is only an imperfect obligation. If a child be rolling in wealth, and its parents be in needy circumstances, he cannot be compelled to contribute the smallest coin to alleviate their wants and distress. If, however, the parent become a pauper and chargeable to the rates of the parish, then under the provisions of the Poor Law,¹ the child must, if he has the means, contribute to his support. But until an

Duty of children to support and maintain parents.

A moral obligation.

Except when parent becomes chargeable.

¹ 43 Eliz. c. 2, s. 7. "The children of every poor, old, blind, and impotent person . . . being of sufficient ability, shall at their own charges relieve and maintain every such poor person," &c.

order is made by the justices under the statute of Elizabeth, there is only a moral and not a legal obligation on a son to support his poor and aged parent. It is the making of the order that transmutes the moral obligation into the positive duty.¹ A child if of sufficient ability is liable for the support of its mother, though she has married again; and the liability to contribute towards such support is not affected by the provisions of 4 & 5 Wm. IV. c. 76, s. 56.²

Difference between liability of parent and of child in respect of mutual support.

The effect of this state of the law would seem to be that a child, though of sufficient ability, on whom an order of justices for the support of his parent had *not* been made, might allow that parent to starve to death, and yet be free from liability to any punishment. There is then a marked difference between the liability of a parent for the support and maintenance of a child, and that of a child for the support and maintenance of its parent; for if any person (including a parent) who has the custody, charge or care of any child wilfully neglects such child in a manner likely to cause such child injury to its health, shall be guilty of a misdemeanour.³ If the child be injured in body or its health the parent in charge may be indicted for an offence of cruelty.⁴ If the child's death be accelerated by want of medical aid, though the parent may be actuated by religious and conscientious objection to calling medical assistance, the latter may be indicted and convicted of manslaughter.⁵ This liability is apart from any order made upon the parent for the support of the child; whereas until the order is made upon the child to contribute to its parent's support, he is under a mere moral obligation which cannot be enforced, and which, if not complied with, renders him amenable to no sanction of the law. Of course the child must be under sixteen years of age, or, if over that age, be from some physical or mental defect unable to provide for itself.

Rights of children.

Emancipation.

Emancipation is not a right which can be enforced by the child, but is rather a privilege which is allowed by the parent. A child under age may be freed from the parental control by becoming what is termed emancipated. A child who, though a minor, leaves his father's family and household, and by reason of his trade, occupation, or condition is not under the power or control of the father, becomes forisfamiated and emancipated, that is, *sui juris* and independent; thus, a son, nineteen years of age, who left his father's family and went to another place, where he remained, was held to be emancipated.⁶ Emancipation is based upon a condition of things which is inconsistent with the

¹ *Reg. v. Ireland*, L. R. 3 Q. B. 130; and see *Buncroft v. Mitchell*, L. R. 2 Q. B. 549.

² *Arrowsmith v. Dickenson*, 20 Q. B. D. 252.

³ 4 Edw. VII. c. 15, s. 1.

⁴ *Ibid.*; and see *Ree v. Friend et uxore*, cited 1 Russ. Cr. 949.

⁵ *Reg. v. Senior*, [1899] 1 Q. B. 283.

⁶ *St. Michael's, Norwich, v. St. Matthew's, Ipswich*, 2 Stra. 831.

idea of the child being a part of the father's family and under his control;¹ and it would seem that even in the case of a minor marriage would operate as an emancipation.² Enlistment in the army is a relation inconsistent with the parental control, and operates as an emancipation of the child.³ But mere enlistment is insufficient to bring about emancipation if the son is discharged from the army, and comes back and lives with his father before he attains his majority.⁴ But service in the police force does not emancipate him, though living away from his father.⁵ Ordinary apprenticeship or domestic hiring of a minor child does not effect his emancipation.⁶ But where an adult child leaves the paternal household and enters the army, or ordinary service, as domestic servant or labourer, he is deemed to be emancipated.⁷ Emancipation in the Roman system was of far greater importance than in the English; in the former a large alteration was effected in the privileges and liabilities of the child; whereas in the latter it is chiefly used in testing whether the child has or has not acquired a separate settlement for poor-law purposes. Emancipation from parental control would not relieve a child from the necessity of contributing to the support of its parents, if occasion should demand it. The only effect of emancipation as between parent and child would seem to be that it gives to a minor child a right to his own wages or earnings.

A parent, as has been seen, can be compelled to support and maintain his child, if of ability to do so, but there is no duty upon him compelling him to leave by will any sum, however small, to his child.⁸ In this respect the English law differs from the Roman, which provided that descendants who had been disinherited by their ascendants might bring an action *de inofficioso testamento* (undutiful will), for the purpose of setting it aside.⁹ The Scotch *legitim* (or *bairn's part of gear*) is one-third of the father's personal property where he leaves a widow, and one-half where he does not, which is divisible as of right among his children. If a parent die without making a will, and leave real property, the law gives it to the eldest son, and in default of a son or sons, to the daughter, or if more than one, to them equally as tenants in common.

Right of inheritance.

Real property.

¹ See *Rex v. Whitton-cum-Twambrookes*, 3 T. R. 355; *Reg. v. Scammonden*, 15 L. J. M. C. 30.

² See *Rex v. Everton*, 1 East, 526.

³ *Rex v. Walpole St. Peter's*, 1 W. Bl. 699; *Rex v. Stanwix*, 5 T. R. 670.

⁴ *Rex v. Rotherfield Greys*, 1 B. & C. 345; and see *Rex v. Woburn*, 8 T. R. 479.

⁵ *Reg. v. Selborne*, 29 L. J. M. C. 56.

⁶ *Rex v. Halifax*, Burr. 806; *Rex v. Tottington Lower End*, Cald. 284; *Rex v. Stretton*, Cald. 487.

⁷ *Rex v. Roach*, 6 T. R. 247.

⁸ The popular theory that a parent must leave something to his child is not based upon any legal fact; and a child need not be "cut off with a shilling" in order to render the will effectual.

⁹ By Justinian's legislation, which followed the analogy of the *lex Falcidia*, it was a quarter of the amount the complainant would have obtained if the deceased had died without making a will (Dig. 5, 2, 8, 6; Hunter, Rom. Law, 602).

Personal
property.
Statute of
Distributions.

If the father die intestate as to his personal property, the law¹ divides the property equally among the children; if he does not leave a widow, they take the whole; if he does, they divide two-thirds of it among themselves. When grandchildren take under the statute, they take *per stirpes* and not *per capita*.² In section 7 of this statute the term "next of kindred" does not include the issue of the intestate.³

The inheritance and succession of her children to their mother's real and personal property on intestacy are the same as in the case of the father, with the one qualification, that if the father survives he takes absolutely her personal property to the exclusion of the children, and this notwithstanding the alteration effected by the Married Women's Property Act, 1882.

Wills Act,
1837.

But children and other issue do obtain an advantage in respect of the wills of their parents, for where a parent devises or bequeaths property to a stranger, who dies in his lifetime, such devise or bequest lapses; but under the Wills Act, 1837,⁴ where a child or other issue to whom any real or personal estate shall be devised or bequeathed for an interest not determinable at his death shall die in the lifetime of the testator, leaving issue who shall be living at the testator's death, such gift shall not lapse. This provision, however, does not apply to an appointment under a special power,⁵ or to a testamentary gift to children as a class.⁶

The effect of gifts and transactions between parent and child, and how the law endeavours to protect the weaker against the undue influence of the stronger, have been before considered.⁷

Suit by infant
child against
parent.

For a personal
tort.

The right of a child to bring an action against its parent in respect of the latter's dealings with its property is unquestioned. But at this point the question may be asked whether an infant child can sue its parent for a tort, such as personal violence done against it, and whether an adult child can sue its parent for a tort committed during infancy?⁸ There is no rule of the common law to prevent such actions being brought, because the relation of parent and child is not of so intimate and close a nature as that existing between husband and wife. But there is no case in the books which actually shows that this action has ever been maintained on grounds such as the personal violence of the parent towards the child. The reason of this may well

¹ 22 & 23 Car. II. c. 10 (Statute of Distributions).

² *Re Natt, Walker v. Gammage*, 37 Ch. D. 517.

³ *Ibid.*

⁴ 1 Vict. c. 26, s. 33.

⁵ *Griffiths v. Gale*, 12 Sim. 327; *Holyland v. Lewin*, 26 Ch. D. 266, in which case *Freme v. Clement*, 18 Ch. D. 499, was disapproved of.

⁶ *Re Harvey's Estate, Harvey v. Gillow*, [1893] 1 Ch. 567.

⁷ *Ante*, chap. iii. pp. 557 *et seq.*

⁸ If the action was brought during infancy the infant would necessarily appear by a next friend.

be that the dictates of family life, and the repugnance that society would evince towards a display of such feelings, have discouraged such actions; besides, the courts of equity, if not always those of law, have interfered to remove the child from the custody of the parent when unfit to retain it. If recourse is not had to equity, it would be better, and in the interests of society, that the cruel and unnatural parent should be punished by the more speedy redress of a criminal court for an act of criminal violence, if proved so to be, than by a pecuniary fine inflicted after the more tedious process of a civil suit. And here a reason (which is almost a *reductio ad absurdum*) may be urged why a civil action ought not to be brought, namely, that if the child recovered damages against its father, and died under age, the father, as next of kin to his child, would get back the unexpended portion of the original amount, minus the small percentage of succession duty (if payable at all) between parent and child.

Removal of
child from
custody of
parent.

But where the tort is not mere personal violence, but some other wrong, such as libel or slander, there does not seem to be any reason why an infant child should not sue its parent and recover compensation. Where the child is of age and emancipated, and a tort of any kind or description is committed against him by the parent, an action would lie on his part to redress the injury, and such actions, though not frequently, are brought and maintained. The remarks of an American writer¹ on this point may be interesting: "The question, moreover, is sometimes raised in these days, whether a young son or daughter occupying the filial relation may not, on becoming of age, sue the parent or *quasi*-parent for alleged maltreatment or other injury. With reference to a blood parent, however, all such litigation seems abhorrent to the idea of family discipline which all nations, rude or civilized, have so steadily inculcated, and the privacy and mutual confidence which should obtain in the household. An unkind and cruel parent may and should be punished at the time of the offence, if an offender at all, forfeiting custody and suffering criminal penalties if need be; but for the minor child who continues, it may be for long years, at home and unemancipated, to bring a suit when arrived at majority, free from parental control and under counter influences, against his own parent, either for services accruing during infancy, or to recover damages for some stale injury, real or imagined, referable to that period, appears quite contrary to good policy. The courts should discourage such litigation, and so upon corresponding grounds the parent's suit, as to cause of action referable to the period and relation of tender childhood."

Reasons for
not bringing
such action.

¹ Sch. Dom. Rel. s. 275.

CHAPTER V.

RIGHTS AND LIABILITIES OF PARENTS IN RESPECT OF TORTS DONE TO OR BY THE CHILD.

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THE subject-matter of this chapter will be divided under two heads, namely, how far a parent may maintain an action for torts done to his children; and how far he may be rendered liable for torts committed by his children.

Right of parent
to maintain
action for tort
done to child.

(1) The right of the parent to maintain an action for a tort done to his child is based upon the relation or *quasi*-relation of master and servant. A child who is under age or adult may maintain an action for damages in respect of a tort or injury committed upon him;¹ but under certain circumstances the parent may also claim indemnity for the injury, whether it be an assault and battery, injury by negligence, or seduction of child from home, or the like. A parent has a right of action for an injury done to his child by the wrongful act of another, if the child is old enough to be capable of rendering him some act of service, and can be treated in law as his servant;² in other words, a parent as such has no remedy for an injury done to his child, and cannot recover for it, unless the latter can be treated in law as his servant. Thus, where an infant two and a half years old was injured by the defendant's carriage, his father was nonsuited in an action for damages in respect of the injury, on the ground that the loss of service being the gist of the action,

Loss of
services by
parent gist of
action.

¹ *Jay v. Whitfield*, cited 3 B. & A. 308.

² Add. Torts, 531; *Hall v. Hollander*, 4 B. & C. 660; *Grinnell v. Wells* M. & G. 1033.

and the child being incapable of rendering any service because of his tender age, the action could not be maintained.¹ The parent must allege in his action that it is the tortious act of the defendant "*per quod servitium amisit*," &c., but in a case of an assault or injury of this nature no evidence of service is necessary beyond that which the law will imply as between parent and child.² The incidental expenses incurred in consequence of the injury can be recovered; but where the loss of service by the parent cannot be sustained, it is very doubtful whether the parent could recover for such expenses, though under an obligation to incur them.³

The parent may also sustain an action against a person for wrongfully depriving him of his child's services, either by enticing him away, or by improperly harbouring it after it has left its home. Enticement is where the child is removed from the parental control without force; abduction, on the contrary, necessitates the employment of some force. Here again the right of action depends upon the relation of master and servant. If the parent has relinquished his right to the child's services, he cannot maintain such action, but as long as the child remains under his roof, his right to do so exists. Thus, an action will lie for enticing away the plaintiff's daughter, though there be no allegation that the defendant debauched her, or that there was any binding contract of service between her and the plaintiff.⁴ And where the plaintiff's daughter, nineteen years old, resided with him as a member of his family, and assisted him in his business, by means of a fictitious letter of invitation dictated by the defendant, procured her mother's consent to her quitting her home for a few days, and left, and the defendant took her to a lodging-house, where he cohabited with her for nine days, after which she returned home, it was held that there was a sufficient continuing relation of master and servant *de facto*, and sufficient evidence of a wrongful enticing away of the daughter by the defendant, to entitle the plaintiff to maintain the action.⁵ So, too, where a person hires a girl as a servant, and withdraws her from her father's service for the very purpose of getting possession of her person and seducing her, this fraudulently concocted service does not put an end to the relation of master and servant previously subsisting between the daughter and her father, who may maintain an action for the seduction.⁶ As this action is founded on the loss of services, the right of the parent to bring it does not seem limited to the infancy of the child.⁷ Where

Enticement
and harbour-
ing of children.

¹ *Hall v. Hollander*, 4 B. & C. 660.

² *Evans v. Walton*, L. R. 2 C. P. 615.

³ See *Grinnell v. Wells*, 7 M. & G. 1033; *Hall v. Hollander* (*ubi sup.*). In America there is a tendency to be more liberal towards the parent. Sch. Dom. Rel. s. 258.

⁴ *Evans v. Walton* (*ubi sup.*).

⁵ *Ibid.*

⁶ *Speight v. Olivier*, 2 Stark. 495.

⁷ See *Harper v. Luffkin*, 7 B. & C. 387.

the girl enticed away or abducted for immoral purposes is under eighteen, the guilty party may be criminally punished.¹

“To afford shelter is one thing; to encourage filial disobedience another. The mere employment of a runaway child does not amount to enticement. But where it appears that the defendant, knowing that the son had absconded from his father, boarded him in his family and allowed him to work on his farm as he pleased, doing this with the intention of aiding or encouraging, or with the knowledge that it aids and encourages the son to keep away from the father, he is liable to this action.”² If the defendant had derived any benefit from the labour and services of the child, the parent would be entitled to recover the amount.³ The right to bring such actions belongs to the mother on the death of the father. It would also belong to her if on divorce or judicial separation she had the care and custody of her child; but there does not appear to be any authority one way or the other for her being able to maintain the action when she voluntarily lives apart from her husband, and is not judicially separated from him.

The next point to be considered is the right of the parent to maintain an action for damages for the loss of services consequent upon the illness of a daughter who has been seduced and thereby become pregnant. This right of action is so clearly based (though fictitiously) upon the relations of master and servant, that to discuss it under the head of master and servant would not only have been possible, but perhaps more logical than in this present chapter. In a treatise on the law of master and servant it must of course find a place; but inasmuch as a large majority of the actions are brought by parents in respect of the seduction of their daughters, and not by masters in the popular sense of the word for the seduction of their servants, it has been thought possible, without an excessive violation of the logical treatment of the subject, to discuss this action when dealing with the law of parent and child.

The basis of this action is the relationship of master and servant, with the loss of the services of the daughter consequent upon the wrongful act of the defendant; and, as will be seen, the services rendered by the daughter to support the fiction may not only be very slight, but even constructive, that is, implied by law rather than evidenced by facts;⁴ but there must be some

¹ 48 & 49 Vict. c. 69, s. 7. See *Reg. v. Prince*, L. R. 2 C. C. R. 154.

² Sch. Dom. Rel. s. 260.

³ *Foster v. Stewart*, 3 M. & S. 201. In America it is the law that the father may sue on the basis of a contract for his absconding son's wages, but is put to his election; and the suit in tort against the employer, for unlawfully enticing, or harbouring his minor child, precludes the action of assumpsit for wages earned. *Thompson v. Howard*, 31 Mich. 309 (Amer.).

⁴ *Fores v. Wilson*, 1 Peake, 77; *Grinnell v. Wells*, 7 M. & G. 1033; *Eager v.*

Harbouring
a child.

Action for
seduction of
daughter.

Relation of
master and ser-
vant necessary.

service, the loss of which forms the foundation of the action.¹ The daughter herself has no remedy against her seducer, nor her parent, if the seduction does not result in pregnancy or sickness,² because, as it has been said, her own incontinence shall not be the means of obtaining a pecuniary compensation for any loss she may have sustained through it.³ But it was found necessary to punish seducers, and this action, whether founded on trespass or on the case, was devised for their punishment.

There is an important difference between the action brought by the parent or master for an assault and battery, &c., on his child or servant and this action, for in the former no compensation is to be given for wounded feelings, whereas in this action what are known as "sentimental damages" may be given. This is an instance of the bad logic of the action as now founded. Tindal, C.J., in *Grinnell v. Wells*, thus states the law: "As the father is only liable under the statute (43 Eliz. c. 2, s. 6) to maintain his daughter where he is of sufficient ability so to do, and as the damages recoverable by the father when he brings the action are, confessedly, not limited to the actual expenditure of his money, but may be given according to the circumstances of aggravation in the particular case, the right of action to recover compensation would be confined to persons of ability to maintain the daughter, and would be denied to the poorer orders of the community—a result that would be most unreasonable."⁴

Provided the relation of master and servant can be proved to have existed between the person seeking compensation and the person debauched, the services rendered by the latter to the former need not be real valuable services, but constructive services would be sufficient; and it is only necessary that the parent or master should have the legal right to an interest in them.⁵ Thus, others besides the father may maintain this action; a stranger in blood where the relation of master and servant exists between plaintiff and the person seduced,⁶ a brother,⁷ an aunt,⁸ and an adoptive father.⁹ An adjudication of sessions that the alleged father is not the father of the applicant's bastard child is not a judgment *in rem* on the paternity of the child so as to prevent a person entitled to bring an action for the seduction of the

Damages for injured feelings may be given in an action for seduction.

Services need not be valuable, constructive sufficient.

Who may maintain action.

Grimwood, 1 Exch. 61; *Manley v. Field*, 7 C. B. (N.S.) 96; *Terry v. Hutchinson*, L. R. 3 Q. B. 599.

¹ *Whitbourne v. Williams*, [1901] 2 K. B. 722.

² *Eager v. Grimwood* (*ubi sup.*).

³ *Saterthwaite v. Duerst*, 5 East, 47 n.

⁴ 7 M. & G. 1033, 1043. But, as the learned reporter notes: "It may be observed, however, that the quasi-fiction of *servitium amisit* affords protection to the rich man whose daughter occasionally makes his tea, but leaves without redress the poor man, whose child . . . is sent unprotected to earn her bread amongst strangers."

⁵ See *Evans v. Walton*, L. R. 2 C. P. 615. In America the rule as to constructive service is carried even further than over here. Sch. Dom. Rel. s. 261.

⁶ *Fores v. Wilson* (*ubi sup.*).

⁷ *Howard v. Crowther*, 8 M. & W. 601.

⁸ *Edmondson v. Machell*, 2 T. R. 4.

⁹ *Irwin v. Dearman*, 11 East, 23.

mother from bringing it.¹ Whether a married woman living with her child apart from her husband, but not judicially separated, could maintain the action is doubtful. But the right to bring an action of this sort does not pass to the trustee of a master who has become bankrupt, as the trustee would have no right to make a profit of a man's wounded feelings.² It is not necessary that the daughter should be under age; and the real question is whether or not she has been emancipated from her father's control; consequently, where a married daughter was living with her father, and performing various acts of service for him, the father was held entitled to bring the action on the establishment of the relationship of master and servant between him and his daughter, and that the defendant as a wrong-doer could not set up the right of her husband to the services of the plaintiff's daughter;³ on the contrary, if the plaintiff's unmarried infant daughter be in the service of another at the time of her seduction, the action will not lie.⁴ The following cases will show the circumstances under which this action may be sustained, and when it will fail, and that the relationship of master and servant and consequent loss of services on the part of the former are absolutely necessary to its successful maintenance.

When action
unsuccessful.

Where the person seduced resides at the plaintiff's home, no proof of actual service need be given if the plaintiff has the right to demand her services;⁵ very slight evidence of such services is requisite,⁶ such as milking cows,⁷ making tea,⁸ and the like; and this equally for a niece⁹ as for a daughter. The person seduced need not be at the beck and call of the plaintiff, as where the plaintiff's daughter lived with her brother, but went every day to her father's house to do all the household work;¹⁰ or where she resided some distance off, but acted as mistress of a household belonging to her father,¹¹ or was temporarily engaged in service,¹² or only performed services for him after her day's work was over.¹³ The action has also been maintained where she had left her situation, and was seduced on the way home to her father's house,¹⁴ for a fresh entering into her father's service on her leaving her situation was assumed.¹⁵ Where the father's control over the services of his daughter is put an end to by the wrongful act of

¹ *Anderson v. Collinson*, [1901] 2 K. B. 107. For observations on this case see p. 604.

² *Howard v. Crowther*, 8 M. & W. 601.

³ *Harper v. Luffkin*, 7 B. & C. 387; and see *O'Reilly v. Glavey*, 32 L. R. Ir. 316.

⁴ *Davies v. Williams*, 10 Q. B. 725.

⁵ *Maunder v. Venn*, M. & M. 323.

⁶ *Manvell v. Thomson*, 2 C. & P. 303.

⁷ *Bennett v. Alcott*, 2 T. R. 168.

⁸ *Carr v. Clarke*, 2 Chit. Rep. 260.

⁹ *Manvell v. Thomson* (*ubi sup.*).

¹⁰ *Mann v. Barrett*, 6 Esp. 32.

¹¹ *Holloway v. Abel*, 7 C. & P. 528.

¹² *Griffiths v. Teetgen*, 15 C. B. 344.

¹³ *Rist v. Faur*, 32 L. J. Q. B. 386; *Ogden v. Lancashire*, 15 W. R. 158.

¹⁴ *Terry v. Hutchinson*, L. R. 3 Q. B. 599.

¹⁵ See *Gladney v. Murphy*, 26 L. R. Ir. 651.

the defendant, the defendant will not be allowed to avail himself of his own wrong, but the service will be deemed to be continued through the tortious interruption.¹

This action cannot be maintained where there has been only seduction, and no pregnancy or sickness causing loss of service,² for some proof of loss of service is necessary;³ or where the plaintiff has connived at his daughter's unchastity;⁴ or where the person seduced is in the service of another,⁵ and she is seduced by her own master, where he has not hired her for purposes of seduction,⁶ whether intending to return to the plaintiff's on the termination of the service,⁷ or not;⁸ even though the seduction during her temporary absence from work took place under her parent's roof;⁹ or where she goes home occasionally, and performs some domestic services in her parent's house;¹⁰ or where the relation of master and servant is contracted after the seduction, for the loss of service cannot then be made the foundation of the action.¹¹ Where the daughter seduced is the real head of the house, this action is not maintainable by her father.¹²

Action unsuccessful.

Mere intention to return to father's house immaterial.

For the evidence to be adduced in aggravation of damages because of the heartless conduct of the defendant, or in mitigation because of the conduct of the person seduced, see Addison on Torts,¹³ and Smith's Master and Servant.¹⁴

As a necessary branch of this subject, the right of the parents to recover damages for injuries causing the death of children, and the corresponding rights of children to recover damages for injuries causing the death of their parents, will next be discussed. It was and is a rule of law, that if the injuries wrongfully inflicted upon a servant cause his immediate death, the master has no right of action; thus, if a father was supported by his son who was killed on the spot by the negligent and wrongful act of some third person, his father could not maintain an action against the wrong-doer;¹⁵ though if the son lingered, however

Rights of parents and children under Lord Campbell's Act.

¹ *Speight v. Olivier*, 2 Stark. 493; *Long v. Keightley*, 11 Ir. C. L. 221. See also *Evans v. Walton*, L. R. 2 C. P. 615.

² *Saterthwaite v. Duerst*, 5 East, 47 n; *Eager v. Grimwood*, 1 Exch. 61.

³ *Grinnell v. Wells*, 7 M. & G. 1033. ⁴ *Reddie v. Scoolt*, 1 Peake 316.

⁵ *Dean v. Peel*, 5 East, 45; *Harris v. Butler*, 2 M. & W. 539; *Thompson v. Ross*, 29 L. J. Ex. 1. ⁶ *Gladney v. Murphy* (*ubi sup.*).

⁷ *Blaymire v. Haley*, 6 M. & W. 55; *Gladney v. Murphy* (*ubi sup.*).

⁸ *Dean v. Peel* (*ubi sup.*). ⁹ *Hedges v. Tagg*, L. R. 7 Ex. 283.

¹⁰ *Whitbourne v. Williams*, [1901] 2 K. B. 722.

¹¹ *Davies v. Williams*, 10 Q. B. 728.

¹² *Manley v. Field*, 7 C. B. (N.S.) 96. ¹³ Pp. 536-539.

¹⁴ Pp. 179-181.

¹⁵ *Higgins v. Butcher*, Yelv. 89; *Baker v. Bolton*, 1 Camp. 493; *Osborn v. Gillett*, L. R. 8 Ex. 88. In this case Bramwell, B., dissented from the majority of the court and held that the action would lie. His Lordship said that the rule of law as set out above was derived from a mistaken apprehension of the maxim, "*actio personalis moritur cum persona*," and that the "death of the action" referred to the incapacity of the deceased to bring the action, which died with him, but did not refer to the right which a master had to bring an action for loss of services occasioned by the injury or death of his servant. In 1881 his Lordship was of the same opinion: see *Solicitors' Journal*, Aug. 27, 1881, p. 813. Some of the American courts support the view taken by Lord Bramwell.

short a time, the father might bring his action under Lord Campbell's Act, 1846.¹ The preamble of that statute says that "no action at law is now maintainable against a person who by his wrongful act, neglect, or default may have caused the death of another person"; then the statute goes on to enact, that when the death is caused by such wrongful act, and the person fatally injured might have recovered damages in respect of such injury, the right of action shall survive for the benefit of the "child," and may be brought by the executor or administrator of the deceased. If there is no executor or administrator, or such does not bring the action within six months of the death, then, under 27 & 28 Vict. c. 95, the persons beneficially interested in the action may bring it for themselves. The services that have been lost through the death of the relative must have been rendered on account of the relationship of the parties, and not in pursuance of a contract.²

Child *en ventre sa mère*, but not a bastard, within the Act.

The action must be brought within a year from the death,³ whether by the personal representatives, or the persons beneficially interested. A child *en ventre sa mère*,⁴ but not a bastard,⁵ is within the remedy of Lord Campbell's Act. Contributory negligence on the part of the deceased will be a bar to the representatives of the deceased maintaining the action.⁶ There must be some proof of damage or the action will fail,⁷ but a reasonable expectation of pecuniary advantage may be taken into consideration by the jury.⁸ It has been held in the Irish Exchequer Division that where the value of the services of the deceased was greater than the cost of the support of the deceased, the death would not entitle the relative who complained of the death to compensation;⁹ but it has been also held that where it can be shown that the services of the deceased had a distinct pecuniary value, and were of more value than the cost of the support of the deceased, though no actual evidence is given of the exact amount of the value of the services or of the keep of the deceased, there is a case to go to the jury for pecuniary compensation.¹⁰ Damages for "wounded feelings,"¹¹ or for funeral expenses,¹² cannot be given.

¹ 9 & 10 Vict. c. 93.

² *Sykes v. North-Eastern Railway Co.*, 44 L. J. C. P. 191.

³ 9 & 10 Vict. c. 93, s. 3; 27 & 28 Vict. c. 95, s. 1.

⁴ *The George and Richard*, L. R. 3 A. & E. 466.

⁵ *Dickinson v. North-Eastern Railway Co.*, 33 L. J. Ex. 91.

⁶ *Dynen v. Leach*, 26 L. J. Ex. 221; *Waite v. North-Eastern Railway Co.*, 28 L. J. Q. B. 258.

⁷ *Duckworth v. Johnson*, 29 L. J. Ex. 25.

⁸ *Pym v. Great Northern Railway Co.*, 31 L. J. Q. B. 249.

⁹ *Hull v. Great Northern Railway Co. (Ireland)*, 26 L. R. Ir. 289. The court in this case disapproved of *Duckworth v. Johnson (ubi sup.)*.

¹⁰ *Wolfe v. Great Northern Railway Co. (Ireland)*, 26 L. R. Ir. 548. In this case the Court of Appeal approved of *Duckworth v. Johnson (ubi sup.)*, and held that the *onus* of proof required in the case of *Hull v. Great Northern Railway Co. (ubi sup.)*, was satisfied, and the *onus* of disproof was shifted to the defendant company.

¹¹ *Blake v. Midland Railway Co.*, 21 L. J. Q. B. 233.

¹² *Dalton v. South Eastern Railway Co.*, 27 L. J. C. P. 227; see *Osborn v. Gillett*, L. R. 8 Ex. 88.

This action can be brought by the child for injuries resulting in the death of the "parent";¹ and the principles which have been laid down above as regulating the bringing and maintaining of actions in the case of parents are the same as those in the case of children. Where executors receive money by way of compensation for injuries causing the death of their testator without bringing an action under this Act, but proceed in the Chancery Division for a declaration as to the persons entitled, the court can distribute it among the relatives of the deceased who are entitled to it as having suffered damage by the death of their relative, as though it were a jury under this Act.² Children of workmen killed during their employment are entitled to compensation, if such employment was within the provisions of the Workmen's Compensation Acts, 1897,³ and 1900.⁴

Action by children.

Declaration of title.

(2) *Liability of Parent for Torts done by Child*.—The liability of a parent for the torts of his children is quite different to that which the law imposed (and does to a partial extent now impose) upon the husband for the torts of his wife, whether committed before or during marriage; for marriage by the common law operated as a conveyance of the wife's property to the husband, and the only redress the injured party had by way of pecuniary compensation was to sue the husband as well as the wife. But the father's pecuniary interest in his unemancipated children is limited to the wages they earn in service. If the father authorized the tort, or clearly ratified its commission, he would be liable; or if he employed his child in a particular employment, and in the course and scope of that employment the child committed a tort, no doubt the principle which renders a master liable for the tortious acts of his servant committed within the scope of his employment and limits of his authority would be applied, and the father held liable for the tort.⁵ But there is a dictum to the effect that "the tendency of juries, where persons under age have incurred debts or committed wrongs, to make their relatives pay, should be checked by the courts," on the ground that "no man ought, as a general rule, to be responsible for acts not his own."⁶ On the whole, it may be stated as a rule that a father is not liable in damages for the torts of his child committed without his knowledge, consent, or sanction, and not in the course of his employment of the child.⁷

Liability of parent for child's torts committed with his consent and knowledge.

¹ 9 & 10 Vict. c. 93, s. 2.

² *Bulmer v. Bulmer*, 25 Ch. D. 409.

³ 60 & 61 Vict. c. 37.

⁴ 63 & 64 Vict. c. 22.

⁵ See *post*, Master and Servant, chap. viii.

⁶ Per Willes, J., in *Moon v. Towers*, 8 C. B. (N.S.) 611, 616.

⁷ Sch. Dom. Rel. s. 263; *Moon v. Towers* (*ubi sup.*).

CHAPTER VI.

ILLEGITIMATE CHILDREN.

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AN illegitimate child, or bastard,¹ is one who is born out of lawful wedlock. A child is legitimate provided that its parents are lawfully married at the date of its birth, and it is immaterial whether they were married or not at the time of its conception.

¹ There is some doubt as to the etymology of the term "bastard." The more recent writers would derive it from *bast*, signifying a pack-saddle, and the suffix *ard*, and its meaning would be "son of a bast, or pack-saddle," that is, not of a bed, as a lawful son or child ought to be. In former times the muleteers who went up and

But where the child is posthumous, or born after the death of its father, the time at which it was conceived becomes of great importance; if born within the furthest period allowed for gestation from the date of the death of its mother's late husband, it will be presumed to be his child, and so legitimate; but if born without that period, it will be held to be a bastard.¹

The English law may be somewhat stern in its treatment of bastards, but it does not lightly come to the conclusion that a child born of a married woman is not legitimate; on the contrary, the presumption of law is that it is legitimate. This legal presumption is not to be rebutted by circumstances which create only doubt and suspicion, such as mere adultery by the mother.² It may, however, be displaced by proof of such facts, as, for instance, that the husband was incompetent; was entirely absent, so as to have no intercourse or communication of any kind with the mother; or was entirely absent at the period during which the child must, in the course of nature, have been begotten; or was only present under circumstances as afford clear and satisfactory proof that there was no sexual intercourse. Such evidence as this would put an end to the question, and establish the illegitimacy of the child of a married woman.³ So the husband of a married woman who bears a full-time child well within the ordinary period of gestation from the date of the marriage may show that he had not had any pre-nuptial intercourse with her.⁴ But a husband cannot indirectly bastardize the child of his wife by an allegation of its illegitimacy where access to her was possible during the period of gestation.⁵ But if (as it may be) non-access of the husband is proved from other sources,⁶ then the mother may give evidence to prove the paternity of her child;⁷ and under the Evidence Amendment Act, 1869,⁸ she may give evidence as to her adultery; but the husband cannot give evidence under this Act after the dissolution of his marriage on the ground of his wife's adultery to prove the bastardy of a child born in wedlock.⁹ The mother,¹⁰ or father¹¹ is a competent witness to prove that she was never

Presumption that child of a married woman is legitimate.

How displaced.

Proof aliunde of non-access of husband.

down the country with their wares, were in the habit of sleeping in the outhouses of the inns on their pack-saddles instead of beds. See Skeat's Etymological Dictionary of the English language. The Greek equivalent is *vóthos*, as opposed to *γνήσιος*, and the Latin is *spurius* "unde solent spurii filii appellari, vel a græcâ voce, quasi *σποράδην* concepti, vel quasi sine patre filii." Gaius, lib. i. s. 64.

¹ See *ante*, p. 501.

² *Gordon v. Gordon and Gordon*, [1903] P. 141.

³ *Hargreave v. Hargreave*, 9 Beav. 552.

⁴ *Poulett Peerage*, [1903] A. C. 395, overruling *Anon. v. Anon.*, 22 Beav. 481; 23 Beav. 273.

⁵ See *Hewat's Divorce Bill*, 12 App. Cas. 312.

⁶ See *Rea v. Kea*, 11 East, 132.

⁷ *Legge v. Edmonds*, 25 L. J. Ch. 125.

⁸ 32 & 33 Vict. c. 68.

⁹ *Burnaby v. Baillie*, 42 Ch. D. 282; and see *Nottingham Union v. Tomkinson*,

4 C. P. D. 343. ¹⁰ *Rea v. Bramley*, 6 T. R. 330.

Rea v. St. Peter's, Burr. S. C. 25.

married, and that, consequently, her or his reputed children are illegitimate.

Admissions
and declara-
tions of
deceased
persons ad-
missible.

The admissions of a deceased person as to his illegitimacy are receivable in evidence in proof of his bastardy;¹ and family tradition may be proved to corroborate such admissions of the deceased as to his illegitimacy.² Declarations by a reputed father contained in business letters written in his name and under his dictation as to the date of birth of his reputed children may be admitted as evidence after his death, of the date of their birth, upon the question of their legitimacy, though such evidence would tend to prove that they were bastards;³ and in pedigree cases, where the legitimacy of a child born in wedlock is in issue, previous statements by the mother that the child is a bastard are admissible as evidence of her conduct, though such statements could not be made by her as a witness called to give evidence.⁴ Evidence, too, of verbal statements made by the paramour of the wife with whom he was living, is admissible as evidence of conduct tending to show he was the father of the child.⁵ An action may be brought to perpetuate testimony for the purpose of proving the illegitimacy of a child where the wife of a lunatic husband has committed adultery, and given birth to a child which is alleged to be a bastard.⁶

Action to
perpetuate
testimony.

Difference
between adul-
terine bastards
and spurious
issue.

The Roman or civil law doctrine is contained in the maxim, *pater est quem nuptiæ demonstrant*; and one of its effects is that where the parents of a bastard marry, the subsequent marriage confers the status of legitimacy upon the child. This privilege prevails in all countries the laws of which are based upon the civil code, and in most of the United States of America. But bastards are of two kinds; they are either incestuous and adulterous on the one hand, when conceived or born during the marriage of one of the parents; or spurious on the other, called also *vulgo quæsitæ*, when born of promiscuous intercourse. The principal distinction between the two is this, that the latter may be legitimated *per subsequens matrimonium*, but the former (it is thought) never.⁷ Now this privilege of legitimation has never prevailed in the English legal system, and the law may be thus stated, "once a bastard always a bastard." An attempt was made by the bishops in the time of Henry III. to introduce the canon law doctrine, but the peers successfully resisted the proposed innovation.⁸ But except in the

Where status
of legitimacy
recognized,

¹ *Her Majesty's Procurator-General v. Williams*, 31 L. J. P. & M. 157; *Re Perton* (deceased), *Pearson v. Att.-Gen.*, 53 L. T. 707.

² *Re Perton* (deceased), *Pearson v. Att.-Gen.* (*ubi sup.*).

³ *Re Turner, Glenister v. Harding*, 29 Ch. D. 985.

⁴ *Aylesford Peerage Case*, 11 App. Cas. 1.

⁵ *Burnaby v. Baillie*, 42 Ch. D. 282.

⁶ *Re Stoer*, 9 P. D. 120. See this case for the course to be pursued under Ord. xxxvii. r. 35 of the R. S. C. 1883.

⁷ *Fras. Par. & Ch.* 119.

⁸ See *ante*, p. 502. The desire to bring about such a change as this does not seem to have been deeply seated, for there is no record of a later attempt to bring about

matter of succession as heir to real property,¹ where a child is born before the marriage of his parents, if his father is domiciled in a country (at the time of the birth of the child and at the time of the subsequent marriage with the mother) whose laws recognize legitimation *per subsequens matrimonium*, the status of legitimacy of such child will be recognized by the laws of this country.² Strictly speaking, a bastard is *filius nullius*, that is, in the eye of the law he has no parent on whom he has any enforceable claim, or from whom he can derive any rights. But bastards equally with legitimate persons are within the prohibited degrees of consanguinity and affinity; and their marriages within those degrees are incestuous and void.³ The civil law doctrine of *partus sequitur ventrem*, which recognizes a legal tie between the mother and her child, and enables a bastard to succeed to her personal property, has no application in English law. Bastards have no next of kin in the eye of the law, and such cannot be created for them by testamentary disposition.⁴

Bastards within the prohibited degrees of kinship;

but have no next of kin.

But the tendency and growth of the law has been towards a more liberal recognition of the rights and duties of the parents towards their bastard offspring, and to regard the latter more as children of, than strangers to, the former. Thus, the mother has the right in the care and custody of her child while within the years of nurture; for as the maternity is capable of satisfactory proof, she is marked out by nature as its proper custodian.

Recognition of kinship between bastards and their parents.

The rights of a bastard at common law are not numerous, and such as they are he must acquire for himself, and cannot inherit. He can now claim during his tender years the statutory as well as moral right to be supported by his parents.⁵ He may, it seems, acquire a right to a surname by reputation.⁶ Though a bastard cannot inherit, yet under certain circumstances, legacies, and bequests made in his favour, and in the capacity of child of his parents, are held good and valid. It is true that the "description child, son, issue, every word of that species, must be taken *prima facie* to mean legitimate child, son, or issue;"⁷ but bastards can take a legacy or bequest under the term "children" already born, if sufficiently designated or described, or have acquired the reputation of being children or issue,⁸ and both

Rights and disabilities of bastard.

Bequests and legacies to bastard.

When bastard can take under designation of "child."

this alteration of the law. Fuller details of how bastardy may be proved or rebutted, and of the consequences flowing from it, are given above in chap. i. Legitimacy.

¹ *Birtwhistle v. Vardill*, 7 Cl. & F. 895.

² *Re Goodman's Trusts*, 17 Ch. D. 266; *Re Grove, Vaucher v. Solicitor to the Treasury*, 40 Ch. D. 216; *Re Grey's Trusts*, *Grey v. Stamford*, [1892] 3 Ch. 88.

³ *Reg. v. Brighton (Inhabitants of)*, 30 L. J. M. C. 197. See *ante*, p. 77.

⁴ *Re Wood, Wood v. Wood*, [1901] 2 Ch. 578.

⁵ See *post*, pp. 601 *et seq.*

⁶ Co. Litt. 3.

⁷ *Per Eldon, C.*, in *Wilkinson v. Adam*, 1 V. & B. 42; *Dover v. Alexander*, 12 L. J. Ch. 175.

⁸ *Hill v. Crook*, L. R. 6 H. L. 265, affirming L. R. 6 Ch. 311.

legitimate and bastard children can take together under the like denomination and description of "children," &c.;¹ and from this it follows that a bastard cannot take by the description of "child" of his reputed father, until he has acquired the reputation of being such child.² An unmarried man made a bequest "to my children," &c., and parol evidence was allowed to show whom the testator considered in the character of children, and they having obtained a name by reputation, were admitted to take as a class, though illegitimate and not named in the will.³ Where a testatrix bequeathed to A, "the eldest daughter of my deceased daughter S, my gold watch," and she bequeathed other property to trustees "in trust for such of the children of my said deceased daughter S, who shall attain twenty-one, absolutely, equally, share and share alike, the shares of such of them as shall be daughters to be for their sole and separate use"; S had two legitimate children, a son and a daughter, and she had also an illegitimate daughter, who was the person spoken of in the will as "A, the eldest daughter of S"; it was held that there was a sufficient indication of an intention that A should be included in the description of "the children of S."⁴ It is the intention that the illegitimate child shall take that makes the bequest good.⁵ But any reference to an illegitimate child that involves an inquiry as to his paternity will disentitle the bastard child to take.⁶ "The principle which may fairly be extracted from the cases upon this subject is this—the term 'children' in a will *prima facie* means legitimate children, and if there is nothing more in the will, the circumstance that the person whose children are referred to has illegitimate children will not entitle those illegitimate children to take.⁷ But there are two classes of cases in which that *prima facie* interpretation is departed from. One class of cases is where it is impossible from the circumstances of the parties that any legitimate children could take under the bequest. A familiar example of that might be given in this way: Suppose there is a bequest 'to the children of my daughter Jane,' Jane being dead, and having left illegitimate children, but having left no legitimate children. There, inasmuch as the testator must be taken to have known the state of his family, and must be taken to have intended to benefit some children of his daughter Jane, and inasmuch as she had no children who could be benefited except illegitimate children, rather than that

¹ *Hill v. Crook*, L. R. 6 H. L. 265, affirming L. R. 6 Ch. 311.

² *Wilkinson v. Adam*, 1 V. & B. 42.

³ *Beachcroft v. Beachcroft*, 1 Madd. 430.

⁴ *Re Humphries, Smith v. Millidge*, 24 Ch. D. 691.

⁵ See *Harris v. Lloyd*, T. & R. 310.

⁶ Per Bowen, L.J., in *Re Bolton, Brown v. Bolton*, 31 Ch. D. 542.

⁷ See *Dorin v. Dorin*, L. R. 7 H. L. 568; *Re Walker, Walker v. Lutyens*, [1897] 2 Ch. 238, and *Re Smither, Bedford v. Hughes*, [1903] 1 Ch. 198.

the bequest should fail altogether, the courts will hold that illegitimate children are intended, and they will take under the term 'children.' . . . The other class of cases is of this kind : where there is upon the face of the will itself, and upon a just and proper construction and interpretation of the words used in it, an expression of the intention of the testator to use the term 'children' not merely according to its *prima facie* meaning of legitimate children, but according to a meaning which will apply to, and which will include illegitimate children."¹ But where there is no evidence on the face of the will that the testator intended illegitimate children to take, legitimate children alone will take;² though from circumstances *dehors* the will it might be inferred that the testator meant and intended that the term "children" should include and designate illegitimate ones.³ If there are no legitimate children to take, though in the circumstances of the parties a legitimate child might have come into existence, then a bequest to "children" will fail.⁴ The rule of law that where there is a gift to children an illegitimate child cannot take does not apply to a gift over of property by a testator who has designated an illegitimate child as a "child"; and such illegitimate child will take under the bequest;⁵ so where a person born before the testator's will was made was designated as a "child" of the "wife" of a particular person, though she was, to the knowledge of the testator, not the legal wife of that person, such "child" took under the will.⁶ Where it is clear from the construction of the will that the testator intended illegitimate children to be recipients of his bounty, such will take though they are described or designated only as his "relatives";⁷ or as "persons entitled under the Statute of Distributions";⁸ and there are legitimate persons who also fulfil the foregoing descriptions.⁹ If the persons so described take by way of a gift over, such gift over is cogent evidence that they should take notwithstanding their illegitimacy. But a bastard child whose existence was unknown to the testator cannot take under the description of "child" of its parent.¹⁰

A bastard child *en ventre sa mère* at the date of the will of the testator will take if sufficiently indicated;¹¹ "but if a child is

Bastard *en ventre sa mère* can take as a "child."

¹ Per Cairns, C., in *Hill v. Crook*, L. R. 6 H. L. 265, 282. See *Coles v. Jones*, 78 L. T. (Jo.) 60.

² *Dorin v. Dorin* (*ubi sup.*), *Re Hazeldine, Grange v. Sturdy*, 31 Ch. D. 511; *Re Lowe, Danily v. Platt*, 61 L. J. Ch. 415.

³ *Dorin v. Dorin* (*ubi sup.*).

⁴ *Re Brown, Penrose v. Manning*, 63 L. T. 159.

⁵ *Smith v. Jobson*, 59 L. T. 397.

⁶ *Re Horner, Eagleton v. Horner*, 37 Ch. D. 695; *Re Harrison, Harrison v. Higson*, [1894] 1 Ch. 561.

⁷ *Re Joddrell, Joddrell v. Seale*, 44 Ch. D. 590.

⁸ *Re Wood, Wood v. Wood*, [1902] 2 Ch. 542, overruling *Re Standley's Estate*, L. R. 5 Eq. 303.

⁹ See *Re Joddrell, Joddrell v. Seale* (*ubi sup.*).

¹⁰ *Re Mayo, Chester v. Keir*, [1901] 1 Ch. 404.

¹¹ *Crook v. Hill*, 3 Ch. D. 773.

described with reference to its father there seems to be considerable doubt whether the bequest is not void for uncertainty. To establish the fact of paternity would involve an inquiry which the law will not allow, and it is doubtful whether an illegitimate child can acquire a title by repute till it is born."¹

Future illegitimate children born between the date of the testator's will and his death, who are sufficiently designated and have acquired at the time of the testator's death the reputation of being "children" will take;² even though where illegitimate they are believed to be legitimate.³ There must be a clear reference to the children, and not a mere reference that involves an inquiry as to their paternity.⁴ A bastard child born after the testator's death cannot be entitled under such a description or designation,⁵ unless it happens to be *en ventre sa mère* at the date of the testator's death.⁶ This rule is based upon the principle that gifts to such future illegitimate children are *contra bonos mores*, and direct inducements to immorality, and discourage marriage, which the law favours. An illegitimate child, though *en ventre sa mère* at the time of a deed, will not take under the description of "child" in the deed without clear words of reference to it.⁷ But a great distinction is to be drawn between the gifts to illegitimate children whether by deed or will by the putative father or the mother; a gift by the latter cannot be deemed to be against *bonos mores* or policy of the law.⁸

Bastard born after testator's death cannot take.

Disabilities.

Bastard cannot inherit, or succeed *ab intestato* to personal property.

The disabilities of bastards are in modern times principally confined to their incapacity to inherit titles and lands, or succeed *ab intestato* to personal property under the Statute of Distributions. As a consequence of this a bastard cannot have any heirs except such as are the lawful issue of his own body; so, too, legitimate persons alone can take under the Statute of Distributions. This is an important and far-reaching disability. Blackstone gives the above instance as the only difference between legitimate and illegitimate persons, and goes on to say:⁹ "And really any other distinction but that of not inheriting, which civil policy renders

¹ Theob. Wills, 266, citing *Earle v. Wilson*, 17 Ves. 528.

² *Occleston v. Fullalove*, L. R. 9 Ch. App. 147. This case overrules on this point *Howarth v. Mills*, L. R. 2 Eq. 389; but in it Lord Selborne, C., dissented, and the decision is not in accordance with certain dicta which fell from Lords Chelmsford and Colonsay in *Hill v. Crook*, L. R. 6 H. L. 265; *Re Hastie's Trusts*, 35 Ch. D. 728. See *Savage v. Robertson*, L. R. 7 Eq. 176.

³ *Re Du Bochet, Mansell v. Allen*, [1901] 2 Ch. 441.

⁴ *Re Bolton, Brown v. Bolton*, 31 Ch. D. 542.

⁵ *Crook v. Hill*, 3 Ch. D. 773; *Holt v. Sindrey*, L. R. 7 Eq. 170; *Re Lowe, Danily v. Platt* (*ubi sup.*).

⁶ *Ibid.* But in *Re Bolton, Brown v. Bolton* (*ubi sup.*), Fry, L.J., said it was a question of doubt whether a child *en ventre sa mère* at a testator's death could have the reputation of being his child.

⁷ *Re Shaw, Robinson v. Shaw*, [1894] 2 Ch. 573.

⁸ Per Deane, J., in *The Estate of Frogley*, [1905] P. 137.

⁹ 1 Com. 459.

necessary, would, with regard to the innocent offspring of his parent's crimes, be odious, unjust, and cruel to the last degree." But as a matter of fact their disability extends beyond this limit — thus, a bastard cannot avail himself of the benefits conferred by Lord Campbell's Act¹ in compensation for losses sustained by death of certain relatives.² A bastard though adopted by and known by repute as the child of its putative father, is a stranger to him, so far as an effectual appointment of a testamentary guardian by the latter under 12 Car. II. c. 24.³ But in an Irish case, a reputed father having named his executor as guardian of his natural child, the Lord Chancellor, though holding that the child could have no guardian except by appointment of the court, made the appointment of the person named, without a reference to the Master.⁴ Again, where a power exercised on behalf of an illegitimate child is defective, the Court of Chancery will not supply relief against the defective execution in favour of such child.⁵ So where a testator leaves a legacy to a bastard child, interest upon it is not payable at once from the testator's death, as in the case of a legitimate child,⁶ unless the testator directly orders maintenance out of the interest.⁷

Bastard not within Lord Campbell's Act.

Bastard cannot have a testamentary guardian appointed to it.

Defective powers not supplied in his favour.

If a bastard possessed of property, real or personal, dies intestate without leaving a widow or legitimate children the Crown takes by escheat.

When the Crown takes by escheat.

As regards the custody of the child the courts carry out in part the spirit of the maxim *partus sequitur ventrem*, and assign primarily to the mother the care and control of her infant child, not only within the age of nurture, but beyond, for now by statute a pauper mother and her bastard child are inseparable till the latter reaches the age of sixteen, or on marriage, if a female, when it can acquire an independent settlement for itself.⁸ In cases which did not arise under the statute, the courts would follow its analogy, and primarily assign the custody of the bastard child to its mother. It has accordingly been held that the mother is entitled to the custody of her infant child in preference to the father, though from his circumstances he may be better able to educate it.⁹ And if the putative father obtains possession of the child by fraud,¹⁰ or force,¹¹ the court on *habeas corpus* will

Primary right of custody in mother.

¹ 9 & 10 Vict. c. 93.

² *Dickinson v. North-Eastern Railway Co.*, 33 L. J. Ex. 91.

³ *Sleeman v. Wilson*, L. R. 13 Eq. 36.

⁴ *Barry v. Barry*, 1 Moll. 210. But see the Scottish case of *Brand v. Shaws* (16 Ct. of Sess. Cas. 315), which decided that the Guardianship of Infants Act, 1886, which entitles a mother to appoint a testamentary guardian to her infant children is not applicable to the case of a bastard child.

⁵ *Crickett v. Dolby*, 3 Ves. 10.

⁶ *Lowndes v. Lowndes*, 15 Ves. 301; *Dowling v. Tyrrell*, 2 R. & M. 343.

⁷ See *Beckford v. Tobin*, 1 Ves. 308; *Perry v. Whitehead*, 6 Ves. 546.

⁸ 3 & 4 Wm. IV. c. 76, s. 71; 39 & 40 Vict. c. 61, s. 35.

⁹ *Ex parte Knee*, 1 B. & P. N. R. 148.

¹⁰ *Rex v. Soper*, 5 T. R. 278.

¹¹ *Rex v. Hopkins*, 7 East, 579.

order it to be restored to the mother. The mother of a bastard child cannot legally contract with another person to transfer to him her rights and liabilities with respect to the child, any more than the parent of a legitimate child can so contract.¹

The right of the father to the custody has been recognized, though not fully at first, thus, where he had the custody of the child fairly, the court was loath to take it away from him;² so where the mother of a bastard child between eleven and twelve years of age obtained a *habeas corpus* to compel the putative father to bring her before the court, and the child was brought up before the court, the latter declared her entitled to exercise her own discretion as to whither she would go, and would not allow her mother to take her against her will.³ In a recent case,⁴ his right to the custody has been maintained. Indeed, this *natural* relationship between the child and its parents and other relatives is largely recognized both in law and equity;⁵ and except under special circumstances the putative father is, after the mother's death, entitled to the custody of the child.⁶ This claim is not based upon any strict legal right arising out of the legal position of parent and child, or upon any title in the parents to the legal guardianship of their infant child, for the relationship between them forbids that claim, for a bastard has no legal status as a child, even though by repute he may come to have the name of his father, but it is founded on equitable doctrines, and "that sort of blood relationship which, though not legal, gives the natural relations a right to the custody of the child."⁷ But it must be borne in mind that in the case of bastards, as in that of legitimate children, their interests and welfare are the first consideration of the courts.⁸

The Legislature, however, has recently gone very far towards recognizing a more than *quasi*-legal relationship between a bastard and his blood connections, for in the Friendly Societies Act, 1896,⁹ which re-enacts section 8 of the Provident Nominations Act, 1883,¹⁰ it provides that if a member of a registered society or branch entitled from the funds thereof to a sum not exceeding £100 is illegitimate and dies intestate without having made any nomination thereof, the trustees may pay the sum of money which that member might have nominated to or among the persons who, in the opinion of the majority of them, would have been entitled thereto if that member had been legitimate.

¹ *Humphreys v. Polak*, [1901] 2 K. B. 385.

² *Rex v. Moseley*, 5 East, 224 n.

³ *Re Lloyd*, 3 M. & G. 547.

⁴ *Re Crowe (an Infant)*, Ir. L. T. Rep. 1883, p. 72.

⁵ See *Reg. v. Nash*, 10 Q. B. D. 454.

⁶ *Re Kerr (an Infant)*, 24 L. R. Ir. 59.

⁷ Per Jessel, M.R., in *Reg. v. Nash*, 52 L. J. 444.

⁸ *Reg. v. Nash (ubi sup.)*.

⁹ 59 & 60 Vict. c. 25, s. 58.

¹⁰ 46 & 47 Vict. c. 47.

When father's
right recog-
nized.

Welfare of
bastards con-
sidered by the
court.

Friendly
Societies Act,
1896.

This provision, of course, only affects a limited class of the community, but it demonstrates the direction in which the law is nowadays tending.

The father or mother of a bastard child can maintain a prosecution for decoying or enticing it away under 24 & 25 Vict. c. 100, s. 56.¹

The effect of the cases seems to be as follows: Where the infant is within the age of nurture, the right of the mother is paramount as against all claimants, and can be enforced by her though the putative father is in a better social and pecuniary position than herself. But where the child has passed the age of nurture, and the father has owned it, and has fairly assumed and retains the custody of it, and it is to the advantage of the child to remain with him, the court will not assist the mother to regain the control and custody of the child. As against other blood relatives or strangers, the claims of the father and mother are fully recognized; but in all respects the courts will look primarily to the interests and advantage of the child.

Summary of rights of parents as between each other.

It has been before stated (and there is authority for the statement) that the parents of bastard children have no legal right to the guardianship of them.² But as a matter of fact, the mother is frequently appointed guardian to her bastard child.³ As the court will not appoint a guardian for an infant who has no property, a putative father will not be appointed guardian of his illegitimate child having no property, unless he makes a settlement upon him, and he has no absolute right, under any circumstances, to claim the guardianship,⁴ whether to take effect during his life, or after death by testamentary appointment.⁵ The mother likewise has no claim to leave testamentary guardians for her bastard children;⁶ and where the putative father owns and suitably provides for them, the person nominated in the mother's will as guardian, though found to be a fit and proper person, will not be entitled to their custody and education as against the father;⁷ and where illegitimate daughters took considerable fortunes under their father's will, the mother applied for the office of guardian, but the court appointed another person.⁸

No legal right of guardianship in the parents.

As between strangers and the parents of a bastard child, it is now clear law that the latter have a very considerable claim to its custody, control, and education; but under all circumstances the benefit and welfare of the child are kept prominently before

Custody of bastard child as between parents and strangers.

¹ Under this section no person who shall be the mother, or shall claim to be the father of an illegitimate child, shall be liable to be prosecuted on account of getting possession of the child, or taking such child out of the possession of any person having the lawful charge thereof.

² *Rex v. Felton*, 1 Bott & Const, P. L. 467.

³ Macph. Inf. 555.

⁴ *Ibid.* 110.

⁵ *Steele v. Wilson*, L. R. 13 Eq. 36.

⁶ *Ord v. Blackett*, 9 Mod. 116.

⁷ See *Brand v. Shaws*, 16 Ct. of Sess. Cas. 315. This was a decision under the Guardianship of Infants Act, 1886.

⁸ *Curtois v. Vincent*, Jac. 268.

the mind of the court which has to decide the question of the custody. At one time the mother and her illegitimate child were deemed very little more than strangers to one another;¹ and indeed this theory and assumption have been acted upon; and in one case where a mother had left her bastard child, an infant of a year old, in the charge and custody of friends for seven years, but was desirous of taking her child back into her own custody, Wightman, J., on the application of the mother by *habeas corpus*, refused to give the infant over into her custody, on the ground that neither the father nor the mother had any particular right to the custody of their bastard child.² And in another case where the mother applied by *habeas corpus* for the custody of her illegitimate child, who had attained the age of twelve, and was desirous of remaining with her present custodians, the court refused to deliver up the child to her, but allowed the child to make her choice whether she would go to her mother or remain where she was.³ The natural tie between the mother and her bastard child has on equitable principles lately had effect given to it; and, subject to the interests and benefit of the child, her right to its control and custody,⁴ and to dictate the character of its education⁵ is established. But this right is not absolute,⁶ or the same as that of a father of a legitimate child;⁷ but as she has statutory liabilities cast upon her in respect of its maintenance so corresponding rights are recognized in her.⁸

At common law the putative father was not compellable to support his bastard child, or contribute in any way to its maintenance. But by an early statute⁹ the reputed father might be charged with the sustentation of his bastard child for the purpose of relieving the parish in which it was born; and under the general poor-law system of administration he was rendered liable for its support in order to relieve the parish;¹⁰ but by later legislation his liability is now to afford relief to the mother.¹¹ He can be made liable for its support till it reaches the age of thirteen; but if the circumstances of the case warrant it, his liability can be extended till it attains sixteen years.¹² The marriage of the mother no longer frees him from his liability until the period for which he has been ordered to contribute towards its support has expired¹³ or the child has died;¹⁴ and the

Statutory liability of putative father to maintain bastard child.

Marriage of mother does not free him from liability.

¹ See remarks of Maule, J., in *Re Lloyd*, 3 M. & G. 547.

² *Reg. v. White*, 10 L. T. (O.S.) 349.

³ *Re Lloyd (ubi sup.)*.

⁴ *Reg. v. Nash (Rose Carey's Case)*, 10 Q. B. D. 454, overruling *Reg. v. White (ubi sup.)*; *Re v. New*, 20 T. L. R. 583.

⁵ *Reg. v. New (ubi sup.)*.

⁶ *Re Ullee*, 54 L. T. 286.

⁷ *Barnardo v. M'Hugh*, [1891] App. Cas. 388.

⁸ *Per Halsbury, C.*, in *Barnardo v. M'Hugh (ubi sup.)* at p. 395.

⁹ 18 Eliz. c. 3.

¹⁰ 4 & 5 Wm. IV. c. 76, s. 72.

¹¹ 7 & 8 Vict. c. 101, s. 5.

¹² 35 & 36 Vict. c. 65, s. 5.

¹³ The latter portion of section 5 of 7 & 8 Vict. c. 101, providing for the cessation of the order on the marriage of the mother is repealed. *Sotheron v. Scott*, 6 Q. B. D. 518; *Pearson v. Heys*, 7 Q. B. D. 260.

¹⁴ 35 & 36 Vict. c. 65, s. 5.

justices have no power to inquire whether the husband of the mother (if she has married) is or is not able to support the bastard child, but must enforce the order,¹ and they must do so where the mother is a married woman living apart from her husband, who subsequently returns and resumes cohabitation with her.² It has also been decided that where a bastard child becomes chargeable to a union the guardians may apply for an order of maintenance against the putative father under the Bastardy Laws Amendment Act, 1873,³ though its mother has married and her husband is capable of supporting and maintaining the child.⁴ The father cannot oust the jurisdiction of the magistrates to order him to contribute to the support of the child on the application of the mother for that purpose, by any arrangement with her indemnifying him against any liability in respect of the child.⁵ He may be committed to prison for a term not exceeding three months if he refuse to comply with the order, and no sufficient distress be found on his premises to satisfy the amount due under the order.⁶

The putative father is not only liable to the mother but also to the union, and the Guardians (now called District Councillors) may recover by an order of justices the cost of relief of a bastard child who has become chargeable to the union under certain circumstances; and the payment to be made under such an order is recoverable by the relieving officer or other officer appointed to receive it.⁷ An allowance will be made out of a lunatic's estate for illegitimate children, but not for their mother.⁸

A father is not legally liable to support his legitimate children apart from his statutory liability, or unless he contracts to render himself liable, or so acts as to raise an implication of an intention so to render himself liable, though very slight evidence is required to fix him with this liability.⁹ It is equally the case with regard to his bastard children; so if he contracts expressly to render himself liable, or so acts that an implication to render himself liable can be raised, he will be held to his bargain. If the father has adopted a bastard child as his own, though no order has been made on him, he is liable for the expenses of

Putative father liable to the parish as well as mother.

No liability apart from statutory order.

¹ *Hardy v. Atherton*, 7 Q. B. D. 264.

² *Ex parte Grimes*, 22 L. J. M. C. 153; S. C. 17 Jur. 554.

³ 36 & 37 Vict. c. 9, s. 5.

⁴ *Plymouth Guardians v. Gibbs*, [1903] 1 K. B. 177. It is by no means sure that this decision is correct; it is based altogether on the word "chargeable" in the section. But under 4 & 5 Wm. IV. c. 76, s. 57, a husband is liable for the support of the children of his wife, whether legitimate or illegitimate; he is primarily liable, and his liability should be first enforced. If he is not of ability to support his wife's bastard child which becomes chargeable, then no doubt the liability of the putative father would arise. In *Hardy v. Atherton* (*ubi sup.*) the order against the father had been obtained before the mother married, which fact clearly distinguishes that case from the one under discussion.

⁵ *Griffith v. Evans*, 46 L. T. 417.

⁷ 36 & 37 Vict. c. 9, s. 5.

⁹ See *ante*, chap. ii. pp. 536 *et seq.*

⁶ 35 & 36 Vict. c. 76, s. 4.

⁸ *Ex parte Haycock*, 5 Russ. 154.

nursing and necessities;¹ or if he has consented to pay an annual sum for its support, he must continue to do so, or provide for the child at his own expense, or give clear and distinct notice of his intention to discontinue the payment of such annual sum.² Where he has refused to continue its support until the mother obtained an order of affiliation, he will not be liable for the arrears of maintenance.³ An agreement between the father and the mother that she is to support the child, and that he will allow her a sum for such support, will be enforced.⁴ It is not, however, the relief of the mother, but the benefit and interests of the child, that the law regards; and a contract by the mother of a bastard child to release the putative father, in consideration of a present money payment, from all further payments in respect of the child, is not void in law; but neither is it a bar to the jurisdiction of the magistrates to make an order of affiliation on the father, such order being, under the statute, for the benefit of the child, and not of the mother exclusively.⁵

Agreement, by deed, or by simple contract, based on future cohabitation, void; when by deed based on past cohabitation valid.

A contract based upon fornication or illicit cohabitation in the future, whether by deed or simple contract, is void as being *contra bonos mores*.⁶ As regards past cohabitation, the rights of the parties vary as the arrangement was carried out by deed, or by simple contract. If the man contracts by deed he is bound, for the law presumes a consideration; thus, where he covenants to pay an annuity to the woman in consideration of past cohabitation, or gives her a bond to secure to her the payment of money for her support or the support of her children, though such consideration is really no consideration at all, the contract is valid, and an action may be maintained upon it.⁷ A deed in which a man contracts to make provision for a woman with whom he has cohabited, though it provides for the possibility of future cohabitation, is not rendered invalid by the latter provision.⁸

Agreement by simple contract invalid.

Where the arrangement between the parties is only by simple contract, the man is not bound by his promise; so where in a declaration in *assumpsit*, the woman averred that the defendant had seduced and debauched her, and induced her to cohabit with him, whereby she had been injured in her character and deprived of the means of procuring an honest livelihood; that the two had agreed to discontinue the immoral connection and live apart; and that the defendant, as a compensation for the injury and in consideration of the promises, undertook to pay

¹ *Hesketh v. Gowing*, 5 Esp. 131; see also *Gore v. Hawsey*, 3 F. & F. 509.

² *Cameron v. Baker*, 1 C. & P. 268; *Nichole v. Allen*, 3 C. & P. 36; and see *Mortimore v. Wright*, 6 M. & W. 482.

³ *Furrillio v. Crowther*, 7 D. & R. 612.

⁴ *Souch v. Strawbridge*, 2 C. B. 308; *Knowlman v. Bluett*, L. R. 9. Ex. 307.

⁵ *Follitt v. Koetzow*, 29 L. J. M. C. 128.

⁶ *Robinson v. Cox*, 9 Mod. 263.

⁷ *Gibson v. Dickie*, 2 M. & S. 463; *Marchioness of Annandale v. Harris*, 2 P. Wms. 432.

⁸ *Re Wootton Isaacson, Sanders v. Smiles*, 21 L. T. R. 89.

the plaintiff a yearly sum towards her maintenance, which he had failed to do, it was held a bad declaration, as disclosing no legal consideration for the undertaking.¹ But where there is a child for the mother to support, then an arrangement by simple contract to provide for the maintenance of mother and child will bind the father, because the mother assumes a larger responsibility than is placed upon her by law.² The above remarks are a statement of the law; but the law does not seem to be based upon a logical foundation or common sense; for why should a man be held liable because he has signed a deed, and free from liability because his agreement takes some other form? The consideration for holding him bound because a child has to be supported by the mother is not that she undertakes a larger responsibility than is placed upon her by law, because by law she is liable for the support of her bastard until it attains the age of sixteen. It is doubtful whether at the present day the decisions would altogether conform to the above statements of the law.

Where a child is to be supported, agreement valid.

As in the case of the father, a mother at common law was not responsible for the maintenance of her bastard child, and it is only within recent times³ that the statutory duty has been imposed upon the mother of an illegitimate child, so long as she shall be unmarried or a widow, to maintain such child as a part of her family, until such child shall attain the age of sixteen.⁴ Her liability ceases on the marriage of such child, if a female, or, as has already been seen, on her own marriage,⁵ in which case her husband will be bound to maintain such child until it has reached the age of sixteen, or until the death of its mother.⁶ But if the mother has separate estate, and her husband cannot support his family, then her liability to support the illegitimate children revives.⁷ Where the mother of a bastard child dies, there is no obligation on her personal representatives to expend the money or property which belonged to her in the maintenance of such child, the liability of the mother being purely personal.⁸ The statutory liability was imposed upon her to prevent the cost of support and maintenance of bastards falling upon the rates, but the statutes in no way impose that liability upon her estate. As the mother is bound to support her bastard child, it necessarily follows that so far as the working of the poor laws is concerned, they should be inseparable, and she confers her parochial settlement on her child until it acquires a new settlement for itself, which it cannot do (unless a female and marries)

Liability of mother.

Bastard takes settlement of mother till sixteen.

¹ *Beaumont v. Reeve*, 15 L. J. Q. B. 141.

² *Smith v. Roche*, 28 L. J. C. P. 237; *Hicks v. Gregory*, 19 L. J. C. P. 81; *Jennings v. Brown*, 12 L. J. Ex. 86; *Crowhurst v. Laverack*, 22 L. J. Ex. 57.

³ 4 & 5 Wm. IV. c. 76.

⁴ Sect. 71.

⁵ See *ante*, p. 536.

⁶ 4 & 5 Wm. IV. c. 76, s. 57. There is no corresponding liability on the part of the wife to support her husband's illegitimate child.

⁷ 45 & 46 Vict. c. 75, s. 21.

⁸ *Ruttinger v. Temple*, 33 L. J. Q. B. 1.

until it reaches the age of sixteen ;¹ but the mother's settlement must not be a derivative one ; in which case the child takes its birth settlement.² But under the Divided Parishes Act, 1876, when an illegitimate child has reached the age of sixteen or period of emancipation, for the purpose of acquiring a settlement it can add to the period of irremovability over sixteen the necessary period for irremovability under sixteen ;³ and, indeed, after a full three years' residence with the mother before reaching the age of sixteen under such circumstances as to confer a status of irremovability the pauper bastard will acquire a settlement for himself.⁴

How father's
liability
enforced by
mother.

The mother may, under certain circumstances, call upon the man whom she alleges to be the father of her bastard child to support it ; thus, it is provided that

"any single woman who may be with child, or who may be delivered of a bastard child after the passing of this Act, may either before the birth or at any time within twelve months from the birth of such child, or at any time thereafter, upon proof that the man alleged to be the father of such child has within the twelve months next after the birth of such child paid money for its maintenance, or at any time within the twelve months next after the return of the man to England alleged to be the father of such child, upon proof that he ceased to reside in England within the twelve months next after the birth of such child, make application to any one justice of the peace acting for the petty sessional division of the county, or for the city, borough, or place in which she may reside, for a summons to be issued on the man alleged by her to be the father of the child . . . and the justice shall thereupon issue his summons to the person alleged to be the father."⁵

The payment by the putative father on an order obtained by guardians for the support of the child is not the same as an order obtained by the mother so as to entitle her to rely on the payment as having been made to her by the putative father.⁶ The evidence of the mother as to the man summoned being the putative father of her child must be corroborated in some material particular.⁷

Personal
service of
summons.

The summons must be personally served on the alleged putative father, or left at his last place of abode ; and this is a

¹ 39 & 40 Vict. c. 61, s. 35 ; *Overseers of Manchester v. Guardians of Ormskirk Union*, 24 Q. B. D. 678 ; *Guardians of Woolwich Union v. Fulham Guardians*, [1905] 2 K. B. 203.

² *Guardians of Northwich Union v. Guardians of St. Pancras Union*, 22 Q. B. D. 164.

³ *Reg. v. Elvet*, 29 L. J. M. C. 17 ; *Guardians of Highworth and Swindon Union v. Guardians of Westbury-on-Severn Union*, 14 App. Cas. 465.

⁴ *Guardians of West Ham Union v. Guardians of Holbeach Union*, [1904] 2 K. R. 121.

⁵ 35 & 36 Vict. c. 65, s. 3.

⁶ *Billington v. Cyphes*, 52 L. T. 854.

⁷ 35 & 36 Vict. c. 65, s. 4 ; and see *Reg. v. Pearcy*, 21 L. J. M. C. 129 ; 17 Q. B. 902.

question of fact for the justices to determine.¹ If the putative father is out of the jurisdiction, the summons may be left at his last place of abode out of England, if he possesses one;² but if he does not possess a fixed place of abode abroad, service at his last place of abode in England is sufficient.³ The jurisdiction of the justices to hear the summons is not ousted by the fact that the alleged father ceased to reside in England before the child was born, and remained out of the country more than twelve months after the birth.⁴ But where he is domiciled out of the jurisdiction, the service of a summons on him abroad will not give the justices in England jurisdiction to make an order on him.⁵

The term "single woman" includes a widow,⁶ also a married woman living apart from her husband;⁷ but the application for relief cannot be made by a married woman living with her husband, and supported by him,⁸ even though the summons was taken out against the putative father before her marriage, and she was prevented from serving it by his default.⁹ A mere colourable separation from the husband for the purpose of founding the jurisdiction of the justices is insufficient.¹⁰

The justices in petty sessions may make an order on the putative father for the maintenance and education of the child as they may think fit, and enforce the order by distress and commitment.¹¹ No such order shall be in force except for the purpose of recovering money previously due under such order, after the child in respect of whom it was made has attained the age of thirteen years, or after the death of the child; though the justices have a discretionary power to enlarge its operation until the child reaches the age of sixteen.¹²

The father has the right of appeal to quarter sessions against the order of the justices.¹³ The mother has no appeal if her application is refused, but she may make any number of applications within the statutory period; and dismissal on the merits is no bar;¹⁴ though a previous dismissal on the merits should be taken into serious consideration by the justices on any subsequent

"Single woman."

Order of justices on father.

Expiration of justices' order.

Right of appeal of father against order.

¹ See *Reg. v. Lee*, 58 L. T. 384; *Reg. v. Winton and others*, 59 L. T. 382; *Reg. v. Farmer and another*, [1892] 1 Q. B. 637.

² *Reg. v. Farmer (ubi sup.)*.

³ *Reg. v. Webb and others*, [1896] 1 Q. B. 487.

⁴ *Reg. v. Evans*, [1896] 1 Q. B. 228.

⁵ *Reg. v. Thompson*, 12 Q. B. D. 261. Under 44 & 45 Vict. c. 24, s. 6, an English woman alleging that a person ordinarily residing in Scotland is the father of her bastard child may have recourse to the Scottish courts; and *vice versa* in the case of a Scottish woman and an alleged English putative father. See *Reg. v. Thompson (ubi sup.)*.

⁶ *Reg. v. Wymondham*, 2 Q. B. 54.

⁷ *Reg. v. Collingwood*, 17 L. J. M. C. 138; *Stacey v. Lintell*, 4 Q. B. D. 291.

⁸ *Stacey v. Lintell (ubi sup.)*.

⁹ *Tozer v. Lake*, 4 C. P. D. 322. See also *Jang v. Spicer*, 1 M. & W. 129.

¹⁰ *Jones v. Davies*, [1901] 1 Q. B. 118.

¹¹ 35 & 36 Vict. c. 65, s. 4.

¹² Sect. 5.

¹³ 7 & 8 Vict. c. 101, s. 4.

¹⁴ *Reg. v. Machen*, 18 L. J. M. C. 213; *Reg. v. Gavut*, L. R. 2 Q. B. 466; *Reg. v. Hall and Gillespie*, 57 L. T. 306; and see *Reg. v. Robinson*, [1898] 1 Q. B. 734. In this case the mother obtained an affiliation summons against the putative father

application. If the father appeals to quarter sessions against the bastardy order, and the court quashes it, their decision is one on the merits, and is final, and the mother cannot take fresh proceedings before justices in petty sessions.¹ An adjudication on the merits has been held not to be a judgment *in rem* so far as the paternity of the bastard child is concerned, and may be questioned in an action for seduction of the mother by one who has been damnified by the loss of services.² The appeal by the father is a rehearing, and the respondent must begin her case as she did before the justices. The notice of appeal must state the general grounds of appeal.³ When the application is made within the twelve months, it is not necessary that the summons upon it should issue at the same time.⁴

Where a bastard is born abroad, and of a foreign mother, the justices cannot make an order on the putative father to contribute to its support and maintenance;⁵ but they have jurisdiction to make an order where the child is born in England, though begotten in a foreign country;⁶ and if the child is born on an English ship on the high seas, it is the same as if the child had been born in England.⁷

The domicile of origin of a bastard child is that of its mother at the time of its birth.⁸ If the mother acquires a different domicile to that which she had at the time of the birth, her illegitimate offspring will derive the new domicile from her.

and subsequently made three applications for a summons to three different justices, which were not served owing to the inability of the applicant to find the defendant; it was held that these three applications must be treated as one application, and as exhausted by the hearing and dismissal of the summons on a subsequent date.

¹ *Reg. v. Glynne*, L. R. 7 Q. B. 16.

² *Anderson v. Collinson*, [1901] 2 K. B. 107. With all respect this decision hardly seems to be correct. The judgment of the sessions on the merits is a clear adjudication on the status of the alleged father to the effect that he either is or is not the father of the bastard child of the applicant. If this decision be right, the converse of *Anderson v. Collinson* must hold good, that is, if an action for seduction is brought against one who has been adjudicated the father of a bastard child, it must be open to him to prove that he neither seduced the mother nor was the father of the child whose father he has been adjudicated to be. It seems more than doubtful if in any such action the judge would allow the defendant to go behind the order of the sessions. If the action involved merely the seduction, and did not raise a question of paternity, then no doubt the judgment of the sessions would not be a bar to the plaintiff proving the fact of seduction—for a man may seduce a woman and yet not be the father of her child. See *Eager v. Grimwood*, 1 Exch. 61.

³ *Reg. v. Shingler*, 17 Q. B. D. 49.

⁴ *Potts v. Cambridge*, 27 L. J. M. C. 62.

⁵ *Reg. v. Blane*, 28 L. J. M. C. 216.

⁶ *Hampton v. Rickard*, 43 L. J. M. C. 133.

⁷ *Marshall v. Murgatroyd*, L. R. 6 Q. B. 31. From this it would follow that if a bastard child were born on a Scottish or Irish ship, though the vessel were *British*, the justices in *England* would not have jurisdiction.

⁸ Mr. Dicey is of opinion (Dom. 102) that the domicile of the illegitimate infant is not changed by the marriage of its mother, so that its domicile should follow that of its step-father. But this view is open to the remark that, as by English law the husband is liable for the support of his wife's illegitimate children born before the marriage, such would become one of her husband's family; and as its rights and those of the step-father in respect of property could not be in any way affected, the power of conferring a new domicile may exist in the step-father.

Jurisdiction of justices does not extend to bastards born abroad.

Domicil of origin of bastard.

PART III.

GUARDIAN AND WARD.

CHAPTER I.

NATURE OF THE OFFICE OF GUARDIAN.

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IN the young the mind is immature, experience is lacking, the judgment is defective and more or less incapable of forming an accurate conclusion on matters which intimately concern their welfare. Again, an infant, by reason of its tender years, is weak, is opposed to the attacks of those who would take advantage of his weakness, and so needs protection. When the parents of the infant are living, they supply the want of judgment and experience, and afford, or are supposed to afford, the necessary protection for the nurture and education of their offspring. But should the parents be dead, or unfitted for the duties dictated by Nature, then the law humanely interferes, and either actively appoints guardians to protect the infant's person and property, or permits such to be chosen. For these reasons a guardian has been styled a "temporary parent."¹

Why
guardians
necessary.

In English law the guardian performs the double office of educating and protecting the person of the ward, and of managing his affairs and property until majority. In Scottish law, however, which is directly based on the Roman, the period of guardianship over a minor who has not reached the age of fourteen is divided into two portions; (a) up to the age of fourteen the guardianship is called tutory (*tutela*); (b) after tutelage and until majority

Tutory.

¹ Bl. Com. 460.

Curatory.

it is curatory (*curatela*). The *tutor* is appointed to the protection of the pupil's person and property, and so acts for the latter as to supply all that is deficient through his imperfection of reason and want of age. The *curator*, on the other hand, is appointed for the purpose of guarding and managing the affairs of those who have passed pupilarity, but not yet attained majority, or, analogously, of those who, from any infirmity of understanding, are incapable of acting like persons of capacity. The difference between these two species of guardianship is summed up in the expressions, "*tutor datur personæ, curator rei*," and "a curator consents to a minor's deeds, a tutor grants them."

Distinction
between rights
and duties of
parent and
guardian.

The relation of parent and child has been said to be that of guardian and ward, because it is the duty of a parent to protect and shelter his child, and to rear it in a manner which becomes one who is intrusted with a great responsibility. This is rather the moral than the legal aspect of the question, for on comparing the law of parent and child with that of guardian and ward, it will be seen that the powers and authority of the parent are far wider and larger, and less subject to judicial control than those of the guardian; though on the other hand the liabilities of the guardian are in some respects less than those of the parent. Thus, "the parent must support his child from his own means; and in return the child's labour and services belong to him. But the guardian is not bound to supply the wants of his ward, except from the ward's own estate in his hands and the liberality of others, though it were to keep the child from starving. On the other hand, the guardian has no more right to the labour and services of his ward than any stranger."¹ Again, there is no power to prevent a father from encouraging his child to contract an unequal marriage, while a guardian would be prevented from marrying his ward into an inferior social station; and the grounds for removing a ward out of the care and custody of his guardian would be in many cases insufficient to warrant the interference of the courts to remove a child out of the custody of the father.

Guardian of
the person.

Guardian of
the estate.

The natural division of guardians is into guardians of the person and guardians of the estate. Where a guardian is assigned to the person of the ward, the relation between the two is most like that of parent and child. The guardian appointed to the estate bears a close resemblance to a trustee appointed in the ordinary way for the purpose of managing an estate and executing certain trusts in connection with it. But very frequently the same individual is the guardian of the person and the estate; thus, a guardian appointed by will is, unless there is an express

¹ Sch. Dom. Rel. s. 320.

provision to the contrary, guardian both of the person and the estate;¹ and the Court of Chancery, where there is no suit or action pending before it, will appoint a guardian both for the person and the estate. But the court, on the contrary, where a suit is pending, appoints a guardian for the person only, the estate being under the direction of the court; and it often appoints guardians for special purposes connected with the ward's property or person.²

It seems agreed by all writers on this subject that the relationship between guardian and ward is one *uberrimæ fidei*, ^{Guardianship a trust.} not only while it lasts, but even after it has ceased to exist.³ During its existence the parties are under a general disability to deal with each other; and this disqualification proceeds obviously from the necessity of protecting the ward. But even after the ward has attained majority, any transactions between them in the settling of their accounts or delivery up of the trust, if to the advantage of the guardian, will be regarded with suspicion if they have been entered into but a short time after the termination of the relationship, unless ample deliberation on the part of the ward, and the utmost good faith on the part of the guardian, are clearly demonstrated.⁴ The court is suspicious of undue influence, and that though the office may be legally at an end, yet its moral effects may not have worn away,⁵ for a gift which might seemingly be the act of a generous and grateful heart may really proceed from the impulse of a mind misled by undue kindness or forced by oppression.⁶ "The relation of guardian and ward is strictly that of trustee and *cestui que trust*. It is a peculiar relation of trusteeship. . . . A guardian is not only a trustee of the property, as in an ordinary case of trustee, but he is also the guardian of the person of the infant, with many duties to perform, such as to see to his maintenance and education."⁷ Guardians were but trustees, and guardianship of the person of an infant was a more exacting species of trusteeship than the mere trust to hold and dispose of his property.⁸ "It is not to be disputed that if a person appointed guardian in that character possesses himself of any of his ward's property, of that property he becomes a trustee, although he is only a trustee by construction and not appointed by name."⁹ Another proof of the fiduciary relation is that where there are two or more testamentary guardians, and one of them dies or is removed, the

Right of survivorship in testamentary guardians.

¹ *Bedell v. Constable*, Vaugh. 177.

² Macph. Inf. 114; and see *post*, chap. ii. p. 632.

³ *Taylor v. Johnston*, 19 Ch. D. 603.

⁴ 1 Story, Eq. s. 317; *Dawson v. Massey*, 1 B. & B. 226.

⁵ *Wadderburn v. Wedderburn*, 4 Myl. & Cr. 41.

⁶ *Hylton v. Hylton*, 2 Ves. 548; *Hatch v. Hatch*, 9 Ves. 297.

⁷ Per Lord Romilly, *Mathew v. Brise*, 14 Beav. 341, 345.

⁸ *Duke of Beaufort v. Berty*, 1 P. Wms. 703.

⁹ *Sleeman v. Wilson*, L. R. 13 Eq. 36. See also *Revett v. Hervey*, 1 Sim. & St. 50.

survivor or survivors continue in their office.¹ Though this right of survivorship is not acknowledged in the case of guardians appointed by the Court of Chancery, yet in practice the survivor or survivors will be re-elected by the court without a reference.² Again, joint guardians may sue together on account of any joint transaction founded on their relation to the ward, even after the relation ceases. Also, the receipt of one is the receipt of all. Further, one guardian can maintain trespass against the other for forcibly removing the child against his wishes, as one of two joint trustees cannot act in defiance of the other;³ and where one guardian consents to his co-guardian's misapplication of funds he is liable.⁴ And where a person puts himself *in loco parentis* and manages the infant's property he must do so accurately and with complete fairness; and if the account settled between the guardian and the ward on the latter attaining his majority is found to be false and fraudulent, such account, even after a long period of time, will be set aside, and the accounts will be directed to be taken with special inquiries.⁵

Guardian
must make no
profit of his
trust.

From the doctrine that a guardian is a trustee, it follows that his "trust is one of obligation and duty, and not one of speculation and profit. He cannot reap any benefit from the use of his ward's money. He cannot act for his own benefit in any contract or purchase, or sale as to the subject of the trust. If he settles a debt upon beneficial terms, or purchases it at a discount, the advantage is to accrue entirely to the infant's benefit. Every guardian . . . is bound to keep safely the real and personal estate of his ward, and to account for the personal estate, and the issues and profits of the real estate. . . . If he has been guilty of negligence in the keeping or disposition of the infant's money, whereby the estate has incurred loss, he will be obliged to sustain that loss,"⁶ on the principle that all persons acting in a fiduciary character are bound to use the same care and management that a prudent man would exercise in the conduct of his own affairs. Wherever a fiduciary relation is established between the parties, the trustee must act in the most open and faithful manner, and seek no personal profit from the advantage he gains from his position.⁷

¹ *Eyre v. Countess of Shaftesbury*, 2 P. Wms. 103.

² *Hall v. Jones*, 1 Sim. 41. In America there is the right of survivorship among guardians appointed by the Court of Chancery. Sch. Dom. Rel. s. 322.

³ *Gilbert v. Schwenck*, 14 M. & W. 488.

⁴ Sch. Dom. Rel. s. 322.

⁵ *Allfrey v. Allfrey*, 17 L. J. Ch. 30; see also *Coleman v. Mellersh*, 2 M. & G. 309.

⁶ 2 Kent, Com. s. 229.

⁷ See *Erlanger v. New Sombrero Phosphate Co.*, 3 App. Cas. 1218.

CHAPTER II.

THE DIFFERENT KINDS OF GUARDIANS, AND THE METHODS OF APPOINTING THEM.

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Authority of
guardians,
whence
derived.

FROM time to time there have been many species of guardianship, some of which are abolished, others have fallen into desuetude, without being actually abolished, and others are nowadays resorted to but very rarely.¹ Guardians derive their authority either from the law, or a custom recognized by the law, or a special appointment; that is to say, certain persons are designated and marked out by the law to fulfil the office, or are specially appointed for that purpose, either (1) by the father of the infant; (2) by the infant himself; or (3) by a court of competent jurisdiction. This chapter will deal with the different kinds of guardianships most in use.

(1) Guardians by authority of the law.

(a) By nature and nurture.

(b) By 4 & 5 Ph. & M. c. 8.

(c) In socage.

(2) Guardians by custom.

(3) Guardians by special appointment.

(a) Testamentary guardians under 12 Car. II. c. 24, and 49 & 50 Vict. c. 27.

(b) By election of the infant.

(c) By a court of competent jurisdiction.

(i) By Court of Probate, guardians *durante minore ætate*.

(ii) By Court of Chancery.

(4) Foreign guardians.

(5) Guardians appointed for special purposes under different statutes.

(1) *Guardians by Authority of the Law.*

(a) *Guardians by Nature and Nurture*.—Passing over the consideration of the old kinds of guardianship known as “by nature”² and “for nurture,”³ it is sufficient to notice shortly

Guardians by
authority of
the law.

¹ Lord Coke divided guardianship into three classes: (1) *by common law*, which included (a) guardianship in chivalry, which disappeared with the old Court of Wards and Liveries, abolished by 12 Car. II. c. 24; (b) in socage; (c) by nature; (d) by nurture. (2) *By statute law*, 4 & 5 Ph. & M. c. 8. (3) *By custom*. Guardianship by custom in certain localities has virtually fallen into disuse. For the special customs of appointing guardians to infant copyholders in different manors, the reader is referred to Simpson on Infants, pp. 224–236. Macpherson on Infants enumerates no fewer than eleven kinds of guardianship, viz.: (1) guardianship in chivalry; (2) in socage; (3) by custom; (4) by nature and nurture; (5) testamentary guardianship at common law; (6) by appointment of the spiritual courts; (7) by election; (8) under 4 & 5 Ph. & M. c. 8; (9) by statute, 12 Car. II. 24; (10) by prerogative; (11) by appointment of a court of equity.

² Guardianship by nature was originally an incident of tenure in chivalry; it belonged primarily to the father (the mother and other ancestors could be guardians also), and only affected the person of the heir, and was based upon the interest of the ancestor in disposing of his heir in marriage; it lasted till the heir attained twenty-one. Hargrave (*n* 12 to Co. Litt. 88 *b*) thought that at the time he wrote this species of guardianship still existed. Macpherson (*Inf* p. 57), on the contrary, was of opinion that, being an office of chivalry, it disappeared with the military tenures.

³ Guardianship for the cause of nurture vested in the parents, but extended only to the government of the person, and terminated at fourteen. Macph. *Inf*. 60.

guardianship by nature and nurture. "The father is entitled to the custody of his own children during their infancy, not only as guardian by nurture but by nature;¹ and it is "the legal natural right of the father to have the custody of the child."² It is a guardianship pointed out by nature, and belongs exclusively to the parents. The right of the father, except as limited by statute and the control of the courts, is absolute even against the mother,³ though the child be an infant at the breast;⁴ but the guiding principle of the courts in modern days is the interest of the child.

Guardians by nature and nurture.

The mother had no absolute right to be the guardian of her children, but where no other was appointed, she was chosen as being properly so by nature and nurture;⁵ but now on the death of the father she becomes the legal guardian of her children, sole, if the father has not appointed, and joint with any that he may have so appointed.⁶ Her guardianship, if not superseded by the appointment of a new guardian by the court, is the proper and legitimate custody till the infant attains twenty-one.⁷ According to the older law, neither the putative father nor the mother of an illegitimate child had the legal right of guardianship;⁸ but the tendency of the modern law is to recognize the mother not only as the natural but the legal guardian of her bastard child,⁹ who is entitled to its custody unless there are very strong reasons for displacing her right; so that she may sue out a writ of *habeas corpus* for the recovery of its person from strangers into whose custody she had delivered it, and if her choice of a home would be beneficial to the interests of the child, the court will order it to be delivered up in order that it may go to such new home;¹⁰ but this right of the mother is not absolute,¹¹ like that of a father of a legitimate child.¹²

Guardianship of the mother.

The office of natural guardian lasted until the child attained majority, while the guardianship for nurture terminated on the infant reaching fourteen.¹³ The natural guardian was concerned only with the person of the infant, and could not intermeddle with its property.¹⁴ Though a parent is guardian of the child's property at common law, and must account to him for the rents

Parent quasi-guardian of property until appointment by the court.

¹ *Ex parte Hopkins*, 3 P. Wms. 152. See also *Stileman v. Ashdown*, 2 Atk. 477; *Wellesley v. Duke of Beaufort*, 2 Russ. 21; 1 Bl. Com. 461.

² *De Manneville v. De Manneville*, 10 Ves. 52.

³ *Ex parte Glover*, 4 Dowl. 291. His power and control are not effected by his absence abroad. *Re Emily Suttor*, 2 F. & F. 267.

⁴ *Re Thomas*, 22 L. J. Ch. 1075.

⁵ *Villareal v. Mellish*, 2 Swanst. 336; S. C. 2 Atk. 14.

⁶ 49 & 50 Vict. c. 27, s. 2.

⁷ *Eyre v. Countess of Shaftesbury*, 2 P. Wms. 103.

⁸ *Ileg. v. Nash (Re Carey)*, 10 Q. B. D. 454.

⁹ *Re Dareys (Infants)*, 11 Ir. C. L. 298.

¹⁰ *Reg. v. Nash (Re Carey) (ubi sup.)*.

¹¹ *Barnardo v. McHugh*, [1891] App. Cas. 388.

¹² *Harg. n* 12, Co. Litt. 88 b.

¹¹ *Re Ullee*, 54 L. T. 286.

¹⁴ *Ex parte Bond*, 8 L. T. 252.

and profits of it as a bailiff,¹ he is only a *quasi*-guardian until he has been appointed by the court, in which case he gives security, and is altogether under the control of the court, as any other guardian of the estate would be.²

Guardians by
4 Ph. & M. c. 8.

24 & 25 Vict.
c. 100, s. 55:
age of abduc-
tion of girls
under,

(b) *Guardians by* 4 & 5 Ph. & M. c. 8.—This statute, which was repealed by 9 Geo. IV. c. 31, which in its turn was repealed by 24 & 25 Vict. c. 100, survives in the fifty-fifth section of the latter Act, which is directed against the forcible abduction of girls under the age of sixteen. The clause is as follows:—

“Whosoever shall unlawfully take or cause to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, shall be guilty of a misdemeanour.”

Under this section it is not necessary that there should be an intention that the girl should be carnally known.

Criminal Law
Amendment
Act, 1885.

Under the Criminal Law Amendment Act, 1885,³ the age of abduction was raised to eighteen; but in this case to constitute the offence she must be abducted with intent that she should be unlawfully and carnally known. Under this Act, where a girl under eighteen, not living with her father or mother or other person having the lawful care or charge of her, but is in service, leaves the house of her master and goes off with a man, he cannot be convicted of abduction;⁴ and it is a question for the jury whether at the time of the alleged abduction, the girl was in the possession of the person having the lawful charge of her.⁵ Persuasion, inducements or blandishments proceeding from the prisoner must operate on the girl's mind to induce her to leave the house of those having the lawful charge of her;⁶ but it is not necessary that the fraud should be practised on the girl herself.⁷ There is a defence provided by the Act in favour of a person charged with this offence, viz., that he had reasonable cause to believe that the girl was above the age of eighteen; and it is sufficient if, at the moment of taking a girl out of lawful custody, he had reasonable cause to believe that she was of the age of eighteen, though he did not inquire of her age until after he had taken her out of lawful custody, but before the abduction was complete.⁸ It has been held that the effect of the above statutes has been to extend the right of the father or mother to recover the custody of the person of a female child by *habeas corpus* or otherwise, to the age of sixteen. But the truer view

Defence.

Statutes passed
to punish
wrong-doers,
and not to
extend the
time of
parental
control.

¹ *Wall v. Stanwick*, 34 Ch. D. 763.

² These matters have been pursued in fuller detail elsewhere, Parent and Child, chap. iii.

⁴ *Reg. v. Henkins*, 16 Cox, C. C. 257.

⁶ *Reg. v. Henkins* (*ubi sup.*).

⁸ *Reg. v. Pucker*, 16 Cox, C. C. 57.

³ 48 & 49 Vict. c. 69, s. 7.

⁵ *Reg. v. Mace*, 50 J. P. 776.

⁷ *Reg. v. Bellis*, 62 L. J. M. C. 155.

would seem to be that they were directed rather to the deterrence from the commission of the offence, and the prevention of an irremediable mischief, by the punishment of those who forcibly abducted girls of a tender age, whether for the purpose of marriage or prostitution; for without the aid of the statute the parental right could be enforced by *habeas corpus* though the wrong-doer would escape all punishment for his act. The parents have as much right to the control and custody of their daughter of seventeen (and even up to twenty-one¹) as to one of fifteen, and may enforce it by the remedy of *habeas corpus*, with this qualification, that on arriving at the age of sixteen, the law presumes that she can exercise a discretion whether she shall return to her parents or not,² but such choice must be a wise one, and in her own interests.³

Age of choice : girls,

In the case of boys, the age at which the law presumes they can exercise a discretion as to whether they shall return to their parents' control or not has been put at fourteen;⁴ but in their case also, it is submitted, their choice must be wisely made. The Divorce Court has jurisdiction to regulate the custody of children until they attain majority.⁵

boys.

(c) *Guardians in Socage*.—This was once an important species of guardianship, but owing to the more extended supervision of the Court of Chancery over the persons and fortunes of infants, it has fallen into disuse. It is a common law guardianship, and it can only arise in the case of a legal and not merely equitable estate,⁶ and where the infant under the age of fourteen takes the land by descent.⁷ The duty of the guardian was to instruct the ward in the art of agriculture, and to insure the safety of his person and land, and the guardian could not dispose of his interest by alienation, succession, or devise.⁸ In order to secure this safety of the ward's person and lands, the guardianship in socage falls to the lot of the next of blood to whom the inheritance cannot descend;⁹ thus, if the lands descend on the paternal side, the nearest relation by blood on the mother's side will be the guardian in socage. Blackstone¹⁰ gives as a reason for this choice that "the law judges it improper to trust the person of an infant in his hands who may by possibility become heir to him that there may be no temptation, nor even suspicion of temptation, for him to abuse his trust," and adopts the language of Coke,

Guardians in socage.

Common law guardianship.

To whom it belongs.

¹ See *Re Agar-Ellis, Agar-Ellis v. Lascelles*, 24 Ch. D. 317.

² *Reg. v. Howes*, 30 L. J. M. C. 47; S. C. 3 L. T. 467.

³ *Reg. v. Clarke*, 26 L. J. Q. B. 169.

⁴ See *ante*, Part II., Parent and Child, chap. ii. p. 510.

⁵ *Thomasset v. Thomasset*, [1894] P. 295.

⁶ *Re v. Taddington*, 1 B. & Ald. 560. Nor, it would seem, when the interest is only reversionary. *Macph. Inf.* 20

⁷ *Quadring v. Downs*, 2 Mod. 176.

⁸ Co. Litt. 88 b; *Bedell v. Constable*, Vaugh. 177.

⁹ *Ibid.*

¹⁰ 1 Com. 461.

and Fortescue that the opposite theory of the Roman law was "*quasi agnum committere lupo, ad devorandum.*"

Duties of
guardian.

It is the duty of the guardian to take possession of the heir's person, and of the lands and tenements which he has by descent, and also hereditaments not lying in tenure, as rent-charges, rents-seck, common of pasture, and the like; also to receive the rents and profits for the heir until the latter reaches the age of fourteen, to keep his evidences of title safely, and to bring him up well.¹ He is also bound to do all the services incident to the land on behalf of the infant, as to repair a bridge, if the land is liable to that burden.² He ought to keep down the interest on incumbrances, though the infant may be entitled in fee.³ In order to carry out his duty towards the ward, an actual estate and interest in the land is given to him (though not to his own use), so that a settlement may be gained by residence on the land.⁴ He may grant leases in his own name till the ward reaches fourteen;⁵ he can surrender a lease for a renewal,⁶ and can practically accept a surrender;⁷ he may also pay off the principal of a mortgage.⁸ In virtue of his legal possession of the land, he can grant copyholds in his own name, and make admittances; bring actions for trespass or ejectment, or distrain for damage feasant;⁹ but he cannot present to a benefice in right of the ward, for, as he can make no profit out of it, he cannot be accountable in respect of it.¹⁰

Powers of the
guardian.

Guardianship
ends when
ward attains
fourteen.

This kind of guardianship ends when the infant reaches the age of fourteen, or the guardian has been superseded by some other guardian, and at the close of his office the guardian must give an account of his trust,¹¹ and for this reason an infant cannot be guardian in socage.¹² "The power of a guardian in socage is gone by the taking of a husband by the infant, yet they shall have account against the guardian if he continue after."¹³

Guardians by
custom.

(2) *Guardians by Custom.*

The various special kinds of customary guardianships have either been abrogated by statute, or have fallen into disuse, or are but very rarely put in force, because the wider and more effectual guardianship of the Court of Chancery, or by the will of the

¹ Co. Litt. 87 b, 88 a, 89, 123.

² *Rex v. Sutton*, 3 A. & E. 597.

³ *Sergeson v. Sealey*, 2 Atk. 412; *S. C. Sergeson v. Cruise*, 1 Ves. Sen. 477.

⁴ *Rex v. Oakley*, 10 East, 491.

⁵ *Eyre v. Countess of Shaftesbury*, 2 P. Wms. 103.

⁶ *Mason v. Day*, Prec. Ch. 319.

⁷ *Willis v. Whitewood*, Bac. Abr. Gard. (G).

⁸ *Palmer v. Danby*, Prec. Ch. 127.

⁹ See *Rex v. Oakley* (*ubi sup.*); *Rex v. Sutton* (*ubi sup.*).

¹⁰ Co. Litt. 17 b, 89 a.

¹¹ Co. Litt. 88 b

¹² See *Oliver v. Woodroffe*, 4 M. & W. 650, and Co. Litt. 88 b.

¹³ Fitz. Nat. Brev. 118 B. See *Wall v. Stanwick*, 34 Ch. D. 763.

infant's parents, has taken their place. There are three kinds, which it is necessary shortly to describe.

(a) *Guardianship by the Custom of the City of London.*—The right of the Mayor and Aldermen of the City of London to the guardianship of orphans, though still authorized by law, is fallen into comparative desuetude. When any man or woman free of the City of London dies leaving children within age, by the custom of London, the Mayor and Aldermen, in their Court of Orphans, have the custody of the persons, lands, and chattels of such orphans; in the case of males, till the age of twenty-one; in the case of females, till eighteen or marriage. After the death of a freeman, the Mayor and Aldermen may summon his widow or executor to appear at their court, and give security to exhibit an inventory of his estate. The Chamberlain of London is by custom a corporation sole for this special purpose, and is able to take a bond or recognizance to him and his successors.¹ The Court of Orphans may exercise the guardianship itself, or may commit it to any other person.² It would seem that the guardianship extends to lands lying out of London belonging to infants who are City orphans,³ although the custom of London does not affect the succession to real estate.⁴ The consent of the court ought to be obtained before the marriage of any City orphan, during the guardianship, and the licence is usually accompanied by a reference to the Common Serjeant to approve of a settlement on the marriage.⁵ The Court of Orphans or their committee may have a writ of ravishment of ward; and if any one takes an orphan out of their custody, he may be imprisoned till he produces the infant or is delivered by due course of law; and there is no privilege of peerage in such a case.⁶

Guardianship by the custom of the City of London; of freemen's children only.

Consent of court necessary to marriage of ward.

Guardianship by the custom of gavelkind.

(b) If a tenant in gavelkind dies, leaving his heir or heirs within the age of fifteen, the next of blood, to whom the inheritance cannot descend, shall (by the appointment of the lord, if there be several in equal degree of kindred) have the custody of the body, lands, and goods of such infant heir until he attains that age, which is still the full age by the custom of Kent. The lord can take nothing by the appointment, nor could he at any time tender marriage to the heir. When the heir arrives at the age of fifteen, he may claim his lands and goods with the improvements; he has the common law action of account against his guardian;⁷ or where the guardian has been appointed by the lord, the heir may come to the lord's court and demand his inheritance and the mesne profits of the land; and the lord must

¹ 4 Rep. 64 b.

³ *Ibid.*

⁵ *Frederick v. Frederick*, 1 P. Wms. 710.

⁶ Macph. Inf. 51.

² *Wilkinson v. Miles*, 1 Sid. 250.

⁴ See *Babington v. Greenwood*, 1 P. Wms. 531.

⁷ But see *post*, chap. vii.

cause his land to be delivered to him, and distrain the guardian to yield his account. The guardian should be charged and have allowances as guardian in socage at common law; and if he be found in arrear, the lord must levy of him the arrears by distress. This custom of compelling an account by distress extends to him who is actually guardian, whether by right or not. But if the guardian to whom the lord has committed the custody is insolvent, the lord or his heirs are chargeable with the deficiency; and therefore, in practice, the lord seldom interferes, but guardianship takes place as guardianship in socage does at common law, except that it lasts till fifteen, and extends to personal estate.¹

Guardianship
by the custom
of the manor.

(c) If a copyholder dies, leaving his heir within the age at which, by the custom of the manor, he is to be out of ward, then, unless there be a special custom to the contrary, the lord is obliged to admit the infant by the next of kin to whom the land cannot descend, who is thereupon constituted guardian. The rules of succession within manors usually correspond with the general law of inheritance; and, therefore, this next of kin is commonly the same person who would be guardian in socage.² If the infant have lands in socage and the rules of descent in the manor differ from those at common law, the two guardianships will not be united in the same person; and in that case the guardian in socage is entitled to the custody of the person, the lord's right being merely to have some one to perform the services in respect of the copyhold or customary lands. In some manors there is a special custom for the lord to appoint a guardian, but this custom must be proved, as the lord cannot have it in the absence of special custom.³ Where this special custom exists, the father cannot appoint a guardian in respect to those lands under the statute of 12 Car. II. c. 24.⁴ But where there is no such special custom, the father, it has been contended, may validly appoint a guardian under the statute;⁵ and there does not seem to be any reason why, even in the event of a special custom, he should not be able to appoint a guardian of the person though he cannot affect the copyhold property.⁶ This would apply equally to the mother under the Guardianship of Infants Act, 1886.

Special custom
for the lord to
appoint a
guardian must
be proved.

Admittance of
infant copy-
holder.

The old law as to the time and manner of admitting guardians to copyhold land on behalf of infants, as to the recovery of fines from infants, and as to the forfeiture of their estates, was complicated and vexatious. It was greatly improved by the statute 9 Geo. I. c. 29; that statute was in turn repealed by

¹ Macph. Inf. 45.

³ *Drury v. Fitch*, Hutt. 17.

⁵ See 2 Watk. Copy. 104, 105.

⁶ *Ibid.* For further particulars of this subject, see Watkins and Scriven on Copyholds.

² *Ibid.*

⁴ *Church v. Cudmore*, Lutw. 1187.

11 Geo. IV. and 1 Wm. IV. c. 65; of which the following are the chief provisions: Where any person under the age of twenty-one years is or shall be entitled by descent or surrender to the use of a last will, or otherwise to be admitted tenant of any copyhold lands, such person may appear and be admitted by his guardian or attorney.¹ An infant may by writing under his hand and seal appoint an attorney for this purpose.² In default of appearance the lord may, after three courts have been held and proclamations made, at a subsequent court appoint a fit person to be attorney, and admit the infant by him, and upon such admittance set and impose the proper fine.³ Upon every such admittance of an infant the fine may be demanded by the bailiff or agent of the lord by a note in writing, signed by the lord of the manor or his steward, to be left with the guardian of the infant, or with the infant if he have no guardian, or with the tenant or occupier of the land to which the infant has been admitted; and if the fine be not paid or tendered to the lord or his steward within three months after such demand made the lord may enter and receive the profits until he is paid the fine and costs, though the infant die before the fine and costs are paid; but the lord must account yearly for the profits, and pay the surplus, if any, to the person entitled to the same.⁴ When the fine and costs have been fully paid, the lord must deliver up possession.⁵ If the guardian pays the fine he may enter and take the profits until he is reimbursed, notwithstanding the death of the infant before he is reimbursed.⁶ No forfeiture is to be incurred by an infant for not appearing or neglecting to pay fines.⁷

It is the infant who is admitted by the guardian, not the guardian himself; though the guardian has an interest in the land, and not merely an authority. He has the same powers as a guardian in socage.⁸ He has a double duty to perform, towards the infant and towards the lord. As regards the former, he must manage and cultivate the land to the best advantage, and may make such leases as are warranted by the custom, so that they do not exceed the minority of the ward; and he may bring an action for arrears of rent. If the ward be taken out of his custody, he can take steps to recover him.

As regards the lord, he is to render such services as a copyholder can render for another. He must pay the rent, and perform all such manorial rights as are extant. But he cannot swear fealty for his ward, or do any service in court on his behalf, for such service must be a personal one.⁹

¹ Sect. 3.² Sect. 4.³ Sect. 5.⁴ Sect. 6.⁵ Sect. 7.⁶ Sect. 8.⁷ Sect. 9.⁸ See *ante*, p. 613.⁹ Simp. Inf. 230, and the authorities there cited.

Duties and powers of the guardian as respects the infant.

As respects the lord.

If a guardian of a copyholder commits waste, his wardship only and not land is forfeited; for the infant is not answerable for the acts of his guardian who is assigned to him by law.¹

Copyhold Act,
1894.

The guardian of an infant lord or tenant has power to do on his behalf any act or thing required by the Copyhold Acts to be done by such infant.²

(3) *Guardians by Special Appointment.*

Testamentary
or statute
guardians
under 12 Car.
II. c. 24, and
49 & 50 Vict.
c. 27.

(a) *Testamentary Guardians, or Statute Guardians, under 12 Car. II. c. 24.*—This species of guardianship is modelled on that in socage, and sprung directly from the abolition of military tenures, and the conversion of the tenure of almost all lands into socage by 12 Car. II. c. 24. To supply the loss thus created of the feudal protection of infants (such as it was), provisions were framed in the Act to enable fathers to appoint guardians, who are often called “testamentary” because the power to appoint them by will was first given by this statute. By section 8 it was enacted that

“where any person hath or shall have any child or children under the age of twenty-one years, and not married at the time of his death, it shall and may be lawful to and for the father of such child or children, whether born at the time of the decease of the father, or at that time *en ventre sa mère*, or whether the father be within the age of twenty-one years, or of full age, or by deed executed in his lifetime, or by his last will and testament in writing, in the presence of two or more credible witnesses, in such manner and from time to time as he shall respectively think fit, to dispose of the custody and tuition of such child or children, for and during such time as he or they shall respectively remain under the age of one-and-twenty years, or any lesser time, to any person or persons in possession or remainder, other than Popish recusants, and that such disposition of the custody of such child or children made since the 24th day of February 1645, or hereafter to be made, shall be good and effectual against all and every person and persons claiming the custody or tuition of such child or children, as guardians in socage or otherwise; and that such person or persons to whom the custody of such child or children hath been or shall be so disposed of or devised as aforesaid, shall and may maintain an action of ravishment of ward or trespass against any person or persons which shall wrongfully take away or detain such child or children, for the recovery of such child or children, and shall and may recover damages for the same, in the said action, for the use and benefit of such child or children.”

Guardian may
maintain
action of
ravishment of
ward.

Section 9 enacted that

“such person or persons to whom the custody of such child or children hath been or shall be so disposed or devised shall and may take into his or their custody, to the use of such child or children, the profits of all lands,

¹ Macph. Inf. 46.

² 57 & 58 Vict. c. 46, s. 45.

tenements, and hereditaments of such child or children, and also the custody, tuition, and management of the goods, chattels, and personal estate of such child or children till their respective age of one-and-twenty years or any lesser time, according to such disposition aforesaid, and may bring such action or actions in relation thereunto as by law a guardian in common socage might do."

By force of this statute a father only could appoint a guardian for his infant child by will. If the father be an infant himself he can appoint a guardian only by deed, for by the Wills Act¹ an infant is disqualified from making a valid will. This deed is in the nature of a testamentary disposition, and may be revoked by a subsequent will.² A grandfather cannot make a valid appointment under this statute;³ nor a mere stranger by blood;⁴ nor a guardian already appointed.⁵ A mother had not the power to appoint a testamentary guardian;⁶ but the court did have regard to the expression of her wishes if they were found to coincide with those of the father;⁷ she might have been, however, appointed to the office. Her guardianship by nature and nurture was superseded by her husband's appointment of a testamentary guardian. If the father made an ineffectual appointment,⁸ or no appointment at all, she was the natural guardian of her infant children;⁹ and she was not disqualified merely because of her subsequent marriage.¹⁰

Father alone
could appoint.

Mother may be
appointed.

Mother natural
guardian in
default of
appointment.

But under the Guardianship of Infants Act, 1886,¹¹ this disability on her part to appoint a testamentary guardian is removed, and she has the power to appoint by deed or will guardians to her infant children who are unmarried; and such guardianship will take effect after the death of herself and her husband.¹² She may also provisionally nominate a guardian to act jointly with the father as guardian of her infant children after her death.¹³ This provisional appointment should be in form an appointment of a guardian to act jointly with the father.¹⁴ If after the mother's death the father is found unfitted to be the sole guardian of his children, this provisional appointment may be confirmed by the court, who may displace the father altogether.¹⁵ Both parents may appoint guardians, and such shall act jointly.¹⁶

Mother may
appoint under
Guardianship
of Infants
Act, 1886.

Provisional
appointment.

¹ 1 Vict. c. 26, s. 7.

² *Earl of Shaftesbury v. Hannam*, Finch, 323; see *Ex parte Earl of Ilchester*, 7 Ves. 348.

³ *Powell v. Cleaver*, 2 Bro. C. C. 500.

⁴ *Blake v. Leigh*, Amb. 306.

⁵ *Ex parte Edwards*, 3 Atk. 519.

⁶ Macph. Inf. 83.

⁷ *Re Kaye*, L. R. 1 Ch. App. 387.

⁸ *Re Moore*, 11 Ir. C. L. 1.

⁹ *Reg. v. Clarke*, 7 El. & Bl. 186; S. C. *Re Race*, 26 L. J. Q. B. 169.

¹⁰ *Corbett v. Tottenham*, 1 Ba. & B. 59. The usual practice in the event of her subsequent marriage was to direct a reference under which she might be reappointed, if it were for the benefit of the infant. *Re Gornall*, 1 Beav. 347.

¹¹ 49 & 50 Vict. c. 27.

¹² Sect. 3 (1).

¹³ Sect. 3 (2).

¹⁴ *Re G.* (an Infant), [1892] 1 Ch. 292.

¹⁵ *Ibid.*

¹⁶ Sect. 3 (1).

Whence
authority
derived.

What is a
sufficient
appointment.

Guardian
cannot be
appointed to
children of
twenty-one, or
bastards.

Testamentary guardians derive their authority from the parental appointment, and do not require any further qualification, even probate of the will appointing them.¹ But if there is any dispute as to the validity of the appointment, the court may direct the issue to be tried by a jury.² A parol appointment is insufficient,³ but no particular form of words, if reduced into writing, is necessary for the appointment of a testamentary guardian, provided the intention to create a guardianship is clear and the powers essential to the office are conferred.⁴ Thus, the words, "I request Miss M., if she be alive at my decease, to take upon herself the management and care of the house and of my children," have been held enough;⁵ but a devise of the lands to a person in trust for the infant, and for his maintenance and education till he be of age,⁶ or an appointment of a person to be "guardian of the estate,"⁷ do not constitute the trustee or the guardian of the estate a testamentary guardian. An instrument designating a person as guardian need not be executed with the same formality as a will, and an appointment of a guardian by an unattested will, made good by a duly attested codicil, on the same paper, and referring to the will as annexed, and making certain alterations in it, but confirming it in other respects, was held good.⁸ An appointment by deed is only a testamentary instrument in the form of a deed,⁹ and may be revoked by a subsequent will.¹⁰ A testamentary guardian will not be disabled from exercising the office because he has attested the execution of the deed by which he was appointed,¹¹ nor, it would seem, because of his attestation of the will so appointing him. Under the Act of Charles II., and the Guardianship of Infants Act, 1886, the parents have the power to nominate guardians for all their unmarried children at their decease, who have not attained, and until they do attain, twenty-one years of age. A child *en ventre sa mère* is considered as one already born.¹² This power of appointing does not extend to children who have attained their majority,¹³ or to bastards.¹⁴ The guardianship may be determined

¹ *Gilliatt v. Gilliatt and Hatfield*, 3 Phil. Eccl. 222.

² *Re Andrews*, L. R. 8 Q. B. 153; S. C. 42 L. J. Q. B. 99.

³ *Re Moore (ubi sup.)*; *Re Mathews*, 12 Ir. C. L. 233.

⁴ *Bridges v. Hales*, Mos. 108; *Miller v. Harris*, 14 Sim. 540; but see *Bedell v. Constable*, Vaugh. 177; *Re Lord Norbury*, 9 Ir. Eq. 134.

⁵ *Miller v. Harris (ubi sup.)*.

⁶ *Bedell v. Constable (ubi sup.)*.

⁷ *Re Lord Norbury (ubi sup.)*.

⁸ *De Bathe v. Lord Fingall*, 16 Ves. 167.

⁹ *Ex parte Earl of Hechester*, 7 Ves. 348.

¹⁰ *Earl of Shaftesbury v. Hannam*, Finch, 323.

¹¹ *Morgan v. Hatchell*, 24 L. J. Ch. 135.

¹² 12 Car. II., c. 24, s. 8.

¹³ *Ex parte Ludlow*, 2 P. Wms. 638.

¹⁴ *Sleeman v. Wilson*, L. R. 13 Eq. 36. See the Scotch case of *Brand v. Shaws* (16 Ct. of Sess. Cas. 315), decided under the Guardianship of Infants Act, 1886. But see *Re Ullee*, 54 L. T. 286, as to when a father may appoint guardians to his children who are not legitimate by English law. This later case was decided before the Guardianship of Infants Act, 1886, but its principle would remain unaffected by that Act.

before the child reaches its majority, but the creation of a guardianship without any time fixed would in all probability be held to be wardship during minority.¹ Though the parents cannot under the Act appoint guardians for their infant children who have married, yet their marriage during infancy will not determine their wardship, at least in the case of males;² in the case of females, there is more room for doubt. On the one hand, it may be urged that a woman on marriage leaves her parents family, and so passes out of parental control, and comes under the power and protection of her husband; on the other, it may be said that the parents' strict right of appointing a guardian to watch her interests should not be broken in upon or curtailed by her marriage, contracted, perhaps, for the very purpose of escaping the wholesome but irksome restraint. The Court of Chancery will not permit the marriage of one of its wards to end its wardship,³ and so, by analogy, the natural and obvious right of a parent to protect the child will be preserved intact, until she has reached the age at which the law sets her free from control, and endues her with the fullest responsibility for her actions.

The parents may appoint a guardian conditionally;⁴ or "in possession or remainder," that is, may appoint successors in the guardianship. They may also appoint a testamentary guardian, and yet recommend that their children may be placed under the care and control of other persons, subject to the general control of the guardian.⁵ The office of a guardian is personal and not assignable;⁶ therefore where more than one testamentary guardian is appointed, the office goes to the survivor; but the parent may authorize the surviving guardian to nominate another in the place of the guardian who has died.⁷ A joint testamentary guardian who has declined to accept the trust is not entitled as of right after the death of his co-guardian to be appointed guardian by the court.⁸ The Court of Chancery will not recognize the appointment of a firm as guardians.⁹

In former times a father of any religious persuasion might exercise his right of appointing a guardian,¹⁰ but the person appointed must not have been a Roman Catholic.¹¹ But since religious disabilities have almost totally disappeared both in England and Ireland, members of the Church of Rome are no

Office not assignable.

Who may be appointed.

Particular religious faith no bar to appointment.

¹ *Mendes v. Mendes*, 1 Ves. Sen. 91.

² *Eyre v. Countess of Shaftesbury*, 2 P. Wms. 103.

³ *Roach v. Garvan*, 1 Ves. Sen. 160.

⁴ *Selby v. Selby*, 2 Eq. Cas. Abr. 488.

⁵ *Knott v. Cottee*, 2 Ph. 192.

⁶ *Eyre v. Countess of Shaftesbury* (*ubi sup.*); *Mellish v. Da Costa*, 2 Atk. 14.

⁷ *In The Goods of Parnell*, L. R. 2 P. & D. 379.

⁸ *Re Johnstons (Infants)*, 2 Jo. & Lat. 222.

⁹ *De Mazar v. Pybus*, 4 Ves. 644.

¹⁰ *Villareal v. Mellish*, 3 Swanst. 538.

¹¹ 12 Car. II. c. 24, s. 8.

longer ineligible for the office of tutor.¹ Members of other religious bodies not in conformity with the Church of England have always been eligible. Accordingly a Jew,² and now Roman Catholic ecclesiastics in England,³ and in Ireland,⁴ or a Dissenter,⁵ may be appointed.

Guardians of
person and
estate.

Guardianship
of Infants
Act, 1886.

Testamentary guardians are entitled to the custody of the ward's person and property as against guardians in socage (if any), but not now against the mother;⁶ though if she be one with other testamentary guardians, while her wishes and opinions may be respected, yet in authority she is on an equality with the rest.⁷ If the mother under the Guardianship of Infants Act, 1886,⁸ has provisionally appointed a guardian to act with the father, and the court after her death is satisfied that he is not a person who ought to be the sole guardian of his children, the guardian whose appointment is confirmed by the court would have equal rights with the father.⁹ When the guardians are unable to agree upon any question affecting the welfare of an infant ward, any of them may apply to the court for its direction.¹⁰ After the death of both parents any guardian appointed under this Act may apply to the court for directions as to the custody of his ward.¹¹ But a person nominated by will guardian of the estate of an infant during minority is not such a testamentary guardian as to deprive the mother of the control and custody of the infant.¹² As against all persons the guardian has the same remedies, as, for instance, the writ of *habeas corpus*, as the father had.¹³ If there be two testamentary guardians, and one takes the infant out of the custody of the other, the latter has no remedy at law but to take the infant out of the possession of the other at his opportunity;¹⁴ but if an infant be in the service of one of the guardians, or of a third person with the consent of one of the guardians, he cannot lawfully be removed from his service.¹⁵

Powers as to
real estate of
ward same as
those of a
guardian in
socage.

The testamentary guardian has the same power over the real estate of the ward as the guardian in socage.¹⁶ Under the Guardianship Act, 1886, every guardian in England and Ireland has all such powers over the estate and the person, or over the estate (as the case may be) of an infant as any guardian appointed by will or otherwise now has in England under 12 Car. II. c. 24,

¹ In England by the Roman Catholic Emancipation Act, 10 Geo. IV. c. 7; in Ireland by 33 Geo. III. c. 21.

² *Villareal v. Mellish*, 3 Swanst. 538.

³ *Talbot v. Earl of Shrewsbury*, 4 Myl. & Cr. 673.

⁴ *Re Byrnes*, 21 W. R. 794.

⁵ *Corbett v. Tottenham*, 1 Ba. & B. 59.

⁶ *Eyre v. Countess of Shrewsbury*, 2 P. Wms. 103.

⁷ *Campbell v. Mackay*, 2 Myl. & Cr. 31.

⁸ 49 & 50 Vict. c. 27.

⁹ Sect. 3 (2).

¹⁰ Sect. 3 (3).

¹¹ Sect. 5.

¹² *Re Lord Norbury*, Ir. R. 9 Eq. 134.

¹³ *Butler v. Freeman*, Amb. 302; *Re Andrews*, 8 L. R. Q. B. 153; S. C. 42 L. J. Q. B. 99.

¹⁴ Litt. s. 323.

¹⁵ *Gilbert v. Schwenck*, 14 M. & W. 488.

¹⁶ *Bedell v. Constable*, Vaugh. 177.

or in Ireland under 14 & 15 Car. II. c. 19, or otherwise.¹ A testamentary guardian is entitled to administration in preference to a guardian chosen by an infant.²

A testamentary guardianship is a trust; and therefore the Statute of Limitations does not run against the ward in the matter of accounts,³ but if on attaining majority he acquiesces in them, he will be barred.⁴ The cases applicable to guardians appointed by the father would now be applicable to those appointed by the mother.⁵

(b) *Guardians by Election of Infant*.—It would be of no practical usefulness to treat of this kind of guardianship except in the briefest possible manner; for the power of the Court of Chancery has quite if not altogether superseded it. This right of an infant to choose a guardian for himself does not ever seem to have been frequently exercised. An infant tenant in socage who has no testamentary guardian, may at the age of fourteen, when socage guardianship determines, choose a guardian for the rest of his minority.⁶ An infant who was without a testamentary guardian, and had no socage, lands, or whose interest in them was merely equitable, might, it seems, appoint such a guardian either before or after fourteen, but not before seven years of age.⁷

Guardianship
by election of
infant.

The election might take place before a judge on circuit,⁸ or, as was most usual, by deed,⁹ or even by parol;¹⁰ but the appointment is not binding on the infant and will not supersede the duty and authority of the Court of Chancery, which may appoint another.¹¹

(c) *Guardians Appointed by a Court of Competent Jurisdiction*.

(i) *By Court of Probate, or Guardians durante minore ætate*.—Administration *durante minore ætate* is the sole relic of the power of the old spiritual courts of appointing a curator to an infant's personal estate, and is exercised by the Probate Division of the High Court of Justice, the successor to the ecclesiastical courts.¹²

Administra-
tion *durante*
minore ætate.

When an infant is left sole executor under a will, or is the next of kin to whom letters of administration ought properly to be granted, the court will grant administration to a person on his behalf, who for the purposes of the administration suit will

When granted.

¹ 49 & 50 Vict. c. 27, s. 4.

² *In the Goods of Morris*, 31 L. J. P. M. & A. 80.

³ *Mathew v. Brise*, 14 Beav. 341.

⁴ *Sleeman v. Wilson*, L. R. 13 Eq. 36.

⁵ 49 & 50 Vict. c. 27.

⁶ Co. Litt. 78 b; *Mendes v. Mendes*, 1 Ves. Sen. 91.

⁷ Co. Litt. 87 b, 88 a.

⁸ *Anon.*, 2 Ves. Sen. 274.

⁹ *Lord Baltimore's Case*, Harg. n 15 to Co. Litt. 88 b.

¹⁰ *Ibid.*

¹¹ *Ex parte Watkins*, 2 Ves. 470.

¹² *Brotherton v. Harris*, 2 Cas. temp. Lee, 131.

Distinction
between infant
and minor.

be deemed the guardian of the infant.¹ The court draws a distinction between an infant under seven and a minor, or one who is over seven, but has not yet reached majority, for the court will *ex officio* assign a guardian to the former,² while the minor will be allowed to choose his own guardian.³ The choice of this guardian is quite in the discretion of the court, and though it is the ordinary practice to appoint the next of kin, the court is not bound to choose from their number;⁴ and if the infant make an unsatisfactory election, it will be controlled and set right.⁵ This administration lasts till the infant reaches the age of twenty-one;⁶ but ends, if there are several infants, on the eldest attaining majority.⁷

Choice of
guardian in the
discretion of
the court.

Powers of the
administrator
durante minore
etate.

An administrator during the minority of one entitled to administration, whether infant executor or infant next of kin,⁸ has, for the time, all the power and authority of an absolute administrator;⁹ thus, he may bring actions to recover debts due to the deceased,¹⁰ and also trover for his goods.¹¹ The limit to his administration is the minority of the person, but there is no other limit.¹² A power of sale given by a testator to his executors or administrators may be exercised by an administrator *durante minore etate*.¹³ He may assent to a legacy, if there are assets for the payment of debts.¹⁴ Again, he may receive debts due to the deceased, and he may discharge and acquit them. So he may be sued for the debts due from the deceased; and if he give his bond for any of such debts, he may retain goods to the value;¹⁵ and if an action be brought against him, and the administration determine pending the action, he ought to retain assets to satisfy the debt which attached on him by the action.¹⁶ Likewise he may retain for his own debt.¹⁷

Guardianship
by the Court
of Chancery.
Origin.

(ii) *Guardians appointed by the Court of Chancery*.—This most important species of guardianship traces its origin to the delegation to the Court of Chancery of the duty of the Crown as *parens patriæ* to safeguard the interests of those who could not take

¹ This species of administration is styled "limited administration," as it is confined to a particular extent of time. See Rules 33-36 P. R. (Non-contentious business).

² 1 Wms. Exors. pp. 387, 388. ³ *Rich v. Chamberlayne*, 1 Cas. temp. Lee, 134.

⁴ See 1 Wms. Exors. 388. For the addition of an infant on attaining twenty-one to a suit commenced by the administrator, see Order XXVII. r. 4. The next of kin is entitled to the administration before creditors. *John v. Bradbury*, L. R. 1 P. & D. 245.

For further information as to whom the court will grant or refuse administration, see 1 Wms. Exors. (*ubi sup.*) and Simp. Inf. 238.

⁵ *Re Burchmore*, L. R. 3 P. & D. 139.

⁶ 38 Geo. III. c. 87, s. 6.

⁸ 38 Geo. III. c. 87, s. 7.

⁷ Bac. Abr. Exors. 133.

⁹ Com. Dig. Administration, F.

¹⁰ *Piggott's Case*, 5 Co. Rep. 29 a; Com. Dig. Administration, F.

¹¹ *Sethe v. Sethe*, Roll. Abr. Exors. (M) pl. 2; Com. Dig. (*ubi sup.*).

¹² 1 Wms. Exors. 393.

¹³ *Monseil v. Armstrong*, L. R. 14 Eq. 423; *Cope v. Cope*, 16 Ch. D. 49.

¹⁴ *Prince's Case*, 5 Co. Rep. 29 a.

¹⁵ *Briers v. Goddard*, Hob. 250.

¹⁶ *Sparkes v. Crafts*, Cumberb. 465.

¹⁷ *Roshelly v. Godolphin*, T. Raym. 483.

care of themselves, more especially infants. The superintendence of the care and custody of infants has for long been one of the most well-defined and fully developed branches of equity jurisprudence.¹ The Court of County Palatine has concurrent jurisdiction with the High Court to appoint guardians, but subject to a general right of interference by the Chancery Division.² But even this salutary power of the Court of Chancery has its practical limits, for the court cannot, and does not, take upon itself to maintain and supervise the interests of all the infants in the kingdom, and it has not the means of acting, except where it has property to act upon;³ not from any want of jurisdiction, but from a want of means to exercise it, by applying the property for the use and maintenance of the infants.⁴ But the possession of property does not seem to be a necessary condition precedent to the interference of the court so as to award custody of the person.⁵ In former times the Court of Exchequer, as an equity court, was wont to exercise a general power of appointing guardians and ordering maintenance for infants where there was a suit pending for the administration of their property.⁶

It is not intended here to inquire into the general subject of wards of court, which will be discussed lower down, under the head of "Infants,"⁷ but rather into the powers to appoint guardians possessed by the Chancery Division, to which are assigned such questions.⁸ The Court of Chancery will appoint guardians for infants who have no father or mother or testamentary guardians where a suit is pending in which the infants are interested, or upon petition without suit. But (as above mentioned) before the court will assume jurisdiction, there must be a sum of money settled upon the infant which the court can administer. Wherever the infant is unprotected and unable to take care of itself, or injury or detriment of the infant is apprehended, then the court will intervene with its protective justice, and appoint a guardian responsible to itself, who will act for the benefit and interest of the ward; and its jurisdiction is not ousted by the fact of the infant being lunatic or of unsound mind.⁹

Grounds for
appointment
by the court.

¹ Hargrave, the learned editor of *Co. Litt.*, in one of his notes (*n* 16, 88 *b*), seeks to show that this Chancery jurisdiction over infants was not of very ancient date, and was a usurpation, if a necessary one. Mr. Fonblanque (2 *Tr. Eq.* 228 *n*, 5th edit.) controverts his statements, and maintains that it flowed from the general authority of the equity courts, exercising a necessary superintendence and control over those unable to take care of themselves. See *Butler v. Freeman*, Amb. 301.

² *Re Alison's Trusts*, 8 Ch. D. 1.

³ *Wellesley v. Duke of Beaufort*, 2 Russ. 1, 19.

⁴ The usual way is to settle money on the infant (some small sum such as £100 is enough), and to bring a suit for its administration.

⁵ *Re Spence*, 2 Ph. 247; *Re Fynn*, 2 De G. & Sm. 487; *Brown v. Collins*, 25 Ch. D. 56; *Re Scanlan (Infants)*, 40 Ch. D. 200; *Re Nerin*, [1891] 2 Ch. 299; *Barnardo v. M'Hugh*, [1891] App. Cas. 395; *Re M'Grath (Infants)*, [1893] 1 Ch. 143.

⁶ Macph. Inf. 102, citing *Evans v. Massey*, 1 Y. & J. 196, and other cases.

⁷ *Post*, Part IV. chap. v.

⁸ 36 & 37 Vict. c. 66.

⁹ *Re Edwards*, 10 Ch. D. 605.

Guardianship
of Infants Act,
1886.

Guardianship of Infants Act, 1886.—Under the Guardianship of Infants Act, 1886, where a father dies without appointing a guardian to his infant child, or the guardian appointed by him is dead or refuses to act, the court may from time to time appoint a guardian or guardians to act jointly with the mother;¹ and it may confirm the provisional appointment of a guardian by a mother to her infant children, on being satisfied that the father is unfitted to be their sole guardian.² A guardian so appointed shall have the same powers over the estate and the person, or over the estate (as the case may be) of an infant as a testamentary guardian previously had.³

When guar-
dian of the
person ap-
pointed.

When guar-
dian of the
person and
estate.

A guardian will be appointed on the petition of the infant himself, or of some person on his behalf, though no action has been begun;⁴ even where there are testamentary guardians and they decline to act,⁵ or disagree,⁶ or where the infant has lawfully appointed a guardian for himself.⁷ Where a suit is pending, a guardian of the *person* only is appointed, the estate being under the direction of the court; but the court does not take upon itself the actual guardianship of the infant.⁸ Where there is no suit pending which will enable the court to take upon itself the management of the infant's property, a guardian of the estate as well as of the person may be appointed on summons. The application must be supported by evidence showing the nature, rental, or income, or other material particulars of the estate, and also the fitness of the proposed guardian, and his consent to act.⁹

How guardians
are appointed.
In a summary
way by sum-
mons at
chambers.

Guardians
officers of the
court.

Guardians are now appointed in a summary way by an originating summons in chambers, without requiring a bill to be filed;¹⁰ formerly filing a petition was the proper method. If no action or matter be pending, an originating summons is taken out in the name of the infant *pro hac vice*, and is instituted in the matter of the infant, and has the effect of making him a ward of court.¹¹ Guardians so appointed are treated as officers of the court, and are held responsible to it.¹² Where a guardian is sought to be appointed, evidence must be adduced as to the age of the infant, his fortune and income, and as to the number of his relations. Evidence must also be produced of the fitness of the proposed guardian, and of his willingness to take upon

¹ 49 & 50 Vict. c. 27, s. 2.

² *Re G. (an Infant)*, [1892] 1 Ch. 292.

³ Sect. 4.

⁴ By summons in chambers; 2 Dan. Ch. Pr. 1113. See *Re Findlay (an Infant)*, 32 Ch. D. 221.

⁵ *Ex parte Champneys*, 2 Dick. 350.

⁶ *Lady Teynham v. Lennard*, 4 Bro. P. C. 302.

⁷ *Curtis v. Rippon*, 4 Madd. 462; *Coham v. Coham*, 13 Sim. 639.

⁸ Macph. Inf. 100.

⁹ *Ibid.* 105; 2 Dan. Ch. Pr. 1120.

¹⁰ Order L.V. r. 2 (12), also rules 2 and 3 of the Supreme Court Rules made under the Guardianship of Infants Act, 1886.

¹¹ *Stuart v. Marquis of Bute*, 9 H. L. Cas. 440.

¹² *Wellesley v. Duke of Beaufort*, 2 Russ. 1.

himself the duties of the office.¹ The usual course is to appoint a guardian of the person and estate, without a receiver, and he is usually required to enter into a recognizance duly to account, with sureties; the security will be regulated by the amount which the guardian is likely to receive during the currency of his periodical account; but where the amount of the income or fortune is very small, the court may dispense altogether with the security, and will be content with the guardian undertaking to account.² The costs of an application to appoint a guardian will be paid out of the infant's property by a sale if necessary;³ or by allowing them to a guardian in his accounts.⁴

The Court of Chancery has jurisdiction over the custody of English subjects although born and domiciled out of England, and can appoint guardians for an infant domiciled abroad, in a proper case, though its property is situated in a foreign country, by the courts of which guardians for the infant have been appointed;⁵ also for an infant who is out of the jurisdiction, but whose property is within it or under the control of the court; but it is usual to require that the parent or one of the guardians should be within the jurisdiction, in order that some one may be answerable to the court.⁶ The English nationality of the infant must be clearly made out to give the English courts jurisdiction.⁷

The court has ample scope for the exercise of its choice of guardians, and no *prima facie* claims, however strong, will be allowed to prevail against it if the infant's benefit warrants their supersession. It will, even in the lifetime of the father, for strong reasons, appoint another as guardian to his child;⁸ it will set aside the claims of the mother if she be unfit.⁹ It will also attach very little importance to guardianship in socage, or the election of the infant, and will set aside a guardian in socage,¹⁰ or one appointed by the infant himself;¹¹ so, too, where

¹ Dan. Ch. Pr. 1119.

² *Ibid.* 1120. According to the old practice the guardian of the person was required to enter into recognizances that the infant should not marry without the leave of the court, but in special circumstances the recognizance was on the condition that the infant should not be married without the leave of the court, by the consent, privity or connivance of the committee. It appears to be the modern practice not to require a recognizance from the guardian of the person, unless perhaps there is an apprehension of an improper marriage. Simp. Inf. 249.

³ *Barlow v. Cooke*, 5 Ves. 461.

⁴ *Ex parte Thomas*, Amb. 146.

⁵ *Hope v. Hope*, 4 De G. M. & G. 328; *Dawson v. Jay*, 3 De G. M. & G. 764; *Re Willoughby (an Infant)*, 30 Ch. D. 324.

⁶ *Logan v. Fairlee*, Jac. 193; *Hope v. Hope* (*ubi sup.*); Dan. Ch. Pr. 1117, and cases there cited.

⁷ *Re Bourgeoise*, 41 Ch. D. 310.

⁸ *Ex parte Mountfort*, 15 Ves. 447; *Wellesley v. Duke of Beaufort*, 2 Russ. 1; *Thomas v. Roberts*, 3 De G. & S. 758. Ante, Part II., Parent and Child, chap. ii.

⁹ *Heysham v. Heysham*, 1 Cox. Eq. Cas. 179.

¹⁰ *Hunter v. Macrae*, cited Macph. Inf. 112; *Ex parte Watkins*, 2 Ves. Sen. 470.

¹¹ *Curtis v. Rippon* (*ubi sup.*); *Coham v. Coham* (*ubi sup.*).

testamentary guardians are unfit for their trust they will be superseded,¹ or removed.²

Interests of
ward test of
fitness.

The court in choosing guardians will be guided entirely by the interests of the ward; and though not bound to limit its choice will (*cæteris paribus*) select the nearest relations.³ But if the father's wishes, or the infant's manifest advantage are against the appointment, the claims of the mother or nearest relatives will be postponed. So, too, if the mother's wishes and the infant's manifest interests are against the father being left sole guardian, the court has jurisdiction to appoint other guardians with him.⁴ The court will pay regard to the wishes of the father, whose intended appointment has miscarried through some informality, and appoint the individual so nominated without a reference.⁵ The court formerly regarded the wishes of the mother as deserving of attention, though she could not, like the father, make any valid appointment;⁶ but will now give effect to her rights under the Guardianship of Infants Act, 1886, though such rights have been informally expressed by her.⁷ Regard will also be paid to the wishes of an infant who being of years of discretion has chosen a guardian for himself, who, if a proper person, will either be appointed alone,⁸ or in conjunction with others.⁹

Guardian
appointed to a
bastard child.

Though a testator cannot by will lawfully appoint any one to be the guardian of his bastard child,¹⁰ yet the court may, without reference, grant the guardianship of the infant to the person so nominated.¹¹ A father of a bastard will not as a rule be appointed its guardian unless he settles property on it; but in one case the court on the death of the mother did appoint the father as guardian of his illegitimate child, for whom he evinced much affection; and the child was delivered into his custody on the terms that the maternal aunt, whom its mother had left as the guardian, should have reasonable and proper access to it.¹² But the court has refused to appoint the mother guardian to her bastard daughters who took a fortune under their father's will,¹³

Marriage of
female guar-
dian deter-
mines the
office.

Where a mother or other female is appointed guardian and marries, the appointment of a new guardian is made by the court, though the late guardian may be reappointed,¹⁴ but not until

¹ *Beattie v. Johnstone*, 10 Cl. & F. 42.

² 49 & 50 Vict. c. 27, ss. 6, 13.

³ *Beattie v. Johnstone* (*ubi sup.*); *Simp. Inf.* 246, and the cases there cited; *Hunter v. Macrae*, cited *Macph. Inf.* 112; *Darcy v. Lord Holderness*, 1 P. Wms. 704 n.

⁴ 49 & 50 Vict. c. 27, s. 3.

⁵ *Hall v. Storer*, 1 Y. & C. Ex. 556.

⁶ *Re Kaye*, L. R. 1 Ch. App. 387.

⁷ *Re G. (an Infant)*, [1892] 1 Ch. 298.

⁸ *Ex parte Edwards*, 3 Atk. 519.

⁹ *Mansell's Case*, 2 Swanst. 536.

¹⁰ *Sleeman v. Wilson*, L. R. 13 Eq. 36.

¹¹ *Chatteris v. Young*, 1 J. & W. 106; but see *Elwes v. Const.*, 1 Madd. Ch. Pr. 435.

¹² *Ord v. Blackett*, 9 Mod. 116. In this case the dispute was between the father and the mother's sister, who was appointed executrix and guardian under the mother's will, by which real property was left to the child. The court also ordered the sum for the child's maintenance and education to be paid to the father.

¹³ *Curtois v. Vincent*, Jac. 268.

¹⁴ *Re Gornall*, 1 Beav. 347; *Jones v. Powell*, 9 Beav. 345.

after a reference for the purpose of ascertaining whether or not her reappointment would be for the benefit of the infant. For analogous reasons it has been laid down that a married woman ought not to be appointed as sole guardian.¹ The solicitor for any of the parties who exercise a control over the infant's estate must not be appointed guardian of infant's person.²

When of two or more guardians appointed by the court one dies, the guardianship is at an end, for there is no survivorship to those that remain;³ and this fact marks the difference between this kind of guardianship and testamentary; the survivors will, however, probably be re-elected.⁴ The power to appoint guardians to infants, or to make them wards of courts, is not limited by the English domicile of the infant, or by the fact that he has no property in this country;⁵ and an infant when resident in England has been made a ward of Chancery, though domiciled in Scotland, and having all his property there.⁶

No survivorship among guardians appointed by the court.

Power of court not limited by English domicile.

For termination of office, see *post*, chap. iv.

(4) *Foreign Guardians.*

Foreign Guardians.—Where an infant is within the jurisdiction of the Court of Chancery for whom a guardian has been appointed in a foreign country (whether by act of parties or some competent tribunal), difficult questions sometimes arise as to the rights and powers of the foreign guardian within the jurisdiction of the Court of Chancery. This conflict arises from the fact that the appointment of a guardian is territorial, that is, confined to the jurisdiction of a country in which he is appointed, and cannot, except by the comity of nations, be recognized by foreign countries. Mr. Dicey, in his work on Domicil,⁷ sums up very accurately the strict rule of law on the subject. He says: "A guardian appointed under the law of a foreign country (called hereinafter a foreign guardian), has no direct authority as guardian in England; but the English courts recognize the existence of a foreign guardianship, and will, in their discretion, give effect to a foreign guardian's authority over his ward." This rule coincides with the opinion of Story, who holds that "notwithstanding that a foreign guardian has no absolute rights as such in a foreign jurisdiction, the fact that he is such is entitled to great weight in the courts of another when called upon to determine, in

Guardians appointed by a foreign court.

Foreign guardian has no direct authority in England.

¹ *Re Kaye (ubi sup.)*. See *Re Duke of Somerset, Thynne v. St. Maur*, 34 Ch. D. 465.

² *Re Johnstons*, 2 Jo. & Lat. 222. See *Re Kemp's Settled Estates*, 24 Ch. D. 485.

³ *Bradshaw v. Bradshaw*, 1 Russ. 528.

⁴ *Hall v. Jones*, 2 Sim. 41.

⁵ *Re Willoughby (an Infant)*, 30 Ch. D. 324.

⁶ *Johnstone v. Beattie*, 10 Cl. & Fin. 42.

⁷ Rule 28. p. 172.

their discretion, to whose custody a minor child shall be committed; and if it appears for the best interests of the child that he should be under the care and custody of a guardian appointed in a foreign State, the court may so decree, even though another guardian has been appointed in the State where the minor subsequently is found.”¹ Thus, it may be said that foreign guardians as such have no rights here in England, their powers and functions are confined to the limits of the country in which they have been appointed; and the Court of Chancery has the power to appoint its own guardians for any infant within its jurisdiction, who is without a parent or guardian, whether the infant does or does not possess property within the jurisdiction.²

Gradual recognition of the rights of foreign guardians.

It is possible to trace the tendency of the English law towards the more complete recognition of the rights of foreign guardians. Thus, the case of *Johnstone v. Beattie*³ may *prima facie* be taken as an authority that foreign guardians were powerless here in England as against guardians appointed by the Court of Chancery to wards who were domiciled subjects of a foreign country, and were only temporarily resident in England. But with reference to that case Lord Campbell, when Lord Chancellor, said in *Stuart v. The Marquis of Bute*:⁴ “All that can be considered as judicially decided by the House was, that if there be a foreign child in England, with guardians duly appointed in the child’s own country, the Court of Chancery may, without any previous inquiry whether the appointment of other guardians is or is not necessary, and would or would not be beneficial for the child, make an order for the appointment of English guardians.”⁵

In the later case of *Di Savini v. Lousada*,⁶ where an Italian court had appointed guardians for an Italian infant who came to England, and being made a ward in Chancery was, with the consent of the Italian guardians, placed in the custody of English guardians, who did not carry out the directions of the Italian guardians, the Court of Chancery, upon the application of the Italian court, appointed new guardians, and declared its readiness to carry out in all respects the orders of the Italian court with regard to the infant, so far as might be consistent with the laws of England. In the case of *Nugent v. Vetzera*⁷ it

¹ Conf. Laws, s. 499 a.

² *Johnstone v. Beattie*, 10 Cl. & F. 42.

³ *Ubi sup.* See Lord Cottenham’s remarks (p. 114): “Foreign tutors and curators . . . cannot be English guardians without being able to derive their authority from some one of the sources from which the English law considers that the right of guardianship must proceed; and it has before been shown that the rights and duties of a foreign tutor and curator cannot be recognized by the courts of this country with reference to a child residing in this country. The result is that such foreign tutor and curator can have no right as such in this country.”

⁴ 9 H. L. Cas. 440, 464.

⁵ See also *Ex parte Watkins*, 2 Ves. Sen. 470.

⁶ 22 L. T. 61.

⁷ L. R. 2 Eq. 704.

was held that the Court of Chancery might appoint guardians for infants temporarily within the jurisdiction, but the power and control of the foreign guardians appointed by proper and competent tribunals will be respected.¹ *Dawson v. Jay*² is no authority for saying that foreign guardians will not be permitted to take their wards out of the jurisdiction, but only *under certain circumstances* they will be prevented by the court from so doing, and that it will not compel their removal out of the jurisdiction.

The rights of foreign guardians to the control and custody of their wards (subjects of a foreign country) for whom English guardians have been appointed, will be respected and not interfered with, and if the foreign guardians think, in the honest exercise of their discretion, that it would be for the advantage and interest of their wards to remove them out of England, the Court of Chancery will permit them to do so.³ This is an acknowledgment of the principle that the status of persons with respect to acts done and rights acquired in the place of their domicile, and contracts made concerning the property situated therein, will be governed by the law of that domicile, and that England . . . will hold as valid or invalid such acts, rights, and contracts, accordingly as they are holden valid or invalid by the law of the domicile.⁴ But the Court of Chancery reserves to itself the right to interfere with the control of the foreign guardian, and would not permit him to exercise any powers over his ward which could not be exercised by an English guardian.⁵

Right of foreign guardians to custody of ward.

The next point to be considered is the powers of the foreign guardian over the property of the ward situate within the jurisdiction of the Court of Chancery. As regards real or immovable property, it is clear that the *lex rei sitæ*, i.e., the law of England, must regulate his power, and unless the foreign guardian come in and qualify and be appointed guardian by the court, he would have no power to deal with immovables. Where the infant and guardians are domiciled abroad, and the infant is a tenant for life within the meaning of the Settled Land Act, 1882; and the foreign guardians are fit and proper persons to be trustees under the Act, the court will appoint them as such trustees, notwithstanding their foreign domicile.⁶ As regards personal or movable property, the right of a foreign guardian to deal with such has not been the subject of an actual decision,⁷ and therefore

Powers of guardian over ward's property.

Real property

Personal property.

¹ See *Re Bourgeoise*, 41 Ch. D. 310.

² 3 De G. M. & G. 764.

³ *Stuart v. Marquis of Bute*, 9 H. L. Cas. 440; *Di Savini v. Lousada*, 22 L. T. 61; *Nugent v. Vetzera*, L. R. 2 Eq. 704. The complete supersession of the foreign guardian would be an offence against the comity of nations, and tend to put an end to the interchange of friendship between civilized communities.

⁴ Phil. Int. Law, §. 381.

⁵ Dicey, Dom. 176.

⁶ *Re Simpson, Re Whitchurch*, [1897] 1 Ch. 256.

⁷ See remarks of Wood, V.C., in *Scott v. Bentley*, 24 L. J. Ch. 244.

is still within the region of speculation. But according to the common law of this country, the rights of a guardian are deemed to be strictly territorial, and so no foreign guardian can *virtute officii* exercise any rights or powers over the movable property of his ward in a country other than that in which he has been appointed without conforming to the law of the place in which the movables are situate.¹ This is clearly the law of the American States,² but the Scottish courts are more inclined to defer to the appointment made by the *lex domicilii* of the minor and his guardians.³ If the infant be domiciled in this country, its personal property must be dealt with according to English law; ⁴ but if abroad, personal property will be paid over to him, if by the law of his domicil he is entitled to receive it,⁵ and to his foreign guardian if he be also entitled to receive it.⁶ In the earlier case of *Re Hellman's Will*,⁷ payment to the foreign infant's foreign guardian was refused. This decision was practically followed in a recent case on the ground that the court was not bound to pay out a fund in court to a foreign guardian as of right, and that evidence ought to be produced to show that the fund would be applied for the benefit of the infant.⁸ The Court of Probate may grant administration in England to the duly appointed foreign guardians of infants domiciled abroad.⁹

Tutors appointed by will in a foreign country are not testamentary tutors within 12 Car. II. c. 24.¹⁰

(5) *Guardians appointed for Special Purposes.*

Guardians may be appointed by the Chancery Division for the special purposes provided for by the following Acts:—

- (a) To give legal consent to the infant's marriage under 4 Geo. IV. c. 76, s. 16.
- (b) To consent on behalf of infant under the Improvement of Lands Act, 1864 (27 & 28 Vict. c. 114).¹¹

¹ See Dicey, Dom. 176.

² Story, Conf. Laws, s. 504 a, and the cases there cited.

³ Fraser, Par. and Ch. 602 *et passim*.

⁴ *Gambier v. Gambier*, 7 Sim. 263.

⁵ *In the Goods of the Countess da Cunha*, 1 Hag. Con. Rep. 237; *Re Hellman's Will*, L. R. 2 Eq. 363.

⁶ *Re Crichton's Trusts*, 24 L. T. (O.S.) 267; *Re Ferguson's Trusts*, 22 W. R. 762 (Irish case).

⁷ *Ubi sup.*
⁸ *Re Chatard's Settlement*, [1899] 1 Ch. 714. This appears to be a retrograde decision; and it is difficult to imagine how such complete satisfactory evidence could be produced.

⁹ *In the Goods of Sartoris*, 1 Curt. 910.

¹⁰ *Johustone v. Beattie*, 10 Cl. & F. 42; *Scott v. Bentley*, 1 K. & J. 281; *Stuart v. Marquis of Bute*, 9 H. L. Cas. 440.

¹¹ Set. Judg. & Ord. 841.

4 Geo. IV.
c. 76, s. 16.

27 & 28 Vict.
c. 114.

- (c) To consent to improvements being effected on the infant's ^{33 & 34 Vict.} property (*e.g.*, building a mansion-house) under the ^{c. 56.} Limited Owners Residences Act, 1870 (33 & 34 Vict. c. 56).¹
- (d) To concur in the grant of a site for a church, &c., under ^{36 & 37 Vict.} the Places of Worship Sites Act, 1873 (36 & 37 ^{c. 50.} Vict. c. 50). The father of the infant is a competent person for this purpose.²
- (e) To consent on behalf of the infant for purposes under ^{37 and 38 Vict.} the Vendor and Purchasers Act, 1874 (37 & 38 ^{c. 78.} Vict. c. 78).³
- (f) To consent on behalf of the infant for purposes under the ^{40 & 41 Vict.} Settled Estates Act, 1877 (40 & 41 Vict. c. 18). ^{c. 18.} Such special guardian must be appointed though the ^{Application for} infant's father be alive, or a testamentary guardian ^{guardian under} has been appointed for him.⁴ "Upon an application ^{Settled Estates} to appoint a guardian to an infant for any such ^{Act, 1877.} purpose as aforesaid, the summons shall be served upon the parent, testamentary guardian, or guardian appointed by the Court of Chancery or the Chancery Division of the High Court of Justice, of the infant, if there be any such parent or guardian, unless the court or judge shall dispense therewith."⁵ Upon an ^{Facts to be} application to appoint a guardian of an infant the ^{proved on} following facts shall be proved :—

- (i) The age of the infant.
- (ii) Whether he has any parent, testamentary guardian, or guardian appointed by the Court of Chancery or the Chancery Division of the High Court of Justice, and if so, whether such parent or guardian has any interest in the application, and, if he has, the nature of such interest, and whether or not adverse to the interest of the infant.
- (iii) Where and under whose care the infant is residing, and at whose expense he is maintained.
- (iv) In what way the proposed guardian is connected with the infant, and why proposed, and how qualified.
- (v) That the proposed guardian has no interest in the application, or, if he has, the nature of his interest, and that it is not adverse to the interest of the infant.
- (vi) The consent of the guardian to act.⁶

¹ Set. Judg. & Ord. 841.² *Marquis of Salisbury's Case*, 2 Ch. D. 29.³ Set. Judg. & Ord. 841.⁴ *Re James*, L. R. 5 Eq. 334; *Re Caddick*, 7 W. R. 334.⁵ Settled Estates Act Orders, 1878, Order 8.⁶ *Ibid.* Order 10.

Where a vesting order is made under the Trustee Act, 1893, vesting or appointing a person to convey the estate of an infant tenant in tail, the estate tail and the remainders over are barred.¹ Where the infant is tenant in tail, the mere appointment of a guardian is not of itself sufficient; for the guardian cannot act when appointed without the special direction of the court. This direction is obtained on summons issued by the next friend, and served on the guardian or proposed guardian, and may be, and usually is, combined with the application of the guardian. On the hearing of this application, the guardian or proposed guardian must make an affidavit, stating that it is proper and consistent with a due regard to the infant's interest that such direction should be given.²

Quasi-guardianship.

A quasi-guardianship often arises at law where there has been no regular appointment, or an appointment without jurisdiction, or there has been some intermeddling. The general principle thus recognized is that any person who takes possession of an infant's property takes it in trust for the infant. Hence, courts of equity will always protect the helpless in such cases by holding the person who acts as guardian strictly accountable.³ And where a guardian continues to manage his ward's property at his request after he has attained his majority, he must account upon the same footing as if the transactions were during the ward's minority.⁴

The infant's next friend (*prochein amy*) who appears for him in actions in which he is plaintiff, and his guardian *ad litem* when appearing as defendant, will be discussed in the part devoted to Infancy.⁵

Guardians, or committees of lunatics.

Guardians or curators are appointed not only to infants and minors, but also to idiots, lunatics, and persons of unsound mind,⁶ for the purpose of tending their persons and managing their estates; these guardians are usually called "committees." The jurisdiction of the Court of Chancery over idiots and lunatics is different to that exercised by it in the case of infants. The jurisdiction over the latter is derived from the original authority vested in the Crown as *parens patriæ* to superintend the care and custody of infants and exercised by the Court of Chancery in its representative capacity;⁷ while its jurisdiction over lunatics is the delegation of a power conferred on the Crown by Parliament, and is confined to the individual persons whom the Sovereign by

Chancery jurisdiction in lunacy.

Delegation of a power conferred by Parliament.

¹ *Re Montagu, Faber v. Montagu*, [1896] 1 Ch. 549. For vesting orders and their effects generally, see Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 25-35.

² 40 & 41 Vict. c. 18, s. 49; Settled Estates Act Orders, 1878, Orders 6, 9 and 12.

³ See *Revett v. Harvey*, 1 Sim. and St. 502.

⁴ *Mellish v. Mellish*, 1 Sim. & St. 138.

⁵ *Post*, Part. IV. chap. vii.

⁶ Lunatic is "any idiot or person of unsound mind." 53 Vict. c. 5, s. 341.

⁷ See *ante*, p. 624.

its sign-manual intrusts with the care and custody of the persons and estates of idiots and lunatics. This is demonstrated by the former practice which denied any right of appeal from a judge in lunacy to the House of Lords, but only to the Sovereign in Council.¹ The Acts of Parliament which conferred upon the Crown the custody of *idiots*, and vested in it the profits arising from their estates, were 7 Edw. II. c. 9 (*de Prerogativa Regis*), and 17 Edw. II. c. 10, which enacted that the king should provide that the lands and tenements of *lunatics* should be kept without waste. These two statutes are said to have differed in their operation. In the case of lunatics the king is a mere trustee; but in the matter of idiots he has a beneficial interest. This beneficial interest it was necessary for him to delegate specially to some particular individual; but the statute in the case of idiots conferred on him the power to act as *parens patriæ*; and so the Court of Chancery acting in the place of the Crown had only original jurisdiction in the case of lunatics, at any rate in the case of lunatics not so found by inquisition.²

Under the Roman law spendthrifts (*prodigi*), or those who wasted their substance in reckless living, were put under the care of curators, after inquisition, who managed their property. "But with us," so says Blackstone,³ "when a man on an inquest of idiocy hath been returned an unthrift, and not an idiot, no farther proceedings have been had." And the propriety of the practice seems to be very questionable. It was doubtless an excellent method of benefiting the individual, and of preserving estates in families; but it hardly seems calculated for the genius of a free nation, who claim and exercise the liberty of using their own property as they please. *Sic utere tuo, ut non alienum lædas*, is the only restriction our laws (up to the present) have given with regard to economical prudence. And the frequent circulation and transfer of lands and other property, which cannot be effected without extravagance somewhere, are perhaps not a little conducive towards keeping our mixed constitution in its due health and vigour. The English courts will not recognize this disability even in the case of a foreigner who has been adjudged a "prodigus" by a competent tribunal of his domicile.⁴

No guardianship of prodigi or spendthrifts.

¹ But an alteration in the appellate procedure has been effected. By 36 & 37 Vict. c. 66, s. 18, "The Court of Appeal established by this Act shall be a superior court of record, and there shall be transferred to and vested in such court all jurisdiction and powers of the courts following (that is to say) . . . (5) All jurisdiction vested in or capable of being exercised by Her Majesty's Privy Council, upon appeal . . . from any order in lunacy made by the Lord Chancellor, or any other person having jurisdiction in lunacy."

² See St. Eq. ss. 1335, 1336; 2 Fomb. Eq. 228 n.; *The Corporation of Burford v. Lenthall*, 2 Atk. 553; *Orendon v. Lord Compton*, 2 Ves. 71; *Ex parte Grimstone*, Amb. 707; *Re Fitzgerald*, 2 Sch. & Lef. 436; *Vane v. Vane*, 2 Ch. D. 124.

³ 1 Com. 306.

⁴ *Re Selot's Trusts*, [1902] 1 Ch. 488.

The Court of Chancery may appoint a guardian to an infant lunatic not so found by inquisition, where the property is small, and it is impossible to obtain an order in lunacy.¹

Custody of
infant felons.

The Court of Chancery has been entrusted with certain powers over infants convicted of felony; ² thus it may assign the care of an infant convicted of felony to any person other than the testamentary or natural guardian.³ The person to whom the custody is assigned must not send the child beyond the seas or out of the jurisdiction of the court.⁴ The execution of the sentence passed upon the conviction of the infant is not to be affected or interfered with.⁵

¹ *Vane v. Vane*, 2 Ch. D. 124.

³ Sect. 1.

⁴ Sect. 2.

² 3 & 5 Vict. c. 90

⁵ Sect. 4.

CHAPTER III.

JUDICIAL CONTROL OVER GUARDIANS.

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IN this chapter the general principles upon which the Court of Chancery acts in controlling guardians in the exercise of their office, and in removing or superseding them when necessary, will be set forth. The detailed instances of its interference will be found elsewhere under their respective headings.

Guardianship is a trust,¹ and a trust of delicacy and importance, which the good ordering of society requires to be faithfully carried out. The Court of Chancery, as having the supreme control over trusts, claims to interfere and see that the trusts are strictly carried out for the benefit of those in whose interests they were created; and will remove trustees who fail in their duty, and appoint fresh ones in their stead, for such exist for the benefit of those to whom the creator of the trust has given the trust estate.² It will thus interfere with those guardians who are appointed to the person of an infant; and this species of guardianship is a more exacting kind of trusteeship than the mere trust to hold and dispose of his property.³ It also exercises a vigilant care over guardians of the estate in regard to the management and disposal of the property of infants; and will carry its aid and protection in their favour so as to reach other persons than those who are guardians strictly appointed; for if one intrudes on the estate of an infant, and takes the profits thereof, he will be treated as a guardian, and held responsible for the same to the infant in a Court of Equity.⁴ Any breach of trust by a guardian will be punished; and if mismanagement of the infant's property

Control of the court.

Guardians of the person.

Guardians of the estate.

Interference of the court.

¹ *Mathew v. Brise*, 14 Beav. 341; *Sleeman v. Wilson*, L. R. 13 Eq. 36.

² *Letterstedt v. Broers*, 9 App. Cas. 371.

³ *Duke of Beaufort v. Berty*, 1 P. Wms. 903.

⁴ *Story*, Eq. s. 1356; *Nanuey v. Williams*, 22 Beav. 452.

is suspected, any person may make an application to the court on behalf of the infant; ¹ and it has been laid down that if any wrong steps had been taken which might not deserve punishment, yet if they were such as induced the least suspicion of the infant's being like to suffer by the conduct of the guardians, or if the guardians chose to make use of methods that might turn to the prejudice of the infant the court would interpose and order contrary.²

Jurisdiction of
court over
parents.

The jurisdiction of the court over guardians is also due to its superintending power over the care of the person of the infant ward in respect of its protection and education, and over the property of the infant in respect of its due management and preservation, and the proper application of it for the ward's maintenance. From the first the court derives its jurisdiction over the infant's natural guardians, its parents. From the second it derives its jurisdiction over the infant's guardians in the ordinary sense of the word. The court has ample power to remove a child from the control of its father and place it under that of its mother till it reaches the age of sixteen.³ It can remove an infant altogether out of the power of its parents, if their character and conduct are of so gross a nature as to make it almost certain that the detriment of the child would ensue by remaining in their company.⁴ The judicial discretion of the court is to be exercised with a view to the welfare of the infant, the conduct of the parents and the wishes as well of the mother as of the father;⁵ and the wishes of the mother will be considered even where she equally with the father has been guilty of a matrimonial offence.⁶ Another ground for its interference with the parental control is where the parent has acquiesced for a long period in the appointment of a stranger as guardian of the child, whom he has allowed to be brought up and educated by the guardian, more especially where the parent being of straitened means, has himself taken some pecuniary benefit as the price of his acquiescence, and the child's reasonable prospects and expectations would be defeated.⁷ Where the mother is unfit to retain the custody of her children, whether in her capacity of natural or testamentary guardian, the court will remove them out of her control.⁸

Jurisdiction
over guardians.

The jurisdiction of Chancery extends over guardians properly so called, including guardians by operation of law, or socage guardians, those chosen by the infant himself, testamentary

¹ *Lord Dudley's Case*, cited *Pomfret v. Windsor*, 2 Ves. Sen. 484.

² Per Lord Hardwicke in *Duke of Beaufort v. Berty*, 1 P. Wms. 903.

³ Under 36 Vict. c. 12.

⁴ 49 & 50 Vict. c. 27, s. 3 (2); 52 & 53 Vict. c. 56; 54 Vict. c. 3.

⁵ *Re A. & B. (Infants)*, [1897] 1 Ch. 786.

⁶ *Ibid.*

⁷ 49 & 50 Vict. c. 27, s. 3 (2); 52 & 53 Vict. c. 56; 54 Vict. c. 3.

⁸ See *ante*, Part II., Parent and Child, chap. ii. p. 513; 49 & 50 Vict. c. 27, s. 2.

guardians, or those appointed by the will of the infant's father, and Chancery guardians, or those appointed by the court itself. The court will also superintend and control guardians appointed by a foreign court, and recognized as having authority in this country, and will, if necessary, appoint new guardians in their place to take charge of the wards. The court has full power to control and interfere with the common law guardian in socage, and the guardian appointed by the infant himself. Its control will be exercised over a testamentary guardian if his conduct be improper,¹ and orders may be made by the court regulating his conduct.² Where guardians, whether appointed by the father or the mother, are unable to agree upon questions affecting the welfare of the ward, any of them may apply to the court for its direction, upon which application it may make such order as it may think fit.³ The court will restrain a testamentary guardian from exercising his legal powers without any misbehaviour on his part, simply on the ground of the infant's benefit.⁴ The court, however, will not lightly interfere with the control of a guardian, and where a penniless child is under the care of a legal guardian who is able and willing to maintain it at his own expense, the duty of the court is to leave the child alone, unless it is satisfied that it is for the welfare of the child that some other course should be taken. The dominant matter for the consideration of the court is the welfare of the child, which is not to be measured by money only, or by physical comfort only, but is to be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical wellbeing, nor are the ties of affection to be disregarded.⁵ If, therefore, the court thinks fit to interfere on the ground of the welfare of the child, it will deprive a parent of its custody.⁶

The court will exercise its discretion generally as to the education of the ward, though it will be guided by the interests of the infant. The guardians are the proper judges of the method of educating their ward; but if they disagree, the court will exercise its own discretion on the subject, and will not consider itself bound by the wishes of the majority. Where the father of the ward has expressed his wishes either openly or impliedly as to the religious faith in which his child is to be brought up, the court will listen and give effect to them.⁷ Parol evidence

When the court can control the education

¹ *Talbot v. Earl of Shrewsbury*, 4 Myl. & Cr. 673.

² *Roach v. Garvan*, 1 Ves. Sen. 157.

³ 49 & 50 Vict. c. 27, s. 3.

⁴ *Andrews v. Salt*, L. R. 8 Ch. App. 622. See *Re Goldsworthy*, 2 Q. B. D. 75, and the remarks of Brett, M. R., in *Re Agar-Ellis*, *Agar-Ellis v. Lascelles*, 24 Ch. D. 317, 387.

⁵ *Re M'Grath (Infants)*, (1893) 1 Ch. 143.

⁶ See *Reg. v. Gynghall*, [1893] 2 Q. B. 242.

⁷ *Talbot v. Earl of Shrewsbury*, 4 Myl. & Cr. 672.

and residence
of the ward.

will be admitted to prove the father's wishes.¹ In general the testamentary guardian is entitled to the custody of the ward's person, but the court may exercise its discretion either in ordering the ward to be delivered up to the guardian, or in permitting him to reside with the mother, or in allowing her to have access to him.² Though the testamentary guardian is legally entitled to the care and management of his ward's property, real or personal, he is himself subject to the control of the court, and must account for what he has received.

Jurisdiction
of courts over
guardians ap-
pointed by
itself.

The power and jurisdiction of the court over guardians appointed by itself is clear and undisputed. A guardian appointed by the court is an officer of the court, and responsible to it,³ and is little more than a bailiff or servant.⁴ Where there is a suit affecting an infant's property, whether he has been appointed by the court or not, the guardian's powers of management can only be exercised subject to the control of the court.⁵ When the court has assumed authority over the person or property of the infant ward, it acts throughout with all the anxious care and vigilance of a parent, and it allows neither the guardian nor any other person to do any act injurious to the rights or interests of the infant. The court has thus power to superintend the religious education of infants; it may settle in what faith they should be brought up, and may even order the discontinuance of their education in a particular religion if not to their detriment. The court will interfere where there is a difference between the guardians as to the management of their ward, or as to the school to which he ought to be sent, or the person with whom he should reside, and generally as to the care and control of the ward.⁶ It has power to order what sums should be expended for the maintenance and education of the infant wards out of their fortune, and the guardians must pass their accounts.⁷ Guardians will be prevented from taking wards of court out of the jurisdiction, and their permanent residence abroad will not be permitted, except to their manifest advantage, as regards health and the like, and then only after leave obtained. The clandestine removal or attempt at removal of a ward of court out of the jurisdiction is a gross contempt, and in its nature criminal, and visited with severe pains and penalties;⁸ to

Contempt of
court.

¹ *Anon.*, 2 Ves. Sen. 56, which is in direct opposition to *Storke v. Storke*, 3 P. Wms. 52.

² *Eyre v. Countess of Shaftesbury*, 2 P. Wms. 103; *Ex parte Earl of Ilchester*, 7 Ves. 380.

³ *Wellesley v. Duke of Beaufort*, 2 Russ. & Myl. 639.

⁴ See *Rex v. Sutton*, 3 A. & E. 608.

⁵ *Webb v. Shaftesbury*, 7 Ves. 480; and see *Bethell v. Abraham*, L. R. 17 Eq. 24.

⁶ *Duke of Beaufort v. Berty*, 1 P. Wms. 704; *Storke v. Storke* (*ubi sup.*); *Anon.* (*ubi sup.*).

⁷ *Dan. Ch. Pr.* 1120; *Campbell v. Mackay*, 2 Myl. & Cr. 31; *Re Medley*, I. R. 6 Eq. 339.

⁸ *Eyre v. Countess of Shaftesbury* (*ubi sup.*).

conceal or withdraw the person of the infant ward from the proper custody is likewise a contempt, and those who are aware of its place of concealment must divulge it.¹ It is also a contempt to disobey the orders of the court in relation to the maintenance and education of the ward, or to marry the infant without the proper consent of the court.

The court will assist guardians in the exercise of their trust if their wards prove refractory.² The court, of course, cannot be aware of the conduct of the large number of wards under its care, but in order to keep itself informed, it requires the guardians from time to time to give general information of what is taking place; and, whenever necessary, they ought to apply to the court for advice and directions.³ The Court of Chancery has complete control over the marriage of its wards, and though it does not now as a matter of practice require the guardian under ordinary circumstances to enter into a recognizance not to allow the ward to marry without the consent of the court, yet it might think fit to exact such security where the ward is a female, and about to reside out of the jurisdiction.⁴

Control over marriage of wards of court.

Where a guardian appointed by the court does not behave to the satisfaction of the court, orders regulating his conduct will be made upon him; and if the court has the slightest suspicion that the infant will suffer from such conduct, it will interpose on its behalf.⁵

Orders regulating conduct of guardian.

As a necessary incident of the power of the court to control guardians and protect the interests of infants, it has the power to remove or supersede guardians. As before seen, in all such cases the guardianship is treated as a delegated trust for the benefit and advantage of the infants,⁶ and if it is abused, or in danger of being abused, the court will interpose, not only by way of remedial justice, but of preventive justice.⁷ It is indisputable that the court has power to remove those guardians that are appointed by itself, but it also can remove or supersede those appointed by the infants themselves, and common law guardians, or guardians in socage. The ground for removal of the guardian is general unfitness for the trust reposed in him, whether it take the shape of actual breaches of trust, or gross personal misconduct on his part, and even suspicion of possible harm or loss to the ward will induce the court to interpose on its behalf; thus if a

Removal and supersession of guardians.

¹ *Ramsbotham v. Senior*, L. R. 8 Eq. 575; *Rosenberg v. Lindo*, 48 L. T. 478.

² *Hall v. Hall*, 3 Atk. 721; *Tremaine's Case*, Stra. 168. In this case the infant went to Oxford contrary to the orders of his guardian, who would have had him to Cambridge, and the court sent a messenger to carry him from Oxford to Cambridge; and upon his returning to Oxford, there went another, *tam* to carry him to Cambridge, *quam* to keep him there.

³ *Kay v. Johnston*, 21 Beav. 536

⁴ See *Jeffreys v. Vantesswartswarth*, Barn. Ch. 141.

⁵ 2 Foub. Eq. Bk. ii. chap. ii. s. 1, note a; Macph. Inf. 119.

⁶ *Roach v. Garcan*, 1 Ves. Sen. 157.

⁷ St. Eq. s. 1339; *Duke of Beaufort v. Berty* (*ubi sup.*).

guardian is shown to have caused, encouraged, or procured the seduction or prostitution of his infant ward under the age of sixteen, the court may divest him of all control over her, and appoint some other person her guardian till she reaches majority.¹ Becoming a lunatic or idiot, or being convicted of a serious criminal offence, would be a ground for removing a guardian. The application to remove a guardian of the person or estate should be made by summons, supported by evidence of the facts which render the application necessary.²

Testamentary
guardians now
removed and
superseded.

The control of the court over testamentary or statute guardians is clearly established, but the opinion prevailing down to recent times was that it had not the power (at any rate, it would not exercise it) to remove testamentary guardians. The reason for this was said to be the deference paid by the court to the statute constituting their guardianship;³ thus, testamentary guardians were not removed, but superseded, and restrained from interfering with the infant's person or estate;⁴ the court suspended their office by taking the wards out of their control and custody.⁵ But under the Guardianship of Infants Act, 1886, the High Court of Justice in any of its divisions has a discretion on being satisfied that it is for the welfare of the infant to remove from his office any testamentary guardian or any guardian appointed, or acting by virtue of the Act, and may also for the welfare of the infant appoint another guardian in the place of the guardian so removed.⁶ The court can likewise make them give security for their proper conduct,⁷ or make orders regulating their conduct,⁸ and even punish them; thus, where one of two testamentary guardians of an infant girl about nine years old took her from a boarding-school and married her to his own son who had no fortune, the court ordered the guardian to produce the girl in court, and then committed her to the other guardian, and ordered an information to be brought against the guardian who married her to her disparagement. If the girl had been a ward of court the guardian would have been committed to prison.⁹ When a testamentary guardian is superseded, a new guardian will be appointed to take charge of the ward's person and estate. The reason for superseding a testamentary guardian is the same as that for removing the other kinds of guardians, namely, general unfitness for the trust reposed in him, either because of personal misconduct,¹⁰ or

¹ 48 & 49 Vict. c. 69, s. 12. See *Hiscocks v. Jermonson*, 10 Q. B. D. 360.

² Dan. Ch. Pr. 1120.

³ *Foster v. Denny*, 2 Ch. Cas. 327.

⁴ *Ingham v. Bickerdyke*, 6 Madd. 275.

⁵ Macph. Inf. 128. This renders it possible for them to be reinstated in their office.

⁶ 49 & 50 Vict. c. 27, ss. 6, 13.

⁷ *Foster v. Denny* (*ubi sup.*).

⁸ *Roach v. Garvan*, 1 Ves. Sen. 157.

⁹ *Goodall v. Harris*, 2 P. Wms. 561.

¹⁰ *Morgan v. Dillon*, 9 Mod. 135; *S. C. Dillon v. Lady Mountcashell*, 4 Bro. P. C. 306, reversing *Morgan v. Dillon*.

because of his being in a position which would render it disadvantageous to the ward that he or his property should remain under his control. A testamentary guardian will be suspended for permitting his ward to contract an unfitting marriage;¹ for tampering with the ward's religious views;² a change of religion on the part of the guardian if likely to act to the detriment of the ward would be a ground of suspension;³ so where he becomes a lunatic,⁴ or insolvent, or bankrupt;⁵ he has also been suspended from his office where he has allowed his rights to lapse by acquiescence.⁶ Deliberately keeping the ward out of the jurisdiction would be a ground for practical removal or supersession. Mismanagement of the ward's estate would be a ground for removing or superseding him.⁷ But nothing short of such unfitness will deprive him of his rights; thus, he will not be superseded merely on account of his pecuniary interest in the death of his ward;⁸ nor is absence from the jurisdiction in itself a sufficient ground for supersession.⁹ The marriage of a female testamentary guardian does not operate as an absolute disqualification, but, as a rule, a reference will be directed to inquire whether the interests of the infant would be served by her continuing in the office.¹⁰ What would be grounds for superseding a testamentary guardian in former days might now be grounds for removing him altogether.¹¹

A guardian may be superseded or removed by summons at chambers, for the purpose of appointing a new guardian in the room of the one sought to be removed or superseded.¹²

In order to prevent guardians and trustees who have estates and interests in the lands and during the lives of their wards from continuing in possession of the lands after the death of the *cestui que trust*, any person claiming an estate in remainder, reversion or expectancy in or to any estate after the death of any such infant ward, on affidavit that he has cause to believe such infant to be dead, and that his or her death is concealed by such guardian or trustee, may, once a year, if he thinks fit, move for an order on the guardian or trustee concealing or suspected of concealing such ward to produce the person supposed to be dead before the parties named in the order; and on the refusal or neglect to produce such ward may obtain an order to have the

How guardian removed or superseded.

Order for production of person of ward.

¹ *Roach v. Garvan* (*ubi sup.*).

² *Di Savini v. Lousada*, 18 W. R. 425.

³ *F. v. F.*, [1902] 1 Ch. 688. The court should be slow to exercise its power in a case of this kind, and only the interests of the ward should be the guiding principle.

⁴ *Ex parte Lady Anne Brydges*, cited 2 Fonb. Eq. 247 *n.*

⁵ *Smith v. Bate*, 2 Dick. 631.

⁶ *Andrews v. Salt*, L. R. 8 Ch. App. 622.

⁷ *Lord Dudley's Case*, cited *Pomfret v. Windsor*, 2 Ves. Sen. 484.

⁸ *Morgan v. Dillon*, 9 Mod. 135; *S. C. Dillon v. Lady Mountcashell*, Bro. P. C. 306, reversing *Morgan v. Dillon*.

⁹ *Re Lewis*, 2 Moll. 485.

¹⁰ *Jones v. Powell*, 9 Beav. 345.

¹¹ 49 & 50 Vict. c. 27, ss. 6, 13.

¹² Dan. Ch. Pr. 1120. See Rule 6 of R. S. C. (Guardianship of Infants), 1887.

ward produced in court or before commissioners ; in which case the ward is to be taken to be dead, and the claimant may enter on his lands.¹ If the ward is beyond sea the claimant may send over persons to view him.² If the ward is afterwards proved to be alive after such order is made, the ward may re-enter on his lands.³ If the guardian or trustee of the ward shall hold over after the determination of the life of the ward, the person entitled on the death of the latter to the land shall be entitled to recover from him the full value of the profits received during such wrongful possession.⁴ A person entitled on the death of the ward to an immediate contingent remainder may apply for an order ;⁵ so, too, a person entitled under an executory devise may apply.⁶

¹ 6 Anne, c. 18, s. 1.

² Sect. 2.

³ Sect. 3.

⁴ Sect. 5.

⁵ *Ex parte Grant*, 6 Ves. 512.

⁶ *Re Pople, Ex parte Baker*, 40 Ch. D. 589; and see *Re Stevens*, 31 Ch. D. 320.

CHAPTER IV.

TERMINATION OF GUARDIAN'S OFFICE.

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PERPETUAL tutelage is a thing unknown to the English law, as being contrary to the spirit of independence implanted in the Saxon race. When a man not afflicted with imbecility of reason reaches an age when he is deemed by the law to be capable of managing his own affairs, he is loosed from the care and control of guardians.¹ But where a person is not *compos mentis*, a curator or committee, as before seen, is generally appointed to look after his person or manage his affairs so long as his madness or weakness of reason lasts. Again, a person's property may be in the hands of trustees during his whole life, but such are appointed

Guardianship
lasts only till
majority.

¹ At one period of Roman law women were under a state of perpetual pupillage; if they were married they became *in manum viri*; if they were unmarried and their father was alive, they were in his *potestas*; if their father was dead and they were unmarried, they were under the tutelage of their nearest agnates. "Pupillorum pupillarumque tutores et negotia gerunt et auctoritatem interponunt, mulierum autem tutores auctoritatem dumtaxat interponunt." Ulpianus, II, 25. But as Gaius (lib. i. s. 190) says: "Feminas vero perfectæ ætatis in tutela esse fere nulla pretiosa ratio suasisse videtur, nam quæ vulgo creditur, quia levitate animi plerumque decipiuntur, et æquum erat eas tutorum auctoritate regi, magis speciosa videtur quam vera." Before the time of Justinian this perpetual tutelage of women was obsolete, and curators for special purposes were appointed to give authority to her acts.

only for the purpose of preserving or disposing of property in a particular manner (as, for instance, husband and wife, with trustees appointed to carry out the trusts of their marriage settlement, or an ordinary tenant for life, with trustees to preserve the interests of the remainder-men, or other interested parties). But, except in such instances, guardianship, according to English law, lasts only till the ward attains majority, or for the period for which it is fixed either by the law, or the person appointing, unless it is sooner determined.

How terminated.

Guardianship may be terminated in various ways, which may be classified as follows: (1) By what may be termed natural limitations, such as (a) completion of the period for which it was instituted; (b) death of the ward; (c) death of the guardian. (2) By the act of the parties, such as (a) marriage of the ward; (b) marriage of a female guardian; (c) resignation of guardian. (3) By the improper conduct of the guardian, removal and supersession of the guardian.

(1) *Natural Limitation.*

Natural limitation.

(a) *Completion of the Period for which it was instituted.*—The different kinds of guardianship end at various periods according to their nature. Guardianship in socage came to an end when the infant heir reached the age of fourteen. Testamentary guardianship under 12 Car. II. c. 24, s. 8, usually terminates when the ward reaches the age of twenty-one, but may end at an earlier period, if provided for by the will appointing the guardian; thus, where a testator appointed his wife guardian of his children until her marriage, and the wife married again, her guardianship ceased.¹

Chancery guardianship is put an end to by the ward arriving at the age of twenty-one. A person arriving at majority or years of legal discretion is deemed competent to manage his property, and take due care of himself; consequently, those who are set over him before arriving at that period to watch and protect him both in person and property are no longer needed, and are relieved from their office on proof of their having fairly and properly discharged their trust.

Death of ward.

(b) *Death of Ward.*—When the ward dies, the guardianship is, of course, brought to an end; and it only remains for the guardian to account for his trust with the heirs or the legal and personal representatives of the dead ward, if any.

Death of guardian.

(c) *Death of Guardian.*—Death of the guardian necessarily brings the guardianship of the particular guardian to an end, but not the wardship of the ward. Where there are co-guardians,

¹ *Selby v. Selby*, 2 Eq. Cas. Abr. 488.

the death of one of them has not the same effect in the case of testamentary and Chancery guardians. Where one of two guardians appointed by testament dies, the survivor is entitled to continue in his office.¹ Where one of two guardians appointed by the Court of Chancery dies, the right of the survivor determines, and it becomes necessary to apply again to the court to make a new appointment;² in the absence of any objection it is usual to re-appoint the survivor without a reference.³ Where the guardian in socage dies, the person next entitled to take upon himself the office would succeed.

(2) *By Act of Parties.*

(a) *Marriage of the Ward.*—The question whether the marriage of the ward puts an end to the wardship depends upon whether the ward is male or female, also whether the guardianship was testamentary or Chancery. Marriage effects a considerable change in the position and status of the contracting parties, and affects the position of the wife more than that of the husband, for she is deemed to come under the care and custody of her husband, though now his marital rights over her property have been abrogated. If a male ward marries, neither as regards his person nor his estate would the powers of his testamentary or Chancery guardian be determined; at least it is clear that as regards his estate the functions of his guardian would not cease.⁴ Whether the guardianship of his person ceases is a more difficult question to answer. Marriage usually acts as an emancipation of the child, freeing him from parental control, and enabling him to act independently. If the child can then emancipate himself from his father's control by marriage, it would seem to follow that he could do so when he was only under a guardian, who has no greater rights than a parent. A father, however, voluntarily allows his son to be emancipated, but when a guardian is appointed by a father, his trust does not ordinarily expire till the ward has attained his majority; and for the guardian to allow him to emancipate himself by marriage might amount to a breach of trust on his part. It may, therefore, be urged that the guardianship of a male ward does not terminate on his marriage.

By act of parties.
Marriage of ward.

Whether testamentary guardianship of male ward terminated by marriage.

The marriage of a female ward in chancery does not determine the guardianship either of her person or property; for it is clear that the Court of Chancery would not allow itself to be ousted of its authority by an act of the parties which might amount to a contempt of its orders and jurisdiction. A female ward in

Guardianship of female ward of court not determined by marriage.

¹ *Eyre v. Countess of Shaftesbury*, 2 P. Wms. 103.

² *Bradshaw v. Bradshaw*, 1 Russ. 528.

³ *Hall v. Jones*, 2 Sim. 41.

⁴ *See Mendes v. Mendes*, 1 Ves. Sen. 89.

Chancery, married or unmarried, is under the control of the court both as to person and property till her period of wardship is put an end to by attaining majority. Whether the marriage of a female ward determines her testamentary guardianship seems to be a question yet awaiting judicial determination. In *Mendes v. Mendes*,¹ Lord Hardwicke is made to use language supporting the contention that marriage of a female ward determines her wardship,² but in the later case of *Roach v. Garvan*,³ Lord Hardwicke held that wardship was not determined by the marriage of a female ward, and that there was no precedent for the contention that it was determined; but his lordship added that the Court of Chancery had not been in the habit of appointing guardians to a married female infant, and that he would not do so. The better opinion is that the testamentary guardianship of female wards as regards their property is not determined by their marriage. This view may be perhaps strengthened by the operation of the recent legislation affecting married women, by which the rights and control of a husband over his wife's property is to all intents and purposes abrogated; accordingly, the claims of the husband over his wife's property (not settled to her separate use) which were in conflict with those of her guardian can no longer afford a reason for holding that the claims of the husband on marriage bring about a practical determination of the testamentary guardianship. The only ground for holding her freed from the control of her guardian would be that as she is deemed fitted for performing the duties as head of a household and of a mother of a family, she ought to be deemed capable of managing her own property. Where a female ward marries a minor, it is only right and proper that her state of wardship should not be determined by her marriage; otherwise, if the minor husband was himself under guardians, nice and difficult questions might arise as to the right of the husband's guardians to take over and administer the property of the infant wife; whereas her husband, if of age, would not be entitled to do so. Notwithstanding that the balance of convenience in certain cases would permit her marriage with an adult to end her wardship, yet in the main the uniform rule that her marriage with an adult or minor should have no effect on her status of ward, so far as her property was concerned, would be of greater advantage.

(b) *Marriage of Female Guardian*.—Under the common law, when a female guardian in socage married, her guardianship was practically determined, because her husband took upon himself

Whether testamentary guardianship of female ward terminated by marriage.

Effect of M.W.P. Act, 1882.

Marriage of female guardian. In socage.

¹ 1 Ves. Sen. 89.

² *Eyre v. The Countess of Shaftesbury* was given as the authority for this dictum, but there is nothing in the reports in 2 P. Wms. 103, or Gilb. Eq. Rep. 172, to support this proposition, and in the other report of *Mendes v. Mendes*, 3 Atk. 619, this dictum is not reported.

³ 1 Ves. Sen. 157.

jure mariti the office of guardian. But now, under the Married Women's Property Act, 1882,¹ marriage would give no such right to the husband to assume the office. In the case of a female testamentary guardian, her marriage does not put an end to her office; "if a *feme* guardian marry, the guardianship is not transferred to the husband, nor shall it be forfeited by the attainder or misdemeanor of the husband."² If the marriage of the testamentary guardian was likely to prejudice the interests of the ward, the court now would supersede or remove the guardian.³ It ought to appear to the satisfaction of the court that it would be to the ward's benefit to continue to reside with the married guardian.⁴ When a female guardian appointed by the Court of Chancery marries, her guardianship is suspended, and a reference as of course is made to inquire whether or not under the altered circumstances she should or should not be continued in her office; and where no harm is likely to ensue it is usual to confirm her appointment.⁵

(c) *Resignation of Guardian*.—Guardianship in socage is a trust reposed in the next of kin by the law, and could not be refused, nor resigned when acted upon. The socage guardian could not resign his office nor assign it;⁶ the guardian in socage has no interest of profit, it is an interest of honour . . . committed to the next of kin, and is therefore inherent in the blood, and cannot be assignable.⁸ Where testamentary guardians have accepted the office, it has been laid down that they will not be discharged of their trust upon their own application, and that the court will compel them to act, because, being trustees, they cannot resign their office at will, and they will not be allowed to vacate it except for strong and urgent seasons.⁹ But as it cannot be for the infant's benefit to continue him in the care of a negligent or reluctant guardian, it is difficult to see how the court can avoid transferring the custody and control of the ward to another; and, consequently, the court has practically permitted the guardian to resign his trust,¹⁰ and appointed another guardian on the application of the infant for that purpose.¹¹ But where a testamentary guardian has altogether declined to act, it is not necessary to remove him by a suit brought for that purpose, and it is sufficient to petition, if requisite, for the appointment of a new guardian.¹²

¹ 45 & 46 Vict. c. 75, s. 24.

² Com. Dig. Gard. 384.

³ 49 & 50 Vict. c. 27, ss. 2, 6, 13.

⁴ *Jones v. Powell*, 9 Beav. 345.

⁵ *Re Gornall*, 1 Beav. 347; *Jones v. Powell* (*ubi sup.*).

⁶ See *Bedell v. Constable*, Vaugh. 177.

⁷ Statute of Marlbridge, 52 Hen. III. c. 17.

⁸ Per Lord Commissioner Gilbert in *Eyre v. Countess of Shaftesbury*, Gilb. Eq. Rep. 172, 177.

⁹ *Spencer v. Earl of Chesterfield*, Amb. 146.

¹⁰ *Ibid.*

¹¹ *Ex parte Champneys*, Dick. 350.

¹² *O'Keefe v. Casey*, 1 Sch. & Lef. 106.

Chancery
guardian.

A guardian appointed by the Court of Chancery who accepts the office is a trustee, and cannot renounce or resign his trust, unless he obtain the sanction of the court to lay down his office; for it would be unreasonable that having once undertaken the duties of guardian, he should be allowed at his own caprice to relieve himself of the burden, to the probable detriment of his ward. If he has valid grounds for retiring, he ought to seek the aid of the court in releasing him from his obligations which he voluntarily assumed.

Guardianship
cannot be
delegated.

For the like reason that guardianship is a trust and a personal confidence, a guardian, whether testamentary or appointed by the Court of Chancery, cannot delegate his duties and office to another. If he attempts to do so, his responsibility remains unaffected, and he must account with his ward as though he had not endeavoured to divest himself of his duties and liabilities.¹

(3) *By Removal or Supersession of Guardian for Improper Conduct.*

Removal or
supersession
of guardian.
Improper
conduct.

The Court of Chancery alone has the power to remove or supersede guardians from their trust by reason of their improper conduct, or the interest of the wards suffering if they were continued in their office. This jurisdiction is exercised by the court in virtue of the delegation to it of the duty of the Crown as *parens patriæ* to superintend and protect the interest of infants.² Natural guardians, such as the father or mother, or legal guardians, as those in socage, do not require to be formally removed by the court, for the appointment of a guardian by the court to take their place operates as a removal or supersession. A testamentary guardian can now be actually removed, and not merely superseded, or directed to conform to a particular line of conduct.³ A guardian appointed by the court can be removed by the court, but before he can be removed or superseded, a formal application to the Court of Chancery for that purpose must be made. The grounds and method of removal or supersession are given elsewhere.⁴

Remedies
against
guardians.

The remedies of a ward against his guardian are both legal and equitable.

At law.

As regards the
person.

(1) *At Law.* (a) If the ward was so treated by the guardian as to render his custody of him practically an illegal detention, the infant could have his remedy by *habeas corpus*.

As regards
property.

(b) The three common law remedies which the infant had against his guardian are now either abolished or obsolete, so that it is not necessary to do more than state what they were.

¹ See *Turner v. Corney*, 5 Beav. 517.

² See *ante*, chap. ii. p. 624.

³ See *ante*, chap. iii. p. 642; 49 & 50 Vict. c. 27, ss. 6, 13.

⁴ *Ante*, chap. iii. pp. 641 *et seq.*

(i) The action of waste, which was to prevent waste where a guardian wasted an infant's property or allowed a stranger to do so, but it must be voluntary, and not merely permissive waste.¹ This action has been abolished,² and the legal remedy for waste is now by action of trespass.

(ii) The action of novel disseisin was brought where the guardian aliened his ward's estate. This has been also abolished.³

(iii) The right of bringing an action of account is still in existence, but has fallen into desuetude: accounts are now taken by a like action in Chancery. This action could not have been brought during the continuance of the guardianship.⁴

(2) *In Equity.* (a) The power of the Court of Chancery to remove or supersede the guardian, when the interests of the ward demand it, have already been given in the preceding chapter.

(b) The court will see that the fiduciary relation of guardian and ward is properly exercised, and will do all in its power to remedy and repair a breach of trust; thus, it will direct and insist upon an account between the parties, and reinstate as nearly as possible the ward in his original position, if the trustee has failed to perform his trust and duties properly.⁵

The respective rights of guardian and ward on the termination of the guardianship are set out in a later chapter.⁶

¹ Simp. Inf. 453.

⁴ Co. Litt. 89 *a*.

² 3 & 4 Wm. IV. c. 27, s. 36.

⁵ See *post*, chap. vii.

³ *Ibid.*

⁶ *Ibid.*

CHAPTER V.

RIGHTS AND DUTIES OF GUARDIANS IN RESPECT OF THE PERSON OF THE WARD.

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THE relationship of guardian and ward, like that of parent and child, creates certain rights in the guardian, and at the same time involves certain duties on his part connected with the person of the ward. These rights and duties will be considered in this chapter.

Right of Guardian to the Care and Custody of the Ward.—Right of guardian to care and custody of ward.

Nature herself suggests that those who are of young and tender years should be under the care and protection of the strong until the time comes when they are able to take care of themselves, and engage on an equal footing in the affairs of life. The parents of young children are pointed out by nature as their most proper guardians; when they are removed their place is taken by other guardians, who are required by society to act in all respects towards their wards like good and prudent parents. The care and custody of children are intrusted to the natural parents, on the presumption that they will carry out their sacred trust in the highest degree, and as dictated by nature and required by a well-ordered society. So, as a rule, properly appointed guardians are entitled to the legal care and custody of their wards, not only as against the world at large, but as against the immediate relatives of the wards.¹ Thus, if an infant during the lifetime of its parents is made a ward of court, and the Court of Chancery appoints a guardian to him, the latter is entitled to his care and custody even as against the parents; or if a father has by his will appointed a guardian for his children, the guardian has a claim to their care and custody,² but not now para-Even as against the mother. mount to that of their mother,³ but she shares the responsibility with the father's testamentary guardian.⁴ So, in like manner, if a mother has provisionally appointed by will a guardian to her infant child, on her death, if the father is found to be a person who ought not to be sole guardian of his child, the court may confirm the provisional appointment of the guardian by the mother.⁵

In former days if the ward were taken out of the custody Remedies of guardians.

¹ *Re Andrews*, L. R. 8 Q. B. 153; S. C. 42 L. J. Q. B. 99.
² *Eyre v. Countess of Shaftesbury*, 2 P. Wms. 103.
³ 49 & 50 Vict. c. 27. s. 2. ⁴ *Ibid.* ⁵ *Ibid.* s. 3 (2).

Habeas corpus.

Care and custody of infant under control of the court.

Contest between testamentary guardian and mother or other relatives. Testamentary guardian *primâ facie* entitled.

When wishes of ward acceded to.

of the guardian, a writ of ravishment of ward lay against the wrong-doer; ¹ and the modern remedy is the writ of *habeas corpus*,² or an application to the Court of Chancery.³

To take a ward out of the custody of a guardian appointed by the Court of Chancery is a contempt of court which can be punished by committal to prison. As in the case of natural parents, so in the case of guardians, the question of the care and custody of the person of the infant ward is in the discretion and under the control of the Court of Chancery, which it will freely exercise for the benefit and on behalf of the infant, either by ordering him to continue in or be restored to the custody of the guardian, or by permitting him to remain under the control of some other person. The court will also exercise its discretion in matters appertaining to access to the infant ward.

A testamentary guardian has not now a superior claim to the mother to the care and custody of the ward; but if she clandestinely remove it from out of his custody, and the interests of the child would thereby suffer, she would be ordered to deliver the infant up to him.⁴ Though the court will enforce the right of the guardian to the custody of the children as against their immediate relatives (because the effect of the appointment of a guardian is to commit the custody of the ward), yet it looks with great anxiety to the execution of the duty belonging to the guardian, and the attention expected to be paid to the reasonable wishes of the natural parent.⁵ If a mother has obtained an order for the custody of her children under 36 Viet. c. 12, and the father dies appointing testamentary guardians for his children, her right to their custody would no doubt be held superior to that of the testamentary guardians not only up to the age of sixteen but to their majority.⁶ When the ward has attained to years of discretion, and is capable of exercising a choice, the court will lend weight to his or her wish to reside with one guardian rather than another;⁷ and even to reside with one who is not a guardian, if harm is not likely to flow from the choice, and mere

¹ 3 Edw. I. c. 22; 13 Edw. I. c. 35; Macph. Inf. 4.

² *Reg. v. Greenhill*, 4 Ad. & El. 624; *Reg. v. Howes*, 30 L. J. M. C. 47; S. C. 3 L. T. 467; *Re Andreus*, L. R. 8 Q. B. 153, S. C. 42 L. J. Q. B. 99. On a writ of *habeas corpus* sued out by the guardian for the recovery of the ward, a common law court, when the legal title of the guardian to the guardianship of the ward is made out, and the guardian is not an improper person for his office, and the child too young to make a choice, can only make an order restoring the ward to the guardian, for the guardianship carries with it the legal custody of the ward; and no other question can be raised on the writ. Brett, M.R., in *Re Agar-Ellis*, *Agar-Ellis v. Lascelles*, 24 Ch. D. 317, doubted whether either Division of the High Court (Chancery or King's Bench) could entertain on the writ of *habeas corpus* any other question than the legal custody of the infant.

³ See Part II., Parent and Child, chap. ii.

⁴ See *Wright v. Naylor*, 5 Madd. 77.

⁵ Per Eldon, L.C., in *Ex parte Earl of Ilchester*, 7 Ves. 348, 380.

⁶ See Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27)

⁷ *Storke v. Storke*, 3 P. Wms. 51.

residence with another not in a tutorial capacity does not terminate the guardianship.¹ But where the infant ward has not reached an age at which it can be deemed capable of exercising a wise choice, the court will refuse to listen to expressions of choice made by the child.² Thus the court may order one of its wards to be delivered to his guardian, though he is old enough to exercise a discretion;³ or allow him to go at liberty;⁴ or allow him to remain in the circumstances in which he was at the date of the application to the court.⁵

Right of Guardian to Change the Domicil of the Ward.—Immediately arising out of the foregoing considerations comes the important question of the right of the guardian to change the domicil of the ward. This point cannot arise with reference to wards of court, because the Court of Chancery will not (as will be seen more particularly on a later page⁶), except for good reasons, permit its wards to be taken out of the jurisdiction. The great objection to changing the domicil of the ward proceeds from the fact that the right of succession to the personal property of the ward may be affected considerably in favour of the guardian. A person under age being not *sui juris*, cannot acquire *proprio marte* a domicil for himself or herself. An infant's domicil is, during the lifetime of its father, the same as, and changes with, the domicil of the father. It has been held that where the father died, and the mother became guardian of her children, and she acquired a new domicil, and there was a complete absence of fraud in the change, her children's domicil changed with hers, even though her rights of intestate succession to the property of some of her deceased children were enlarged.⁷ It is now settled that if after the death of the father an unmarried infant lives with its mother, and the mother acquires a new domicil, it is communicated to the infant.⁸ Can a guardian, not a parent change the domicil of the ward? This question has never yet been put and answered in the English courts; but the better opinion of English and foreign writers is that the guardian has not the power to change the domicil. Thus Story writes:⁹ "In the case of a change of domicil by a mere guardian, not being a parent, it is extremely difficult to find any reasonable principle on which it can be maintained that he can, by any change of domicil, change the right of succession to the minor's property."

Right of guardian to change domicil of ward.

Right not admitted.

¹ *Anon.*, 2 Ves. Sen. 374; *Bridget Hide's Case*, 3 Salk. 178. In the case of a female ward residing away from her guardian, recognizances would be taken that she should not be married without the leave of the court.

² *Reg. v. Clarke*, 26 L. J. Q. B. 169.

³ *Rochford v. Hackman*, Kay, 309.

⁴ *Bond v. Roberts*, 13 Sim. 400.

⁵ See *Harrison v. Goodall*, Kay, 310 n; *Re Lyons*, 22 L. T. 770.

⁶ *Post*, Part IV. chap. v.

⁷ *Pottinger v. Wightman*, 3 Mer. 67.

⁸ Per Lord Campbell in *Johnstone v. Beattie*, 10 Cl. & F. 42.

⁹ Conf. Laws, s. 506 n.

Domicil of ward fixed by father's death.

Dicey, in his work on Domicil, is of opinion that the Continental view, that the minor's domicil is fixed by the father's death, and cannot be changed during minority by the mother or guardian except by act of law, ought to prevail.¹

Difference between rights and duties of parents and guardians.

Though the guardian is *in loco parentis*, it is only in a modified sense; thus, while he might under certain circumstances be allowed to bind his ward out as an apprentice, he could not claim any right to his earnings or personal services as a parent might.² The guardian is not liable for necessities supplied to his ward unless he has personally authorized their supply, and the mere fact of his knowing that his ward was in possession of the goods furnished would be insufficient to fix him with personal liability. If he has furnished his ward with necessities, he will be allowed to recoup himself out of his ward's fortune and means. But if he permitted his ward to purchase that which was not a necessary, he and not the ward would be liable for the price of the goods. His position towards the ward is wholly fiduciary and temporary; he is under no legal liability to support him out of his own means, and as trustee he could make no profit out of his office by putting the ward out to service and taking his wages. So a guardian could not maintain an action for damages in his tutorial capacity for loss of services consequent upon a tort committed against his ward; thus, if a female ward were living in the house of her guardian and were seduced, he would not, it is submitted, like the father, or mother, or even aunt,³ be able to sustain an action for the seduction grounded on the loss of the services of the ward; because it would be impossible to uphold a mere constructive relation of master and servant between them. The guardian, as such, is not entitled to demand the services of his ward, and acts of service-rendered to him by the ward would be insufficient to ground the action.⁴ It might be otherwise

Guardian cannot maintain action for seduction of ward.

¹ Dom. p. 101 *n.* On p. 100 of the same work this learned writer has the following valuable observations: "It is possible that the domicil of an orphan follows that of his guardian. But whether this be so or not is an open question. In the first place, it may be doubted whether the rule is not rather that a ward's domicil can be changed, in some cases, by his guardian, than that it follows the domicil of his guardian. It is difficult to believe that the mere fact of D's guardian acquiring for himself a domicil in France, can deprive D, the son of a domiciled Englishman, of his English domicil. In the second place, the power of a guardian to change at all the domicil of his ward is doubtful. In the one recorded English case on the subject (*Pottinger v. Wightman*), the guardian was also the mother of the children. As a matter of common sense, it can hardly be maintained that the home of a ward is, in fact, or ought to be, as a matter of convenience, identified with the home of his guardian in the same way in which the home of a child is naturally identified with that of its father. Should the question ever arise, it will probably be held that a guardian cannot change the domicil of his ward, and almost certainly that he cannot do this unless the ward's residence is as a matter of fact that of the guardian." See *Re Beaumont*, [1893] 3 Ch. 490.

² See Part II., Parent and Child, chap. ii. p. 552.

³ *Edmondson v. Machell*, 2 T. R. 4.

⁴ In the American case of *Blanchard v. Hsley*, 6 Lathrop, 487 (Mass.), it was held that a guardian, as such, cannot maintain an action for the seduction of his ward, on the ground that guardianship carries with it no right to the service of the ward, and

if the actual relation of master and servant existed between the guardian and ward, and wages were paid for her services. Another reason for the guardian not being able to maintain the action is, that though he would have to allege damage by reason of loss of service, he could not retain the damages recovered.¹ If, after attaining her majority, the girl (no longer a ward) were to continue to live with her former guardian, rendering him slight services, and was seduced, it might be held that the relation of master and servant was sufficiently constituted to entitle him to maintain the action on account of the loss of services. It is quite clear that if the ward was not living in the house of her guardian, he could not bring this action.

If the ward commit a tort, to which in no respect was the guardian a party, the latter would not be held liable for it.

Guardian not liable for tort of ward.

Duty of Guardian to protect Ward.—It is an obvious duty on the part of a guardian to shield and protect the young and defenceless ward, and any breach of that duty which tends to the detriment of the child's health will be punished as a crime. Thus if any person over sixteen years of age who has the custody, charge, or care of a child, under the age of sixteen, wilfully assaults, illtreats, neglects, abandons or exposes such child, or causes or procures such child to be assaulted, illtreated, neglected, abandoned, or exposed, in a manner likely to cause such child unnecessary suffering or injury to its health (including injury to or loss of sight or hearing or limb or organ of the body and any mental derangement),” is liable to be punished;² and on his conviction or committal for trial for such offence, or any offence involving injury to the child, or being bound over to keep the peace towards such child, the child may be ordered to be taken out of his custody and given over to some person who is willing to undertake such charge.³ Again, where a guardian causes, encourages, or favours the prostitution of a female ward under sixteen, he may be divested of all authority over her,⁴ and the court may appoint some person willing to take charge of her till she reaches majority or a less age.⁵

Duty of guardian to protect ward.

The responsibilities and liabilities of guardians in regard to the care of young persons in their charge have been largely increased of late; thus we find that where a guardian, after being summoned for the purpose before a court of summary jurisdiction, is

Liability of guardian under Youthful Offenders Act, 1901.

no obligation to support her except to the extent of the property belonging to her which comes to his hand. In the English case of *Irwin v. Dearman* (11 East, 23), the adoptive parent was held entitled to recover for the seduction of the girl, not only because he was *in loco parentis*, but because there had been an actual loss of service to which he was entitled.

¹ It is well known that the damages recovered in this action are sentimental rather than actual—as a punishment of the wrong-doer; now the guardian, being in a fiduciary position towards his ward, would not be allowed to reap any advantage or profit from his position; and if he cannot recover damages, he cannot sustain the action.

² 4 Edw. VII. c. 15, s. 1.

³ Sect. 6.

⁴ See *Walker v. Laxton*, 70 L. T. 690.

⁵ 48 & 49 Vict. c. 69, s. 12.

shown to have conduced to the commission of an offence by a young person under his care, either by wilful default or habitual neglect to exercise due care of him, such guardian may be ordered to pay any fine, or damages, or costs imposed upon the young person, and to find security for its good behaviour.¹ And where such young person, being under remand or committal to prison, has been ordered by a court of summary jurisdiction into the custody of some suitable person, the guardian may be ordered to contribute towards the cost of maintenance a weekly sum, not exceeding five shillings, during the whole or any part of the time of his custody.² Again, when such young person is sent to a reformatory or industrial school, the court that sent him there may at the same time order his guardian to contribute to his support and maintenance.³

Duty of guardian to educate ward.

Duty of Guardian to educate the Ward.—The guardian is not only entitled to the control and custody of the ward, but also to regulate the mode and select the place of education of the ward. It is his duty to choose a proper school or place of education, and if he does so, and his ward refuses on no reasonable grounds to go there or stay there, the court will compel him to obey his guardian's wishes.⁴ The Education Acts of 1870 and 1876⁵ compel the guardian to see that his ward receives a sufficient elementary education; but it is his duty to do more than that and to educate him in a manner suitable to his rank and expectations.⁶ In this respect the law requires more of the guardian than of the father; for the latter, if he keeps the education of his child in his own hands, is not bound to give him a better education than that insisted upon by the law; while the guardian would be committing a breach of his trust if he did not educate his ward in a manner which his station and fortune warranted.⁷ The wishes of the parents as to the mode in which the ward is to be educated, and as to the religious faith in which it is to be nurtured, are to have all deference paid to them; "and the law, which permits the father to appoint the guardians of his children, will pay the highest respect to the expression of his wishes as to the mode of their education."⁸ The rule of the court is, that the court, or any persons who have the guardianship of a child after the father's death, should have sacred regard to the religion of the father in dealing with the child, to see that the child is brought up in the religious faith of the father, whatever that religious faith may have been;⁹ and where a father

Wishes of the parents to be followed;

¹ 1 Edw. VII. c. 20, s. 2, sub-ss. 1, 4.

² Sect. 4 (5).

³ Sect. 6 (1). There is a power of appeal against this order. Sect. 7.

⁴ *Hall v. Hall*, 3 Atk. 721; see also *Tremaine's Case*, 1 Stra. 173.

⁵ 33 & 34 Vict. c. 75, s. 3; 39 & 40 Vict. c. 79, s. 4.

⁶ Per Lord Thurlow in *Powell v. Cleaver*, 2 Bro. C. C. 499, 510.

⁷ See Part II., Parent and Child, chap. ii. p. 542.

⁸ *Campbell v. Mackay*, 2 Myl. & Cr. 31, and per James, L.J., in *Hawksworth v. Hawksworth*, L. R. 6 Ch. App. 539, 542.

⁹ *Re Kaye*, L. R. 1 Ch. App. 387.

appoints as testamentary guardian a person of his own religious faith, it is a clear intimation that he wishes his child to be brought up in his own faith;¹ and where he has left no instructions as to the faith in which his children are to be educated the court will presume that he intended they should be reared in his own faith.² A mother's wishes, when they can be carried out, will also be respected.³ The Guardianship of Infants Act, 1886, does not alter this right of the father to decide in what religious faith his child shall be brought up, though under the Act the surviving mother becomes its guardian, and is of a different religious faith to that of its father.⁴ But, on the other hand, where he dies without such instructions, and there are strong indications that he had abandoned his right to have them educated in his own faith, the court will direct that those in control of them should bring them up in that religion in which their father during his lifetime permitted them to be educated.⁵ No pecuniary benefit to the infant will sway the court one way or the other, for the religious faith in which a child is to be brought up is no matter of barter in the court.⁶ At one time the court refused to admit parol proof of the intention of the wishes of the father, whether he left testamentary guardians or not;⁷ but the practice was soon changed, and Lord Hardwicke admitted parol evidence of the intentions of the father,⁸ and since his time it has always been the practice to gather the wishes and intentions of the parent from any available trustworthy source.⁹ If the mother has abandoned any rights she might have possessed, her power to control the education of the child would be lost.

except when they have abandoned their rights.

Where there is any difference between the guardians as to the mode of educating their wards, they should at once apply to the court, which will assist them. But this court will exercise its own discretion in the matter, and will not consider itself bound by the wishes of the majority.¹⁰

Application to the court to settle differences between guardians.

Duty of the Guardian in respect of the Marriage of the Ward.—A guardian should act in respect of the marriage of his ward like a good and prudent parent, and in every way endeavour that the marriage should be one befitting the rank, fortune, and expectations of the ward. It is his duty to prevent improper unions,

Duty of guardian in respect of marriage of ward.

¹ *Talbot v. Earl of Shrewsbury*, 4 Myl. & Cr. 672.

² *Hawksworth v. Hawksworth* (*ubi sup.*).

³ See *Re Kaye*, L. R. 1 Ch. App. 387.

⁴ *Re Scanlan (Infants)*, 40 Ch. D. 200; and see 52 & 53 Vict. c. 56.

⁵ *Re Clarke*, 21 Ch. D. 817.

⁶ Per Lord Cottenham in *Talbot v. Earl of Shrewsbury* (*ubi sup.*).

⁷ *Storke v. Storke*, 3 P. Wms. 51.

⁸ *Anon.*, 2 Ves. Sen. 56. This case was decided twenty years after *Storke v. Storke*.

⁹ See *Re Clarke* (*ubi sup.*).

¹⁰ Macph. Inf. 121; *Storke v. Storke* (*ubi sup.*). See 49 & 50 Vict. c. 27, s. 3 (3).

Guardian of a
ward of court.

and if he deems himself unable to prevent mischief, he should apply to the Court of Chancery for assistance, which will be afforded him if necessary.¹ If the guardian (even a testamentary one) connive at an intended unequal marriage of his ward, the court will interfere, and intrust the ward to the custody of another, more likely to do justice by him.² A guardian of a ward of court is in a sense an officer of the court, and directly under its control, and must report to the court the fact that its ward is contemplating a marriage. He must use every means of discouraging an unsuitable connection. The guardian's consent to the marriage of a ward of court is insufficient, and a marriage with only his consent does not render it less a contempt, unless the leave of the court be first obtained; it is equally so in the case of an attempted marriage. The grounds for the interference of the court are more fully set out in the chapter on Wards of Court.³

Maintenance
and advance-
ment of
infants.

Maintenance and Advancement of Infants.—It has been thought fit to treat these two subjects, viz., the maintenance and advancement of infants, in this chapter; because, though common to a certain extent to more than one division of this work, they intimately concern the personal advantage and position of the infants, and as dispositions of their property are governed chiefly by the rules relating to the administration of trust estates.

Maintenance.

It is the duty of the guardian (parent or not) to protect and rear and educate his ward, and generally to advance his interests to the best of his ability and means at his disposal. But except in the case of the natural guardians, the father and mother, there is no legal liability or duty to support and maintain the ward cast upon the guardian; the latter is in no way bound to take his own means to support the ward. If the ward has a fortune or means which can be devoted to his support and maintenance, it is a sufficient discharge of his duty and trust if the guardian properly and duly apply them to the purposes for which they are available. The question of the maintenance and advancement of infants forms a large and important portion of the jurisdiction of the Court of Chancery; and the principles on which the court acts in making and sanctioning payments for the support and advancement of infants will be set out in the following sections.

Right of infant
to be main-
tained out of
his property.

Where an infant has property of his own, and his father is dead or is not able to support him, he may be maintained out of the income of his property (if his interest in it be absolute), by the person in whose hands the property is, or a stranger may maintain him; and a court of equity will allow all payments

¹ *Lord Raymond's Case*, Cas. t. Talb. 58.

² *Vernon v. Vernon*, cited in *Lord Raymond's Case* (*ubi sup.*).

³ See *post*, Part IV., Infancy, chap. v. For consent of guardians, see Part I., Husband and Wife, chap. vi. p. 85.

made for this purpose, which can be shown to have been proper and reasonable.¹ The Court of Chancery, exercising its well-established equitable jurisdiction over matters pertaining to infants, has full control over their property, whether real or personal, and has authority to give maintenance to infants out of their property, in some cases even where their interest is only contingent, or where accumulation is expressly directed; to refuse to allow maintenance, even if given by the instrument of donation, and to ascertain and fix the amount to be allowed, whether placed in the discretion of third parties or not; to direct to what persons maintenance shall be paid, and to control the application of it.² The court has power to allow maintenance, though there is no suit before it.³

The fact of the father or the mother of the infant being alive does not affect its right to be maintained out of its own property; thus, where infant children after the death of their father petitioned for an allowance of maintenance out of their fortunes, maintenance was determined irrespective of the means of their mother to support them out of her fortune.⁴ The sum granted by way of maintenance is always in the discretion of the court, and relative to the fortune and position in life of the infant,⁵ and the poverty or wealth of his father or mother (if any).⁶ If the guardian is in any doubt as to what amount should be devoted to the maintenance of the infant, he should apply to the court for directions. This does not relieve the father and mother from their statutory liability to maintain their infant children, but rather enables the children to be brought up and educated in a manner which their expectations would reasonably warrant.⁷ The court will not make an allowance to a parent for the maintenance of a child for the time past, although it should appear that, in fact, he had not been of ability to maintain him, and although the will had expressly given the produce of a fund to trustees for his maintenance.⁸

Infant may be maintained during life of parents.

Before the court can order maintenance to be allowed there must be a clear fund which can be devoted to that purpose. Such fund may be the rents and profits of real estate;⁹ or the income of personal property.¹⁰ If the rents are insufficient to keep down charges on the property, maintenance out of them

Maintenance allowed out of a clear fund capable of being devoted to that purpose.

¹ Macph. Inf. 213.

² Simp. Inf. 261.

³ *Ex parte Kent*, 3 Bro. C. C. 88; *Ex parte Salter*, *ibid.* 500.

⁴ *Douglas v. Andrews*, 19 L. J. Ch. 69.

⁵ *Harvey v. Harvey*, 2 P. Wms. 22.

⁶ *Roach v. Garvan*, 1 Ves. Sen. 57.

⁷ See *post*, p. 673 *et seq.*

⁸ *Andrews v. Partington*, 2 Cox, Eq. Cas. 223; *Hill v. Chapman*, 2 Bro. C. C. 231. Under what circumstances the father will be allowed a sum for maintenance out of his children's fortune, see *post*, p. 674 *et seq.*

⁹ *Re Howarth*, L. R. 8 Ch. App. 415; but see *Cadman v. Cadman*, 33 Ch. D. 397.

¹⁰ *Ramon v. Ramon*, 39 L. T. 552.

will not be granted ;¹ nor out of the income of personal property, unless the court is satisfied that it is clear from incumbrances and claims against it.²

Interest of the donee must be vested in possession.

Again, the interest of the donee of the fund must be vested in possession. The vesting of an interest depends upon the construction of the instrument creating the gift ; where the donee takes an immediate interest in the fund, whether the rents and profits of real estate or a legacy, no question as to its vesting, and his being entitled to the interest can well arise ; but where the gift is dependent upon the happening of some contingency, as upon the donee attaining a certain age, it may be more difficult to determine whether the gift is vested in possession or not. It may be stated as a general rule, that where it can be gathered from the words of the instrument of donation that the donee is to take the intermediate interest of a legacy contingent upon the happening of a particular event, his interest in the fund is vested in possession,³ for in such a case the gift of the entire intermediate income accelerates the vesting, and makes it immediate;⁴ so the giving of maintenance may effect a vesting of the fund in possession ;⁵ but this gift of maintenance only vests the fund in possession where it is the gift of the whole interest derived from the fund.⁶ Thus, where the trustees have a discretion to apply less than the whole of the intermediate income in the maintenance of the infants, there is vesting in possession by the mere fact that the infants may be maintained out of the income.⁷ It is the giving the interest which is held to effect the vesting of the legacy, and not the giving maintenance ; but when maintenance is given, questions arise whether it be a distinct gift, or merely a direction as to the application of the interest ; and if it be a distinct gift, it has no effect upon the question of the vesting of the legacy.⁸ Thus, a separate and distinct gift of maintenance, though it may equal in amount the interest, will not vest the fund in possession.⁹ But where a fund is directed to be invested and held by trustees upon certain trusts, or is otherwise directed to be set apart from the rest of the testator's estate, it carries the income.¹⁰ It is, however, the severance of the fund by the direction of the testator that carries the interest;

Gift of interest vests the legacy.

¹ *Pearce v. Brooks*, cited *Chamb. Inf.* 257.

² *Warter v. —*, 13 *Ves.* 92 ; *Wear v. Wilkinson*, cited in *Warter v. —*.

³ *Hanson v. Graham*, 6 *Ves.* 239.

⁴ *Re Byrne*, 23 *L. R. Ir.* 260.

⁵ *Pulsford v. Hunter*, 3 *Bro. C. C.* 416 ; *Fox v. Fox*, *L. R.* 19 *Eq.* 286 ; *Re Bunn*, *Isaacson v. Webster*, 16 *Ch. D.* 47 ; *Re Turney*, *Turney v. Turney*, [1899] 2 *Ch.* 739.

⁶ *Spencer v. Wilson*, *L. R.* 16 *Eq.* 501.

⁷ *Re Grimshaw's Trusts*, 11 *Ch. D.* 407 ; *Dewar v. Brooke*, 14 *Ch. D.* 529 ; *Re Winlle*, *Tucker v. Winlle*, [1896] 2 *Ch.* 711. In these cases *Fox v. Fox* (*ubi sup.*) was either distinguished or dissented from.

⁸ *Per Cottenham, L.C.*, in *Watson v. Hayes*, 5 *Myl. & Cr.* 125, 133.

⁹ *Watson v. Hayes* (*ubi sup.*).

¹⁰ *Re Clements*, *Clements v. Pearsall*, [1894] 1 *Ch.* 665.

therefore, where a fund is set aside by executors merely because the rest of the estate has become distributable, it does not carry interest.¹ The mere fact that the vested interest of the donee is defeasible in a certain event by a condition subsequent will not disentitle him to the interest of the fund, and he will be entitled to maintenance till the happening of the event,² even in spite of a direction to accumulate.³ But a contingent bequest of chattels-real, or other personalty not being residuary personalty, where the subject-matter of the gift is not directed to be set apart from the rest of the estate, will not carry the intermediate income;⁴ though where a specific legacy is vested at once in the legatee, but the enjoyment only is postponed, the legatee is entitled to the intermediate income.⁵ So where a fund is appointed but the enjoyment of it is postponed, it will carry intermediate income.⁶

It has been laid down as the practice of the Court of Chancery that an infant who is entitled under the will of his parent to a legacy contingently on his attaining twenty-one is entitled to maintenance during his minority out of the income of the legacy; but does not acquire an immediate vested interest in the income, and if he dies under twenty-one the surplus income not applied for maintenance does not pass to his representatives.⁷

Contingent legacy by parent, but no gift of maintenance.
Practice of Court of Chancery to allow interest does not vest corpus.

Real Estate.—The same principle is applicable to residuary devises; thus, a future residuary devise, or a devise subject to prior limitations which may or may not take effect, will not carry the intermediate rents and profits.⁸

Where the gift is vested, but the payment of it is deferred until a fixed future day, maintenance will not be allowed out of it, because it does not carry interest until the arrival of the day of payment; nor will it be allowed where the gift of residue is contingent, for the interest must accumulate until the happening of the contingency.⁹ Where an infant has a vested but defeasible interest in a legacy, and accumulations are made out of its produce not required for his maintenance, and his interest in it is divested by reason of his death before twenty-one, his representatives, and not those who ultimately become entitled to the property, are entitled to the accumulations.¹⁰

Real estate.

No maintenance where gift vested, but payment postponed to a fixed day.

But to this rule there are exceptions; where the donor of

Exceptions:

¹ See *Festing v. Allen*, 5 Ha. 573; *Re Inman, Inman v. Rolls*, [1893] 3 Ch. 518.

² See *Taylor v. Johnson*, 2 P. Wms. 504; *Barber v. Barber*, 3 Myl. & Cr. 688.

³ *Stretch v. Watkins*, 1 Madd. 253.

⁴ *Guthrie v. Walrond*, 22 Ch. D. 573; Per Kay, L.J., in *Re Woodin, Woodin v. Glass*, [1895] 2 Ch. 309.

⁵ *Re Woodin, Woodin v. Glass (ubi sup.)*.

⁶ *Long v. Orenden*, 16 Ch. D. 691.

⁷ Per Court of Appeal in *Re Bowlby v. Bowlby*, [1904] 2 Ch. 685, practically overruling *Re Scott*, [1902] 1 Ch. 918. See *post*, pp. 664, 670.

⁸ *Hodgson v. Earl of Bective*, 1 H. & M. 376; *Wade-Gery v. Handley*, 3 Ch. D. 374.

⁹ *Buller v. Freeman*, 2 Atk. 58; *Gotch v. Foster*, L. R. 5 Eq. 311.

¹⁰ *Re Buckley's Trusts*, 22 Ch. D. 583.

where donor
parent, or *in*
loco parentis;
legacy by
parent carries
interest by way
of maintenance
of child.

the fund is a parent, or *in loco parentis*, and the donee is unprovided for. The court in this case acts upon the supposition that the parent, or the person who has put himself in the position of a parent, means the child to be supported notwithstanding the postponement of the vesting of his interest;¹ thus, in the case of real estate, where the rents are insufficient to keep down the incumbrances, the court will not suffer in favour of the remainderman all the surplus profits to be exhausted to discharge the interest in exoneration of the estate, and leave the heir-at-law to starve;² so, too, in the case of personal estate, as where a legacy is vested, but not payable till a future day; in such a case the child has an immediate right to the interest of the money.³ The true view of the practice of the court has been laid down to be that the infant is entitled, not to interest on such a legacy, but only to maintenance, which is raised by the court allowing interest on the legacy.⁴ This is equally the case where the legacy is contingent, though there is no direction as to interest, but there is as to maintenance;⁵ and it applies to a legacy or portion charged on land whether vested and payable *in futuro*,⁶ or contingent.⁷ But where the testator (whether father or person *in loco parentis*) has provided a fund for the support and maintenance of the child, the latter will not be entitled to intermediate interest on the contingent legacy, the presumption of its carrying interest by way of maintenance being rebutted;⁸ though where a parent or person *in loco parentis* leaves a legacy to an infant legatee which is not contingent, such legacy carries interest by way of maintenance from the death of the testator, notwithstanding that the will contains a provision for the maintenance of the child out of the income of the legacy, or out of the income of a share of residue given to him equally with the other children, such share of residue not being deemed to be "another fund."⁹

The ground of this exception has been thus stated: "In the instance of a child, the court does not postpone the payment of interest till a year after the death of a parent, for the court considers the parent to be under an obligation to provide not only a future but a present maintenance for his child, and therefore holds that he could have postponed the time of payment only

¹ *Harvey v. Harvey*, 2 P. Wms. 21; *Incedon v. Northcote*, 3 Atk. 432; *Donovan v. Needham*, 15 L. J. Ch. 193.

² *Revel v. Watkinson*, 1 Ves. Sen. 93.

³ *Green v. Belcher*, 1 Atk. 507; *Hcath v. Perry*, 3 Atk. 101; *Crickett v. Dolby*, 3 Ves. 10; *Wilson v. Maddison*, 12 L. J. Ch. 270. If the infant is *en ventre sa mère* at the testator's death interest runs only from its birth, *Rawlins v. Rawlins*, 2 Cox, 425.

⁴ Per Cozens Hardy, L.J., in *Re Bowlby*, *Bowlby v. Bowlby*, [1904] 2 Ch. 713.

⁵ *Chambers v. Goldwin*, 11 Ves. 1; *Martin v. Martin*, L. R. 1 Eq. 369.

⁶ *Green v. Belcher* (*ubi sup.*). ⁷ *Incedon v. Northcote* (*ubi sup.*).

⁸ *Hearle v. Greenbank*, 3 Atk. 717; *Re George (an Infant)*, 5 Ch. D. 837. In this case it was held that interest by way of maintenance was presumed unless rebutted.

⁹ *Re Moody*, *Woodroffe v. Moody*, [1895] 1 Ch. 101.

from the incapacity of the child to receive, but that he never meant to deprive him of the fruit of the legacy, which fruit is the only maintenance, and which maintenance he was bound to provide.”¹ There does not seem to be any reason, in view of recent legislation, why the gift of a mother, whether a widow or not, who has become liable for the support of her children, should not be affected by the above rule, and the exception; and it is probable that the courts will construe the devises and legacies of a mother to her children as being *in pari jure* with those of a father.² The above practice of the Court of Chancery must be read in connection with the large powers of maintenance given to trustees under the provisions of the Conveyancing and Law of Property Act, 1881.³

A person *in loco parentis* is one who means to put himself in the situation of a father in reference to the duty of providing for the infant beneficiary.⁴ Where the child resides with a father and is maintained by him, that fact contains an inference, though not a conclusive one, that the donor did not intend to place himself *in loco parentis*.⁵ This exception holds good not only where the gift is to a child *nominatim*, but also to children as a class.⁶ But the child must be unprovided for by the father or person *in loco parentis* the whole or part of his minority, for “the implication is rebutted if he provides any maintenance for the child, however small the maintenance, and however large the legacy.”⁷

Another exception is where there are equal legacies to a class of children (even with a direction for accumulation), some of whom must eventually take the benefit of the legacies. The court under these circumstances, the chances of all or the survivor taking being equal, will take the fund and maintain all out of the interest, even though the donor is a stranger.⁸ This rule has been styled “the allowance of maintenance on the principle of compensation,” for the “court if it can collect before it all the persons who may be entitled to the fund, so as to make to each a compensation by the immediate maintenance given, for the diminution of the fund to which he may eventually become entitled, will maintain them all out of the interest.”⁹ If the members of the class take vested interests at birth in a fund which carries intermediate

Person *in loco parentis*.

Or there is a gift to a class, some of whom must eventually take.

¹ Per Lord Alvanley in *Crickett v. Dolby*, 3 Ves. 13.

² See *Fenkes v. Pascoe*, 10 Ch. D. 474; *Re Orme, Evans v. Maxwell*, 50 L. T. 51.

³ See *post*, p. 669.

⁴ *Ex parte Pye*, 18 Ves. 140; *Powis v. Mansfield*, 3 Myl. & Cr. 359.

⁵ *Parsons v. Peters*, 11 Jur. (N.S.) 150.

⁶ *Incedon v. Northcote*, 3 Atk. 438; *Brown v. Temperley*, 3 Russ. 263.

⁷ Per Lord Redesdale in *Ellis v. Ellis*, 1 Sch. & Lef. 1, 5.

⁸ *Marshall v. Holloway*, 2 Swanst. 436. This exception is said to be a practice of the court only, and does not enable trustees to apply the income when the estate is not under administration; *Re Breeds' Will*, 1 Ch. D. 226. See *Re Holford, Holford v. Holford*, [1894] 3 Ch. 30.

⁹ Macph. Inf. 225. See the cases collected in Simpson on Infants, 274-283.

income, such income is divisible among those members of the class who are for the time being in existence, but only as from the date of the birth of each.¹ So, too, if the gift is to members of a class on attaining twenty-one of a fund which does not carry intermediate income, the guardians of those members of the class who have not yet attained twenty-one may employ for their maintenance the income of the share of each; and each member on attaining majority will be entitled to take his share of the whole of the income.²

No maintenance where gift over to a stranger.

Unless consent of stranger obtained,

This principle will not be applied where the property is not given absolutely to the children and the survivor, but in certain events there is a gift over to a stranger³ (whether such stranger is to take in substitution,⁴ or as a residuary legatee,⁵ or as a next of kin⁶), unless the court can procure the consent of all persons interested in the remainder.⁷ The issue of a child dying under age have been considered strangers;⁸ so, too, a sister whose interest under a will was different from that of her brothers and sisters, was deemed a stranger.⁹ When the court can obtain the consent of the parties in whose favour the gift over is made, then it will order maintenance to be allowed.¹⁰ Thus, while the court has power to make an allowance for maintenance beyond that provided by the will of the testator, it yet will direct that the interests of third parties, who may become entitled to the fund out of which the increased allowance has been made, shall be protected by holding the interests of the infants as security for the amount of such increased allowance.¹¹ It is now usual where the infant is allowed maintenance out of a contingent legacy (the infant not being entitled to maintenance by the will of the testator), to secure the interests of those entitled over by insuring the life of the infant to an amount which will cover the advances made by way of maintenance.¹² Where there is no legal estate vested in the trustees who are to apply part of an infant's presumptive share of real estate in maintaining him, yet they have a legal power to enter upon the devised lands and take sufficient profits to enable them to carry out the express power of maintenance.¹³ Where the *corpus* of a contingent legacy is directed to be set apart by a testator for the purpose of meeting

Effect of severance of legacy from *corpus*.

¹ *Shepherd v. Ingram*, Amb. 448; Theo. Wills, 147.

² See *Re Adams, Adams v. Adams*, [1893] 1 Ch. 329. *Re Holford, Holford v. Holford*, [1894] 3 Ch. 30. ³ *Ex parte Kebble*, 11 Ves. 604.

⁴ *Greenwell v. Greenwell*, 5 Ves. 194.

⁵ *Haughton v. Harrison*, 2 Atk. 329.

⁶ *Cavendish v. Mercer*, 5 Ves. 195 *n*.

⁷ *Turner v. Turner*, 11 Ves. 606. See also *Errington v. Chapman*, 12 Ves. 20.

⁸ *Ex parte Kebble (ubi sup.)*.

⁹ *Cavendish v. Mercer (ubi sup.)*.

¹⁰ *Re Colgan (Infants)*, 19 Ch. D. 305.

¹¹ *Re Arbuckle*, 14 L. T. 538; 2 Set. Judg. & Ord. 849, where the form of the order for maintenance, and directions for insurance of the life of the infant as an indemnity, is set out. *De Witte v. Palin*, L. R. 14 Eq. 251.

¹² *Dean v. Dean*, [1891] Ch. 150.

the legacy, then maintenance can be allowed out of the income derived from the invested fund.¹ But if there is an absolute discretion in the trustees to devote the income to be derived from the invested fund to the maintenance of the infant legatees, no one infant has a vested interest in the fund till the happening of the contingency which vests the fund in all.²

Maintenance will, if necessary, be allowed if given by the instrument of donation,³ whether the gift is vested, payment being postponed,⁴ or contingent.⁵ And even where there is a gift over, maintenance will be allowed, if it can be fairly inferred that the testator intended to give it.⁶

Where a person is by the terms of the instrument of donation the donee of income for the maintenance of children, he will be entitled to receive it for that purpose so long as he continues properly to maintain them.⁷ And when he has a discretion to exercise, he must exercise it in a fair and honest manner, and if by his conduct he incapacitates himself from performing the trust he will be entitled only to a share for his own maintenance;⁸ thus, a mother though maintaining and educating her children who lives in a state of concubinage with her paramour does not perform properly the trust reposed in her.⁹

Gift of income for the maintenance of children.

Where a fund is given to a person impressed with a trust for maintenance, it may properly be paid over to the donee, who is accountable for the right application of it, but cannot be made assignable for the benefit of his creditors without regard to the interests of the children;¹⁰ but no account will be demanded of such a trustee unless it can be specifically shown that he has improperly disbursed it;¹¹ and an honest exercise of discretion will not be interfered with.¹²

This question, whether a gift to a person for the purpose of maintaining his children is an absolute gift of the devise, or constitutes the donee only as trustee of the fund on behalf of the children who become beneficially interested in it, not infrequently

Parent absolutely entitled, or only trustee for children.

¹ *Re Medlock, Ruffle v. Medlock*, 55 L. J. Ch. 738; *Re Judkin's Trusts*, 25 Ch. D. 743; *Re Dickson, Hill v. Grant*, 29 Ch. D. 331; *Re Burton's Will, Banks v. Heaven*, [1892] 2 Ch. 38; *Re Clements, Clements v. Pearsall*, [1894] 1 Ch. 665; *Re Woodin, Woodin v. Glass*, [1895] 2 Ch. 309.

² *Re Coleman, Henry v. Strong*, 39 Ch. D. 443.

³ *Simp. Inf.* 284.

⁴ *Hall v. Carter*, 2 Atk. 354.

⁵ *Ellis v. Maxwell*, 10 L. J. Ch. 266.

⁶ *Lambert v. Parker*, G. Coop. 143.

⁷ *Hadow v. Hadow*, 9 Sim. 438. Where income of property is given to a widow for the maintenance and support of herself, and the maintenance, education, and support of her children, *primâ facie*, and in the absence of express directions, children living with her are intended, and not married daughters or adult sons (*Carr v. Living*, 28 Beav. 644), more especially where such have become forisfamiliaried, and set up independent homes for themselves. See *Thorp v. Owen*, 2 Ha. 607.

⁸ *Castle v. Castle*, 1 De G. & J. 352.

⁹ *Re G. (Infants)*, [1899] 1 Ch. 719.

¹⁰ *Wetherell v. Wilson*, 1 Keen, 80. See *Brown v. Casamajor*, 4 Ves. 498; *Hamley v. Gilbert*, Jac. 354.

¹¹ *Hora v. Hora*, 33 Beav. 88.

¹² *Raikes v. Ward*, 1 Ha. 445.

arises. The answer must, of course, depend to a great extent on the construction of the instrument creating the gift. Where income is given to a parent for the support and maintenance of his children, the parent is deemed only to be a trustee,¹ so if the parent die during the minority of the child, the income will still be payable for its support, unless the donor makes its payment cease on the death of the parent.² Where the fund itself is given, the presumption is that an absolute gift was intended,³ and this must be rebutted by words clearly expressive of a trust. Mere words of direction, as that the fund should be employed for the maintenance of children, will be deemed to express the motive of the testator rather than to create a trust. The presumption in favour of a gift being intended is much stronger in the case of a father than a mother, for when a fund is given in aid of the performance of a duty which the donee is already legally bound to perform, it is a gift to and a beneficial interest in the person to whom it is made.⁴ But the effect of the Married Women's Property Act, 1882, would be to equalize this presumption, or at any rate to materially modify it. In the case of a gift from a testator to his widow for the support of her children, the presumption in favour of its being an absolute gift is very strong. Thus, where a testator by his will desired that everything during the life of his wife should remain as it was for her use and benefit, and after his decease he gave his real estate to his male heir, and his personal estate to his children, adding, "I give the above devise to my wife that she may support herself and her children according to her discretion, and for that purpose," it was held that the widow took an absolute interest for her life in the real and personal estate;⁵ so where a testator gave his estate to his widow "to be at her disposal in any way she may think best, for the benefit of herself and family," it was held that she took an absolute interest in the gift.⁶ It is the tendency of the modern authorities to restrict rather than to extend the doctrine of precatory trusts.⁷

Trustees or guardians directed to allow maintenance, or to accumulate income, must follow strictly the words of the instruments under which they are to act. But in order to save the

¹ *Curr v. Living* (*ubi sup.*); and see *Wetherell v. Wilson* (*ubi sup.*); *Re Booth, Booth v. Booth*, [1894] 2 Ch. 282.

² See *Re Yates, Yates v. Wyatt*, [1901] 2 Ch. 438.

³ *Thorp v. Owen* (*ubi sup.*).

⁴ *Byne v. Blackburn*, 26 Beav. 41.

⁵ *Thorp v. Owen* (*ubi sup.*).

⁶ *Lambe v. Eames*, L. R. 6 Ch. App. 597.

⁷ *Re Adams and the Vestry of St. Mary Abbots, Kensington*, 27 Ch. D. 394; *Re Diggles, Gregory v. Edmonson*, 32 Ch. D. 253; *Re Hamilton, Trench v. Hamilton*, [1895] 2 Ch. 370; *Hill v. Hill*, [1897] 1 Q. B. 483; *Re Williams, Williams v. Williams*, [1897] 2 Ch. 12. In considering whether a precatory trust or a condition is attached to a devise or legacy, the court will be guided by the intention of the testator apparent in the will, and not by any particular words in which the wishes of the testator are expressed.

insertion of many clauses in settlements and wills, an Act was passed in 1860 (known as Lord Cranworth's Act¹) which provided that

Act, 1860, and the Conveyancing and Law of Property Act, 1881.

"in all cases where any property is held by trustees in trust for an infant, either absolutely, or contingently on his attaining the age of twenty-one years, or on the recurrence of any event previously to his attaining that age, it shall be lawful for such trustees, at their sole discretion, to pay to the guardians (if any) of such infant, or otherwise to apply for or towards the maintenance or education of such infant, the whole or any part of the income to which such infant may be entitled in respect of such property, &c."

In the case of *Re George*² it was held that the words "income to which such infant may be entitled in respect of such property" did not apply to a case where an infant on attaining twenty-one would not be entitled to interest on his legacy till the time of payment. To obviate this effect and enable trustees to have wider powers, unless they are expressly forbidden by the terms of the instrument under which they are acting, this section of Lord Cranworth's Act was repealed by section 43 of the Conveyancing and Law of Property Act, 1881³ and was re-enacted in the following words:—

Conveyancing and Law of Property Act, 1881.

(1) "Where any property is held by trustees in trust for an infant for life, or for any greater interest, and whether absolutely, or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education, or benefit, the income of that property, or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education, or not."

(2) "The trustees shall accumulate all the residue of that income in the way of compound interest, by investing the same and the resulting income thereof from time to time on securities on which they are by the settlement, if any, or by law, authorized to invest trust money, and shall hold those accumulations for the benefit of the person who ultimately becomes entitled to the property from which the same arise;⁴ but so that the trustees may at any time, if they think fit, apply those accumulations, or any part thereof, as if the same were income arising in the then current year."

Though an infant is now entitled to be maintained out of the income of the property held in trust for him during minority (unless such maintenance is strictly forbidden by the instrument of donation), yet the mere fact of being maintained does not vest the income absolutely in the infant, so that he on majority or his representatives (if he die before attaining majority) take

¹ 23 & 24 Vict. c. 145, s. 26.

² 5 Ch. D. 837.

³ 44 & 45 Vict. c. 41.

⁴ See *Re Buckley's Trusts*, 22 Ch. D. 583; *Re Judkin's Trusts*, 25 Ch. D. 743.

the unexpended portion of the income.¹ The word "property" in this sub-section means "the property the income arising from which has been accumulated,"² that is, the income unappropriated for the maintenance of the infant is to be treated as capital and added to the original capital sum. Thus, if a contingent legacy is settled on an infant tenant for life and the contingency happens, the infant is entitled only to the interest during his life of the amount of the surplus income and the accumulations thereof.³ The word "property" in this sub-section would cease to mean primarily "capital," and include unexpended income only where the infant legatee takes a vested interest.⁴

(3) "This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained. A trust to accumulate income during the respective minorities of the members of a class is not a 'contrary intention' within the meaning of this sub-section,⁵ but where a vested life interest is conferred a contrary intention not to convert the income of the life estate into capital sufficiently appears."⁶

(4) "This section applies whether that instrument comes into operation before or after the commencement of this Act."

This section applies only where the *corpus* of the contingent legacy is directed to be set apart by the testator for the purpose of meeting the legacy, whether the *corpus* is in the nature of residue,⁷ or otherwise.⁸ It does not apply where, in addition to the contingencies mentioned in the statute, a further contingency, such as that of surviving a particular person,⁹ or where apart from the Act the infant on attaining twenty-one would only be entitled to the legacy without interest;¹⁰ or where the whole income is subject to an express trust for accumulation.¹¹ Where, however, a will contains no maintenance clause but directs trust property to be equally divided among the members of a class on attaining twenty-one, the income of the share of each infant member is applicable to his maintenance,¹² even in a case where

¹ See *Re Bowlby*, *Bowlby v. Bowlby*, [1904] 2 Ch. 685.

² *Ibid.*

³ *Ibid.* In this case the Court of Appeal practically overruled a decision of Buckley, J., in *Re Scott* ([1902] 1 Ch. 918), in which he held that the trustees of an infant tenant for life held the accumulations of income for the benefit of the infant tenant for life, who on reaching majority took them absolutely.

⁴ *Re Wells*, *Wells v. Wells*, 43 Ch. D. 281; *Re Humphreys*, *Humphreys v. Levett*, [1893] 3 Ch. 1.

⁵ *Re Thatcher's Trusts*, 26 Ch. D. 426.

⁶ *Re Humphreys*, *Humphreys v. Levett* (*ubi sup.*).

⁷ *Re Smith*, *Henderson-Roe v. Hitchins*, 42 Ch. D. 302.

⁸ *Re Medlock*, *Ruffle v. Medlock*, 55 L. J. Ch. 738; *Re Judkin's Trusts* (*ubi sup.*); *Re Dickson*, *Hill v. Grant*, 29 Ch. D. 331; *Re Burton's Will*, *Banks v. Heaven*, [1892] 2 Ch. 38.

⁹ *Re Judkin's Trusts* (*ubi sup.*).

¹⁰ *Re Dickson*, *Hill v. Grant* (*ubi sup.*).

¹¹ *Re Alfred*, *Hunt v. Parry*, 32 Ch. D. 383.

¹² *Re Holford*, *Holford v. Holford*, [1894] 3 Ch. 30.

the membership of the class is capable of increase.¹ Up to the time of the interest of any of the infants becoming vested in possession, the income of the fund to which they are contingently entitled may be devoted to their maintenance.² Where there is no express direction to maintain, and the infant is not in all events entitled to the fund, then this section does not apply. The provisions of this section may be treated as incorporated into any will to which they are applicable for the purpose of determining whether a legacy to an infant child carries interest.³ The effect of this section is that it does not apply to property the vesting of which is postponed beyond the age of twenty-one years;⁴ consequently, where it is so postponed, clauses for maintenance, education, and the like will be necessary.⁵

The powers of the trustees, however, are enlarged, for they may apply the income of the fund not only for the maintenance of the infant, but also for his "benefit," a much wider term. The trustees under this Act will, it seems, be able to apply the income for the benefit of the infant in cases where the income will go along with the capital if and when the capital vests, but not otherwise.⁶ The interest of the infant is the chief concern of the court; thus, where he may be maintained out of one of two funds, he will be maintained out of that fund which it is most for his benefit to be applied for that purpose.⁷ In cases not strictly within the provisions of these Acts, the trustee or guardian acts on his own responsibility; and it is therefore usual when there is a necessity for an application on behalf of the infant, and no power to authorize an allowance for maintenance, for the court, upon the application of the infant by his next friend, to make an order for his maintenance.⁸ It is a rule that whatever expenditure the court would have sanctioned if applied to by the trustees or guardians of the infant, if laid out by them without application to the court, will be allowed them on taking accounts.⁹

This section being retrospective as regards wills or other instruments made before it came into operation is not intended to affect their construction.¹⁰

As a guide to trustees and guardians who have the care and maintenance of infants, the following principles are of great

Income may be applied for "benefit" of infant.

Segregation of legacy from residue carries interest.

¹ *Re Jeffery, Arnold v. Burt* (No. 2), [1895] 2 Ch. 577.

² *Re Adams, Adams v. Adams*, [1893] 1 Ch. 329.

³ *Re Moody, Woodroffe v. Moody*, [1895] 1 Ch. 101.

⁴ *Re Breeds' Will*, 1 Ch. D. 226.

⁵ See *Re Judkin's Trusts* (*ubi sup.*).

⁶ *Wolstenholme's Conveyancing and Settled Land Acts*, p. 109.

⁷ *Martin v. Martin*, L. R. 1 Eq. 369; *Re Wells, Wells v. Wells* (*ubi sup.*).

⁸ *Dan. Ch. Pr.* 1122.

⁹ *Brown v. Smith*, 10 Ch. D. 377, reversing 46 L. J. Ch. 866.

¹⁰ *Re Humphreys, Humphreys v. Levett*, [1893] 3 Ch. 1.

importance. The payment of interest on a contingent legacy (in other words, the title to be maintained out of the interest of the legacy) depends in many cases on the severance of the legacy from the residue of the estate; thus, where a legacy is severed from the residue for the benefit of a tenant for life and a remainderman, the legacy will carry interest for the benefit of the remainderman from the date of the death of the tenant for life, though the interest of the remainderman in the legacy is not yet vested;¹ and where a fund is directed to be invested and held by the trustees on certain trusts, or is otherwise directed to be set apart from the rest of the testator's estate, it will carry the income which would be capable of being devoted to the maintenance of the infant beneficiary.²

Income bearing fund to class.

Where there is a gift of a fund which carries intermediate income to the members of a class who attain twenty-one, though the first member who attains twenty-one is entitled to the income of his share, yet he is not entitled to the income of the shares of the other members who are minors, which income their guardians would be justified under this Act in employing for their maintenance.³ But in the case of a devise of real estate by way of contingent remainder to children as tenants in common, as each child satisfies the conditions of the will his or her share becomes vested; and it is immaterial whether the limitations are legal or equitable.⁴

Control of court over guardians and trustees.

Guardians having an allowance for maintenance, who duly support, and maintain and support their wards, are not accountable for their expenditure;⁵ but the court takes care that the sums allowed for maintenance shall be properly applied, and has full control over guardians and trustees; and if it thinks that trustees are allowing an insufficient sum, it can increase it, though the trustees have a discretion in the matter.⁶ The court has a general control, and where a fund was given to trustees who were directed to pay the income to a mother to be applied by her at her discretion for the benefit of her infant children, and the court thought she had not exercised a sound discretion, it ordered the income to be paid to the father for the maintenance of the infants.⁷

Trustees are bound to apply the income of a life interest over which their discretion extends in exoneration of property to which

¹ *Kidman v. Kidman*, 40 L. J. Ch. 359.

² *Re Medlock, Ruffle v. Medlock*, 55 L. J. Ch. 738; *Re Clements, Clements v. Pearsall*, [1894] 1 Ch. 665; *Re Woodin, Woodin v. Glass*, [1895] 2 Ch. 309; *Theo. Wills*, 153. In this last case the report of the case of *Furneaux v. Rucker*, W. N. [1889] 135, was disapproved of.

³ *Rochford v. Hackman*, 9 Ha. 475; *Re Holford, Holford v. Holford*, [1894] 3 Ch. 30.

⁴ *Re Averill, Salisbury v. Buckle*, [1898] 1 Ch. 523.

⁵ *Joddrell v. Joddrell*, 14 Beav. 397.

⁶ *Re Hodges, Davey v. Ward*, 7 Ch. D. 754.

⁷ *Re Roper's Trusts*, 11 Ch. D. 272.

the infant is absolutely entitled ;¹ and where under the order of the court they have accumulated the income their discretion as to the application of such accumulations towards the maintenance of their infant ward remains unaffected and absolute.²

Different considerations arise where trustees have a trust for maintenance and where they have a power. Where they have a trust, they have no discretion, but must carry out the terms of the instrument under which they are to act. Where they have a power, then they have a discretion as to the amount and method of application of the sum to be allowed for maintenance. Under the foregoing Act trustees may apply at discretion any income which in their judgment they deem proper, according to the infant's age, for his or her maintenance or benefit, or pay thereout any money to the infant's parent or guardian for the like purposes. Where trustees have a power to apply all or any part of the income of a trust fund for the maintenance and education of an infant, and they exercise their discretion honestly, the court would not interfere except on very strong grounds.³ But, as above pointed out, their discretion must be duly and properly exercised.

An application entitled in the matter of an infant does not give the court jurisdiction to compel trustees to make payments for maintenance, but an action begun by writ or an originating summons is necessary.⁴

As a general rule, maintenance will not be given to a father for the support of his children. The Court of Chancery recognizes the obligation of a father to support his children ; and it is a rule of equity that a power or trust for the maintenance of infants is to be exercised and used with a view to the benefit of the infants, and not for the benefit of the father ; and if the father is able to maintain his children, it is not intended to relieve him from the liability to do so.⁵ Thus, in general, the court will not take the property of the infants and make an allowance out of it to their father for their maintenance ;⁶ or, in other words, where the property of the children is derived from the bounty of a stranger, the father, if of ability to maintain his children, is not entitled to any allowance out of the income for that purpose.⁷ But under certain circumstances, notwithstanding an antecedent trust for accumulation, exceptions are allowed to this rule.

¹ See *Re Weaver*, 21 Ch. D. 615.

² *Re Wise, Jackson v. Parrott*, [1896] 1 Ch. 281.

³ See *Re Lofthouse (an Infant)*, 29 Ch. D. 921.

⁴ *Ibid.*

⁵ See *Wilson v. Turner*, 22 Ch. D. 521 ; in which case *Ransome v. Burgess*, (L. R. 3 Eq. 773) was overruled on this point. See *Re Bryant, Bryant v. Hickley*, [1894]

1 Ch. 324.

⁶ *Fawkner v. Watts*, 1 Atk. 406.

⁷ *Thompson v. Griffin*, 1 Cr. & Ph. 317,

Proved want of ability on part of father to support children.

Where there is Proved Want of Ability on the Part of the Father to Support his Children.—If the father is not of ability, maintenance will be allowed, though there be no express provision in the gift for that purpose.¹ Where he is in very poor circumstances, or insolvent, no reference as to his ability will be made,² and where he is poor, and the fund is small, the whole of the dividends will be paid him;³ and where he is in distressed circumstances a liberal allowance will be made him.⁴ The terms “ability” and “want of ability” are relative. “Where the question turns upon the ability of the father to maintain the child, the rule is not laid down upon the father’s absolute insolvency only, but maintenance is given when the father is not in such circumstances as to be able to give the child such an education as is suitable to the fortune which he expects.”⁵ Thus, in *Jervoise v. Silk*,⁶ the father had an income of £6000 a year, but was allowed £1200 for the maintenance of his children; so, too, in *Havelock v. Havelock, Re Allan*,⁷ General Havelock was possessed of what was styled a “moderate income”; his children were devisees and legatees of a large fortune, the rents and income of which were to be accumulated for twenty-one years; he was allowed £2700 a year for their maintenance. Under these circumstances maintenance will be allowed, notwithstanding a direction for accumulation;⁸ and not only maintenance for the future will be allowed, but a sum for past maintenance will be allowed to the parent.⁹ But there is no general jurisdiction in the court to disregard the trust for accumulation even though there is no other way in which maintenance for the person who if living at the end of the period of accumulation will be the tenant for life.¹⁰

Fund given to father by way of bounty.

Where a fund is expressly given to a parent by way of bounty for the maintenance of children, the parent will be entitled to have them maintained out of it, though of ability to support them;¹¹ thus, where a wife gave property to her husband in trust to apply as much of it as he thought proper in maintaining and educating their son, which the husband did in a proper manner and died, his estate was allowed so much of the income as he had applied, though he was of ability to maintain him.¹²

Where trustees of marriage settlement

Where the Trustees of a Settlement to which the Father is a Party have an Obligatory Trust Imposed upon them to Allow a Sum for the

¹ *Erratt v. Barlow*, 14 Ves. 202.

² *Ex parte Mountfort*, 15 Ves. 449.

³ *Payne v. Low*, 1 R. & M. 223.

⁴ *Roach v. Garvan*, 1 Ves. Sen. 160.

⁵ Per Thurlow, L. C., in *Buckworth v. Buckworth*, 1 Cox, Eq. Cas. 80.

⁶ 1 G. Coop. 52.

⁷ 17 Ch. D. 807.

⁸ *Havelock v. Havelock, Re Allan (ubi sup.)*.

⁹ *Bennett v. Wyndham*, 29 L. T. (O.S.) 138.

¹⁰ *Re Alford, Hunt v. Parry*, 32 Ch. D. 383. See *Re Smeed, Archer v. Prall*, 54 L. T. 929; *Kemmis v. Kemmis*, 13 L. R. Ir. 372.

¹¹ *Leach v. Leach*, 13 Sim. 304.

¹² *Malcolmson v. Malcolmson*, 17 L. R. Ir. 69.

Maintenance of his Children.—This exception seems formerly to have been based upon a theory of contract—that the father had by foregoing certain marital rights, and by being party to the instrument which enabled the trustees to exercise their discretion of allowing maintenance for the support of his children, contracted to have his children maintained out of the fund set apart for that purpose, irrespectively of his being able or unable to maintain them himself; and no reference as to his ability to maintain them was required.¹ A distinction was thus drawn between an ante-nuptial settlement and a post-nuptial or voluntary settlement, on the ground that the contract was purely voluntary.² The effect of this doctrine was limited by holding that where the trustees of the settlement had a mere power, the father was not entitled.³ The consideration for the contract was the father giving up his interest in the fund to be applied for the maintenance of his children, which, but for the settlement, he would have taken in his marital right. This theory of a contract by which a father purchases a right to have his children maintained is not now accepted; and since the passing of the Married Women's Property Act, 1882, it would be very difficult to support any such theory; for on marriage a husband acquires no marital interest in or rights over his wife's property, the giving up of which would form a valuable consideration for such a contract; if he does acquire any interest in his wife's property, it is as the result of an actual bargain or stipulation between the parties, independently of any rights on the part of the husband.

But there is a case in which it was decided that the right of a father, as party to a settlement, to have maintenance allowed him depends, as in the case of a gift by a stranger, upon whether the trustees of that settlement have an absolute and obligatory *trust* imposed upon them to allow maintenance, or merely a discretionary *power* to allow him such maintenance, which they cannot be compelled to put in force if their discretion is honestly exercised.⁴ Where it is an obligatory trust, the father can compel the trustees to allow him maintenance, whether he can support his children or not; where they have a discretionary power, the father cannot enforce maintenance.⁵ A mere declaration in a marriage settlement that the trustees should after the death of the wife apply the whole or such part as they should think fit of the

bound to
allow father
a sum for
maintenance
of children.

Father entitled
where trustees
of settlement
have an absolute
trust to
allow maintenance
imposed
on them.

¹ *Mundy v. Earl Howe*, 4 Bro. C. C. 223; *Stocken v. Stocken*, 4 Myl. & Cr. 95; *Meacher v. Young*, 2 Myl. & K. 490; *Ransome v. Burgess*, L. R. 3 Eq. 773. See *Newton v. Curzon*, 16 L. T. 696.

² *Re Kerrison's Trusts*, L. R. 12 Eq. 422.

³ *Thompson v. Griffin*, 1 Cr. & Ph. 317.

⁴ *Wilson v. Turner*, 22 Ch. D. 521. In this case, *Ransome v. Burgess* (*ubi sup.*) was practically overruled, and the principle in *Mundy v. Earl Howe* (4 Bro. C. C. 223) explained.

⁵ *Wilson v. Turner* (*ubi sup.*).

annual income of the expectant share of any child for or towards the maintenance of such child, is not an absolute trust to apply the income to the maintenance of the child, but a mere discretionary trust equivalent to a power.¹ The court will not ordinarily control the exercise of their discretion by the trustees where it has been honestly exercised,² but where they do not exercise any discretion, but the parent improperly has had the annual income paid to him, the estate of the parent will be held liable to repay the whole of the amount of the income received.³

Maintenance allowed where children are taken out of custody of father.

Where the court has taken from the father the custody of his children, it will order them to be maintained out of their own means, irrespective of the ability of the father to maintain them.⁴ In addition to the above circumstances, it must be remembered that under the Conveyancing and Law of Property Act, 1881,⁵ trustees who hold property in trust for infant children, whether for life or a larger interest, may at their sole discretion pay to their parent the income of that property for their maintenance, education or benefit, unless the instrument of donation expressly forbids such payment. This power can only be exercised by the trustees where property vests at twenty-one, and is not exercisable where the vesting is postponed after that age.⁶

Liability of married women.

A married woman is not primarily liable for the support of her children, and maintenance was always allowed her, although she was possessed of large separate estate,⁷ and reference as to her ability was dispensed with.⁸ But now, by the Married Women's Property Acts of 1870⁹ and 1882,¹⁰ where she has separate estate, and her husband is unable to support the children, she becomes liable to that burden; it is therefore submitted that the same principles which govern the right of the father to claim maintenance, or on which he will be refused it, will be equally applicable to the mother.¹¹

Amount of maintenance allowed; must not in general exceed the interest of the fund.

The amount allowed must not, as a general rule, exceed the interest made by the fund;¹² but where the income is fluctuating, so as to be very large in one year and very small in another, the trustee may expend in one year income derived from another, provided that at the cesser of maintenance he has not spent more than the total income.¹³ It is impossible to lay down any hard-and-fast rule as to the amount that will be allowed by way

¹ *Wilson v. Turner*, 22 Ch. D. 521.

² *Brophy v. Bellamy*, L. R. 8 Ch. App. 798; *Gisborne v. Gisborne*, 23 W. R. 410; *Re Bryant, Bryant v. Hickley*, [1894] 1 Ch. 321.

³ *Wilson v. Turner* (*ubi sup.*); and see *Tempest v. Lord Camoys*, 21 Ch. D. 571.

⁴ See *Wellesley v. Duke of Beaufort*, 2 Russ. 1, 29.

⁵ 44 & 45 Vict. c. 41, s. 43. See *ante*, pp. 669 *et seq.*

⁶ *Re Judkins' Trusts*, 25 Ch. D. 743.

⁷ *Haley v. Bannister*, 4 Madd. 275.

⁸ 33 & 34 Vict. c. 93, s. 14.

⁹ See *Re Bryant, Bryant v. Hickley* (*ubi sup.*).

¹⁰ 45 & 46 c. 75, s. 21.

¹¹ *Ex parte Whitfield*, 2 Atk. 315.

¹² *Douglas v. Andrews*, 12 Beav. 410.

¹³ *Carmichael v. Wilson*, 3 Moll. 79.

of maintenance. It is altogether in the discretion of the court, which will be guided by the rank, fortune, expectations, and the general surroundings of the infant.¹ Thus, where there are younger children, especially if they are numerous and totally unprovided for, upon an application for maintenance for the eldest son, the court will make a liberal allowance to him, that he may be the better able to maintain his brothers and sisters, considering him in the light of the head of the family.² This principle has been extended to the case of an illegitimate brother born of the same father and mother, and who had lived with them, but was quite unprovided for;³ and an allowance has been made for charitable purposes.⁴ The infant's benefit is the great consideration; if others are likewise and at the same time benefited, it is no ground for alleging improper application of the allowance.⁵ Where the fund is small, and the whole of it has been paid to the mother of the infant, who has derived benefit from the expenditure of the amount, even though the trustees ought to have made an application to the court for permission to make the allowance, the court will treat it as having been properly applied, and as though sanctioned by itself, and will refuse to make the mother or trustees liable to account for it.⁶ The court will, at any rate in the event of no opposition by other parties interested, make an order, not only for the personal maintenance of the infant, but for the repairing and furnishing a house in which it was intended that he should reside;⁷ thus, in one case where the net income of a property exceeded £14,000 per annum, the mother of an infant tenant in tail was allowed £4000 a year for the upkeep of the family mansion and suitable maintenance of the infant, though there was a trust for accumulation, and the trustees were to apply only £500 a year for the maintenance and education of the infant.⁸ Where there are more funds than one liable, maintenance will be given from that fund which it is most for the infant's benefit to have recourse to.⁹

The court will not break in upon the principal, whether it be in the form of real estate,¹⁰ or personal,¹¹ for the maintenance and benefit of infants, unless in the case of real estate the rents are insufficient to provide maintenance, and the claims of creditors

When the court will break in upon the principal Real estate.

¹ *Re Allan, Havelock v. Havelock*, 17 Ch. D. 807; *Re Collins, Collins v. Collins*, 32 Ch. D. 229. See cases collected in Simpson on Infants, chap. xv. pp. 299 *et seq.*

² See *Pierpoint v. Lord Cheney*, 1 P. Wms. 493; *Wellesley v. Duke of Beaufort* (*ubi sup.*); and *Tweedell v. Tweedell*, T. & R. 13.

³ *Bradshaw v. Bradshaw*, 1 J. & W. 647.

⁴ *Langton v. Brackenburgh*, 2 Coll. 446.

⁵ *Brown v. Smith*, 10 Ch. D. 377; reversing 46 L. J. Ch. 866.

⁶ *Ibid.*

⁷ *Griggs v. Gibson*, 14 W. R. 538.

⁸ *Re Walker, Walker v. Duncombe*, [1891] 1 Ch. 879. In the allowance of the £4000 per annum was included a sum of £100 a year for charities.

⁹ *Re Wells, Wells v. Wells*, 43 Ch. D. 281.

¹⁰ *Butler's Case*, cited 1 Ves. Sen. 95.

¹¹ *Re England*, 1 R. & M. 499; *Davies v. Davies*, 2 De G. M. & G. 53.

can be protected,¹ or the contingency of the infant failing to become absolutely entitled can be insured against.² Where the donor is a father, though the rents are insufficient to keep down the interest on incumbrances, a charge on the inheritance for maintenance will be allowed in favour of the infant tenant in fee.³ But where there is no income arising out of real estate applicable for the maintenance of an infant remainderman, there is no power to charge the realty for his future maintenance, or for the future maintenance of those who might take in remainder after him.⁴

Personal
estate.

Where the fund or capital is small the court will break into it to allow maintenance, where the infant has no other source from which to look for support; and in the latter case, even where the legacy is large.⁵ Trustees should be more than cautious in breaking into capital without the leave of the court; for if they have done so improperly they will be rendered personally accountable.⁶ But where they have broken into capital under circumstances which, on an application to the court for that purpose, would have induced the court to break into the capital, they will not be called to account merely because they omitted to make the application.⁷

Past main-
tenance.

A father being under natural obligation to support his children will not be allowed for their past maintenance, except under special circumstances;⁸ as where the father became liable to debts he was obliged to contract in supporting the minor, and there was no fund in court until the time of his application for maintenance.⁹ A mother has been allowed for the past maintenance of her children;¹⁰ and where trustees allowed her the whole income of a fund for maintenance, without applying to the court, under circumstances which would have induced the court to allow it, the income was held properly expended.¹¹ But advances to an infant by his mother without any evidence of any

¹ *Butler's Case*, cited 1 Ves. Sen. 95.

² *De Witte v. Palin*, L. R. 14 Eq. 251.

³ *Re Howarth*, L. R. 8 Ch. App. 415; but see *Cadman v. Cadman*, 33 Ch. D. 397. In this case *Re Howarth* was distinguished and doubted. This case was an application on behalf of certain infants entitled to successive estates tail in real estate for whose maintenance there was no income applicable for an order that a sum of money for past maintenance and annual sums for future maintenance should be raised on the security of a charge on the estate. The court refused to make the order. Lindley, L.J., said, "In *Re Howarth* went to the very verge of the law, and perhaps beyond it." In *Cadman's Case* it will be seen that the estate was in reversion, and the charge sought was for future maintenance.

⁴ *Re Hamilton (Infants)*, 31 Ch. D. 291; *Cadman v. Cadman* (*ubi sup.*).

⁵ *Harvey v. Harvey*, 2 P. Wms. 21.

⁶ See *Robinson v. Killey*, 30 Beav. 520.

⁷ *Lee v. Brown*, 4 Ves. 362; *Prince v. Hine*, 26 Beav. 634; *Brown v. Smith*, 10 Ch. D. 377.

⁸ *Ex parte Bond*, 2 Myl. & K. 439. Such as embarrassment of circumstances, *Carmichael v. Hughes*, 20 L. J. Ch. 396; debt incurred for maintenance, *Parsons v. Peters*, 11 Jur. (N.S.) 150; inability to maintain with regard to other children unprovided for, *Ex parte Penleaze*, 1 Bro. C. C. 387 n; or where he can enforce a trust for that purpose, *Mundy v. Earl Howe*, 4 Bro. C. C. 223.

⁹ *Ex parte Darlington*, 1 Ba. & B. 240.

¹⁰ *Bruin v. Knott*, 1 Ph. 572.

¹¹ *Brown v. Smith*, 10 Ch. D. 377.

intention to claim repayment as for a debt, were held not to constitute a debt due and payable to her out of his estate;¹ and if advances were made with a view to repayment, they would seem to be limited to necessities.² Her claim to it in the future, since the passing of the Married Women's Property Act, 1882, will, in all probability, be held to depend upon the like principles which govern the claim of the father.

If a stranger maintains an infant out of charity or affection, he Stranger. has no claim for the money expended;³ but if he maintains it with the intention of being repaid, he may make good his claim;⁴ indeed, "he will have a little more consideration than a trustee, charged with the care of paying an infant when of age a sum of money, would be allowed."⁵

A distinction is drawn between past and future maintenance; in the former case, only that which has been properly expended,⁶ whereas in the latter case a proper sum will be allowed, taking into consideration the rank and surrounding circumstances of the infant.⁷ Where the whole of a fund is given to an infant for his maintenance, whether absolutely or contingently, that part of the income which is not applied for his maintenance belongs absolutely to him or his personal representatives.⁸ But where he is not entitled to the whole income but only to be maintained out of it, the surplus follows the destination of the capital.⁹

Maintenance ceases at the time fixed by the instrument of Cesser of maintenance. donation, whether at twenty-one or at an earlier period. But nice questions have arisen as to whether it ceases on marriage or forisfiliation of the infant,¹⁰ or where by the instrument it is made to cease at a time earlier than the majority of the infant, though on his attaining twenty-one a legacy is made payable to him. It is now the rule that where a testator, who is a parent, directs that the maintenance of a child shall cease at a date earlier than majority, either on marriage or by attaining a certain age, and a legacy is made payable to him contingently on his attaining twenty-one, the court may infer that the testator intended that the infant should be maintained as before in the interval between the date fixed for the cesser of maintenance and his majority.¹¹

¹ *Re Cottrell, Joyce v. Cottrell*, L. R. 12 Eq. 566.

² See *Re Rhodes, Rhodes v. Rhodes*, 44 Ch. D. 94.

³ *Grove v. Price*, 26 Beav. 105.

⁴ *Marlow v. Pitfield*, 1 P. Wms. 558.

⁵ Per Lord Thurlow in *Davies v. Austen*, 1 Ves. Sen. 247, 249.

⁶ See *Bruin v. Knott* (*ubi sup.*).

⁷ See *Jerouse v. Silk*, G. Coop. 52. "The general rule of the court is to allow a gross annual sum proportioned to the age and quality of the infant and *quantum* of the estate, not laying down any strict rule." Per Lord Hardwicke in *Moor v. Lacy*, Macph. Inf. App. III. p. viii.

⁸ *Webb v. Kelly*, 9 Sim. 469.

⁹ *Hanson v. Graham*, 6 Ves. 239.

¹⁰ See *Carr v. Living*, 28 Beav. 644.

¹¹ *Chambers v. Goldwin*, 11 Ves. 1; *Martin v. Martin*, L. R. 1 Eq. 369.

For a collection of cases on this subject see Mr. Simpson's book on Infants.¹

Advancement.

Advancement may be described as a sum paid out of capital to secure a permanent benefit or advantage in life for the person who is presumably entitled to or has a vested or contingent interest in property before the time fixed for his obtaining the absolute interest in the whole or part of such property.² Advancement is not necessarily restricted to the period of infancy, though it may be so restricted by the terms of the instrument under which it is made.³

Difference between maintenance and advancement.

There are certain differences between maintenance and advancement; thus, while the former is generally and nearly always allowed out of interest only, the latter is invariably taken out of capital; another is that the former necessitates the payment of various sums from time to time; while the latter is usually the payment of a single lump sum out of the available capital. Again, advancement is a word of larger import than maintenance; and the powers of trustees and guardians under an instrument containing a provision for advancement are considerably increased; thus, the allowance of maintenance stops at majority, unless the instrument of donation otherwise provides; but the advancement or preferment of the person to be benefited can be made after he has attained twenty-one.⁴ But the power to advance the child may be confined to his minority,⁵ though it is not usual to do so. The discretion of trustees who have a discretionary power of advancement will not be controlled merely because an action has been brought for the administration of their testator's estate.⁶ If, however, the trustees refuse to act, or decline to exercise their discretion, then the court will direct an inquiry whether any and what advancement ought to be made.⁷ The object of maintenance and advancement is the same, viz., the benefit and furthering of the interests of the infant; and, broadly speaking, the same rules apply to the advancement of capital as to the application of interest by way of maintenance. A trustee cannot apply part of the principal towards the advancement of a child where the legacy is subject to a limitation over on the happening of a contingency in favour of a stranger; for the court itself could not make an order for advancement in such a case.⁸ Unless trustees are expressly authorized they cannot advance part of the *corpus* of an estate to a person who, under the terms of the trust

¹ Pp. 314 *et seq.*

² *Re Aldridge, Abram v. Aldridge*, 55 L. T. 554.

³ *Ibid.* The advancement here under consideration is not that made by parents, but by guardians or trustees only. See Part II., Parent and Child, chap. iii. p. 565.

⁴ *Lowther v. Bentinck*, 1 L. R. 19 Eq. 166; *Re Breeds' Will*, 1 Ch. D. 226.

⁵ *Clarke v. Hogg*, 19 W. R. 617.

⁶ *Brophy v. Bellamy*, L. R. 8 Ch. App. 798.

⁷ *Lewis v. Lewis*, 1 Cox, Eq. Cas. 162, cited in *Robinson v. Cleator*, 15 Ves. 526.

⁸ *Lee v. Brown*, 4 Ves. 362.

instrument cannot ever become absolutely entitled to a share of the *corpus* ; and the mere fact that the instrument contains a power of advancement *simpliciter* is no such authorization.¹

Advancement, as a rule, cannot be given out of a fund to which an infant is not absolutely entitled, but where the gift of the fund is to a class (of which the infant to be advanced is one) in a certain event, such as attaining twenty-one or marriage, with a limitation over to the survivors or survivor in the case of the death of any under that age or unmarried, then the court, though not the trustees, can make the advance out of such fund.² A trustee who made such advance, on the contingency not happening which would entitle the infant to the fund, would be liable to make good the amount of the advance to the person entitled over ; but as between the infant and himself, he would be allowed it in his account on the coming of age of the former.³

Powers of the court larger than those of trustees.

Parents sometimes claim to deduct from legacies and other property belonging to their children the amount of the sums expended for their advancement ; but as it is the duty of a father to provide for his child out of his own means, he will not be allowed to recoup himself out of his child's property for any advance made,⁴ unless it is clear that he was unable to afford such advance.⁵ There is now, it is contended, a like liability on the part of the widowed mother, who is clearly bound to support her children. In the old case of *Smee v. Martin*,⁶ a mother was not allowed the expense of putting her child out to apprenticeship, on the ground that she was bound to support him, and this must be held to be the law, more especially in view of recent legislation affecting the position and liability of married women.

Parents cannot claim for amount of sums expended on advancement of children.

Advancement may be made in pursuance of a power contained in the instrument directing the advancement ; or in the absence of such power it is usual to insert, both in settlements and wills, where necessary, express powers authorizing the trustees to advance either the whole or some portion of the capital to which the donee of the fund is entitled, for the benefit of the donee, whether infant or adult.

Advancement under a Power.—The terms of the power ought to be strictly carried out, and the trustees ought to be guided by them ; the advancement ought to be made for the *bona fide* benefit of the infant.⁷ Advances for the following purposes have been allowed: Putting an infant to sea;⁸ maintenance (where included in the words of the power);⁹ a fund settled on the marriage of a

Advancement under a power. Terms of the power to be strictly carried out. Proper advances.

¹ *Re Aldridge, Abram v. Aldridge*, 55 L. T. 554.

² *Franklin v. Green*, 2 Vern. 137. See *Re Breeds' Will*, 1 Ch. D. 226.

³ *Worthington v. M'Craer*, 23 Beav. 81.

⁴ *Darley v. Darley*, 3 Atk. 399.

⁵ Bunb. 136.

⁸ *Warr v. Warr*, Prec. Ch. 213.

⁵ *Ex parte Hayes*, 3 De G. J. & S. 485.

⁷ *Simpson v. Brown*, 13 W. R. 312.

⁹ *Robinson v. Killey*, 30 Beav. 520.

daughter;¹ fund settled by a son in a post-nuptial settlement;² setting up the husband of a daughter in business³ (but not paying the husband's debts⁴); setting up a married daughter in a farming business;⁵ the payment of an adult's debts, where the terms of the instrument are wide enough;⁶ and an advance to enable a family to emigrate.⁷ Where the power is discretionary, the court will not, as a rule, control the discretion of the trustees,⁸ but if they decline to exercise their discretion, an inquiry will be directed as to what would be a proper exercise of the power.⁹ It is not a proper exercise of a trustee's discretion to advance to a married woman, after her presumptive share has become vested, a portion of that share to enable her husband to pay off a debt to a co-trustee; and such advancement amounts to a breach of trust.¹⁰ If a discretionary power is given to trustees for a particular purpose which fails, they cannot exercise it in any other way, though for the benefit of the *cestui que trust*,¹¹ but where the gift to the donee is absolute in its nature, and a particular mode is pointed out in which it is to be laid out, the gift will be good, though the money cannot be laid out in that particular mode,¹² and if in such a case the whole of the amount of the gift be unapplied, the residue will belong to the donee.¹³ A discretionary power of advancement is at an end if the trustees pay the fund into court under the Trustee Relief Act.¹⁴ Where the discretion is a general one, the court can exercise it;¹⁵ but not where it is a personal one, as, for instance, in the case of advances to an individual.¹⁶ Where an advance has been made without fraud, and the donee is able to sell the subject of the advance, such as the goodwill of a business or share in a partnership, the donee will be entitled to retain the produce of the sale.¹⁷ The court does not inquire into the application of money advanced under the power, if it is shown that the purpose for which it was raised was known and a proper one; and trustees who so pay over the amount to be advanced are not liable, though it be afterwards misspent.¹⁸

¹ *Lloyd v. Cocker*, 27 Beav. 645.

² *Roper-Curzon v. Roper-Curzon*, L. R. 11 Eq. 452.

³ *Re Kershaw's Trusts*, L. R. 6 Eq. 322.

⁴ *Talbot v. Marsfield*, L. R. 3 Ch. App. 622.

⁵ *Ibid.*

⁶ *Lowther v. Bentinck*, L. R. 19 Eq. 166.

⁷ *Re Long*, 38 L. J. Ch. 125.

⁸ *French v. Davidson*, 3 Madd. 396.

⁹ *Kilvington v. Gray*, 10 Sim. 293.

¹⁰ *Molyneux v. Fletcher*, [1898] 1 Q. B. 648. Kennedy, J., in this case thought that the well-recognized meaning of the word "advancement" precluded the propriety of an advance out of a trust after it had become vested.

¹¹ *Re Ward's Trusts*, L. R. 7 Ch. App. 727.

¹² *Barlow v. Grant*, 1 Vern. 255; *Leche v. Kilmorey*, T. & R. 207.

¹³ *Palmer v. Flower*, L. R. 13 Eq. 250.

¹⁴ *Re Coe's Trusts*, 4 K. & J. 199; *Re Ashburnham's Trusts*, 54 L. T. 84; *Re Nettelfold's Trusts*, 59 L. T. 315.

¹⁵ *Re Ashburnham's Trusts* (ubi sup.).

¹⁶ *Re Nettelfold's Trusts* (ubi sup.).

¹⁷ See *Andrew v. Andrew*, 30 L. T. 457.

¹⁸ *Re Brittlebank, Coates v. Brittlebank*, 30 W. R. 99.

Advancement in the Absence of a Power.—Trustees acting under an instrument which does not give them a power of advancement may make an advance to the infant out of the infant's property, such as the court itself would have authorized, and will not be called upon to account for having done so.¹ In such cases, as a rule, the trust fund is small, and the application of the capital is clearly for the infant's benefit.² The following have been held proper advances under the circumstances: To pay for being articulated to a solicitor;³ for an apprentice fee;⁴ to bring an infant home from a distant country,⁵ for an outfit for an infant going to a distant colony,⁶ towards furnishing a house for the residence of the infant and his mother and brothers,⁷ and for payment of arrears of rent to save ejectment.⁸ Purchase of a commission in the army was deemed formerly a good advancement, and though it has been abolished, an advancement for the support of a young man at one of the military academies would be deemed good and proper.⁹

Advancement
in the absence
of a power.

Under an ordinary power of advancement sums advanced would have to be brought into hotchpot.

Hotchpot.

Application to the court in the matter of maintenance and advancement should be made at chambers by the guardian (if any) or next friend of the infant; if there is an action or matter pending before the court it should be made by an ordinary summons; but by an originating summons in other cases.¹⁰ In former times a suit was deemed necessary in most cases. The order can be made not only where there is a fund in court or under the control of the court belonging to the infant, the income of which is applicable to his maintenance, but even where the fund is not in court.¹¹ Though the old practice of bringing an action in ordinary cases is no longer necessary,¹² yet an action should be brought in those cases in which the infant's right to maintenance was doubtful,¹³ or where the court alone and not the trustees can exercise a power in favour of the infant,¹⁴ and it has been held that an application for advancement out of moneys exceeding £1000 in court, under the Legacy Duty Act, should be by petition.¹⁵ Where an order for maintenance has been obtained to pay a sum to a widow for the support of her infant

Application
for mainten-
ance and
advancement
how made.

¹ *Lee v. Brown*, 4 Ves. 362.

² *Barlow v. Grant*, 1 Vern. 255; *Andrews v. Partington*, 2 Cox, Eq. Cas. 223.

³ *Re Welch*, 23 L. J. Ch. 344.

⁴ *Franklin v. Green*, 2 Vern. 137.

⁵ *Stephens v. James*, 1 Myl. & K. 627.

⁶ *Re Salter's Trusts*, 17 Ir. Ch. Rep. 176.

⁷ *Perry v. Perry*, 18 W. R. 482.

⁸ *Ex parte McKey*, 1 Ba. & B. 405. See also *Walsh v. Walsh*, 1 Dr. 64.

⁹ See *Evans v. Massey*, 1 Y. & J. 196, and *Cope v. Wilmot*, 1 Coll. 396 n; *De Crespigny v. De Crespigny*, W. N. [1886] 24.

¹⁰ Ord. LV. r. 2 (12); Dan. Ch. Pr. 1126.

¹¹ *Re Colgan (Infants)*, 19 Ch. D. 305.

¹² *Re Howarth*, L. R. 8 Ch. App. 415.

¹³ *Corbett v. Tottenham*, 1 Ba. & B. 59.

¹⁴ *Re Breeds' Will*, 1 Ch. D. 266.

¹⁵ *Re Coore*, W. N. [1883] 167.

children, and she marries again, the order is at an end, and a fresh application to the court ought to be made. But such order does not determine on the death of one of two trustees, who were parties to it.¹ If an increase of the allowance is required the application should be made by an ordinary summons, supported by an affidavit showing the necessity for the increase.²

Guardian not
discharged by
mere payment
to co-guardian.

One guardian is not discharged by evidence of payment of income of the trust fund to his co-guardian for support of the infant ward, but he is not to be bound to vouch the items of expenditure, if the ward has been properly maintained and educated in proportion to the sum expended.³

¹ *Brown v. Smith*, 10 Ch. D. 377, reversing 46 L. J. Ch. 866.

² Dan. Ch. Pr. 1126.

³ *Re Evans, Welch v. Channell*, 26 Ch. D. 58.

CHAPTER VI.

RIGHTS AND DUTIES OF GUARDIANS IN RESPECT OF THE PROPERTY OF THE WARD.

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Guardianship
a trust.

GUARDIANSHIP is a trust, and the Court of Chancery, as exercising supreme control over trusts, watches with vigilance over the management of the property of wards by their guardians. "The relation of guardian and ward is strictly that of trustee and *cestui que trust*. I look on it as a peculiar relation of trusteeship. . . . A guardian is not only the trustee of the property, as in an ordinary case of trustee, but he is also guardian of the person of the infant, with many duties to perform, such as to see to his maintenance and education. I consider that . . . of all the property which he gets into his possession in the character of guardian, he is a trustee for the benefit of the infant ward."¹

General duties
of guardians.

All guardians of whatsoever description are bound to keep safely the property of their wards; they must account for the personal estate, and for the issues and profits of the real. If they make default in their trust they will be held personally responsible. A guardian is bound not to do anything which can place him in a position inconsistent with the interest of his trust, or which has a tendency to interfere with his duty in discharging it.²

Guardian
must exercise
the care of a
prudent man.

In managing the affairs of his ward, the guardian is bound to exercise the same care and prudence as a prudent man of business would exercise in the management of his own affairs, but he is not responsible for more. So if he has a discretion, he must exercise it in a fair and honest manner, and if a loss is the result, he cannot be made to bear it; to render him liable some negligence in the transaction must be proved.³ Consequently, it has been determined that trustees are not bound personally to transact such business connected with or arising out of the proper duties of their trust as, according to the usual mode of conducting business of a like nature, persons acting with reasonable care and prudence on their own account would ordinarily conduct through mercantile agents; and that when, according to

When guar-
dian may
delegate his
duties.

¹ Per Lord Romilly in *Mathew v. Brise*, 14 Beav. 345.

² See *Hamilton v. Wright*, 9 Cl. & Fin. 111.

³ See *Ex parte Belchier*, Amb. 218; *Speight v. Gaunt*, 9 App. Cas. 1.

the usual and regular course of such business, moneys receivable or payable ought to pass through the hands of such mercantile agents, that course may properly be followed by trustees, though the moneys are trust moneys; and that if, under such circumstances, and without any other misconduct or default on the part of the trustees, a loss takes place through any fraud or neglect of the agents employed, the trustees are not liable to make good such loss. But the guardian or trustee must not delegate the execution of his trust unless there is either some moral necessity or sufficient practical reason for so doing.¹ And it has been held that where trustees for sale are selling, they must receive in person the purchase-money, and not delegate their solicitor to receive it unless specially authorized to do so.²

As another consequence of the fiduciary relation of guardian and ward, the guardian can make no profit out of his office, but must in all things act for the benefit of his ward. Whatever advantage or profit results from his dealings with the ward's property accrues entirely for the ward's benefit. "The guardianship should be managed for the ward's benefit. The guardian cannot reap any benefit from the use of the ward's money. He cannot act for his own benefit in any contract, or purchase, or sale, as to the subject of the trust. If he purchases in his character as guardian, he presumptively uses his ward's funds for that purpose. If he settles a debt upon beneficial terms, or purchases it at a discount, the advantage is to accrue entirely to the ward's estate. He cannot be permitted to place himself in an attitude of hostility to his ward, or derive any benefit from the latter's loss. Wherever he abuses the confidence reposed in him, he will be held to a strict accountability."³ If he does unauthorized acts which redound to the advantage of the ward, they will be sanctioned, and the ward will enjoy the benefits derived from them; if, on the contrary, they result in a loss, they will not be sanctioned, but the ward will not be saddled with the loss; and therefore, where there is any doubt, the guardian should apply to the court for directions and sanction.⁴ A guardian is personally liable for his breaches of trust, and he cannot make the estate of his ward suffer for them; thus, if he invest trust funds in unauthorized investments, on one of which a profit is made, and on the other of which there is a loss, he cannot set off the profits against the loss, but must let the estate have the benefit of the profits, while he remains personally liable for the loss.⁵ An infant ward, or *cestui que trust*, cannot authorize a breach of trust,⁶

Guardian may make no profit out of his office.

¹ See *Ex parte Belchier*, Amb. 218; *Speight v. Gaunt*, 9 App. Cas. 1.

² *Re Bellamy and the Metropolitan Board of Works*, 24 Ch. D. 387, reversing 52 L. J. Ch. 89.

⁴ See *Milner v. Lord Harewood*, 18 Ves. 259.

⁵ See *Farrer v. Farrer*, 76 L. T. Jour. 37.

³ Sch. Dom. Rel. s. 348.

⁶ *Wilkinson v. Parry*, 4 Russ. 272.

Guardian cannot, as a rule, purchase estate of ward.

When trustee may buy.

or bind himself by adopting it.¹ So a trustee cannot, as a rule, purchase the estate of his ward, for as the relations of vendor and purchaser are antagonistic, the interests of the ward would be likely to suffer.² Again, the situation of the trustee gives him an opportunity of knowing the value of the property, and as he acquires that knowledge at the expense of the *cestui que trust*, he is bound to apply it for the *cestui que trust's* benefit.³ But in cases where it would be for the infant's benefit, and absolutely necessary that the estate should be sold, and the trustee is willing to give more than any one else, he may bring a suit, make his proposals, and ask leave of the court to effect the purchase, in which case the court will examine into the circumstances, inquire whether the price offered was the best that could have been obtained, and after inquiry, will let another person prepare the particulars of sale, and allow the trustee to bid. In such a case, the ward and guardian are, so far as the property and the sale are concerned, at arm's-length towards one another. If the court has sanctioned the application, and the guardian has purchased, he will be protected; but if he has purchased without the sanction of the court, even though he has given an adequate price, the transaction will under the circumstances be set aside at the suit of interested parties, and a re-sale directed;⁴ and if the property does not fetch the price given or agreed to be given by the guardian, the latter will be fixed with the amount agreed to be given.⁵ If as trustee a guardian renews a lease which is beneficial, it will enure for the good of the infant;⁶ though he may have purchased the old lease from the infant and been in occupation several years;⁷ or is jointly interested with the infant;⁸ and even where the landlord may have refused to renew for the infant, but allowed the guardian or trustee to renew for himself.⁹

Unauthorized acts of guardians.

A guardian who does an act in his ward's name or on behalf of his ward, does not necessarily bind him or his estate,¹⁰ but renders himself personally liable, and "it is a general principle that acts done by a guardian without authority will be protected, and will bind the infant, if they turn out eventually beneficial to the latter; but the guardian does such acts at his own risk,"¹¹ and "agreements are sometimes made on behalf of infants, without judicial sanction, yet so beneficial that they would be enforced in equity, and the infant would not be allowed to avoid them at full age."¹² If, on the contrary, the unauthorized transaction was not advantageous, the ward on arriving at majority

¹ *Zambaco v. Cassavetti*, L. R. 11 Eq. 439.

² *Campbell v. Walker*, 5 Ves. 678.

³ See *Ex parte James*, 3 Ves. 348.

⁴ See *Cary v. Cary*, 2 Sch. & Lef. 173.

⁵ *Campbell v. Walker* (*ubi sup.*).

See also *Tennant v. Trenchard*, Lr. 4 Ch.

App. 537.

⁶ *Griffin v. Griffin*, 1 Sch. & Lef. 352.

⁷ *Killick v. Flerney*, 4 B. C. C. 161.

⁸ *Ex parte Grace*, 1 B. & P. 376.

⁹ *Campbell v. Walker* (*ubi sup.*).

¹⁰ *Hooper v. Eyles*, 2 Vern. 480.

¹¹ Macph. Inf. 339.

¹² *Ibid.*

might disaffirm it, and require the guardian to place him *in statu quo*.

The general duties of guardians are to act for the benefit of the infant wards, and not to make any profit out of their estate ; and whatever advantage results from their dealings with the ward's property must accrue entirely for the advantage of the latter. They must account for whatever comes into their possession ; and not only must they so account, but they must do their best in the management of the real and personal estate of their wards. They must get in all the outstanding personal estate, whether it consists of legacies, or special or simple contract debts, and for such purposes they can give good quittances or receipts ; they must reduce the choses in action into possession. So, if the property produces an income, whatever surplus is left over after providing for the management of the property, and the education and maintenance of the ward, should be properly invested by them so as to make the estate as productive as possible. They may sue and vindicate their rights in the name of the ward as his next friends.¹ They must manage the property with a view that the most shall be made of the estate during minority, and not of the immediate income only.² They must not convert the ward's property, unless they are specifically authorized to do so, or obtain leave of the court ; they must not renew leases except for the infant's benefit ; and they must not break in upon capital, for it is their duty to preserve the principal entire.³ The guardian must not commit waste of his ward's land ; and to turn an ancient pasture into arable is on his part an act of waste.⁴

General duties
of guardians.

There is a difference to be noticed in the powers of a guardian appointed by the Court of Chancery, and of guardians not so appointed. A person who is appointed by the Court of Chancery guardian to an infant who is possessed of property is, so far as the property is concerned, in somewhat the position of a receiver (an officer who used to be more frequently appointed to manage an infant's estate than at present), but has more independent control over the ward's property than a mere servant of the court. It has been held that he had no control over the ward's property (such as to enable him to give a receipt to a tenant)⁵ unless he was empowered by an order of the court to use the whole of the infant's fortune in maintaining him ; but as he is compelled to give security to account on taking up the management of the

Difference in
powers of
Chancery and
other guar-
dians.

¹ 1 Dan. Ch. Pr. 106 ; Rules of the Supreme Court, 1883, Ord. xvi. r. 16. Where infants defend, guardians *ad litem* are specially appointed. *Ibid.*

² *Sutton v. Jones*, 15 Ves. 588.

³ *Davies v. Austen*, 1 Ves. 247 ; *Walker v. Wetherall*, 6 Ves. 473.

⁴ *Clark v. Thorp*, 2 Ves. Sen. 232.

⁵ *Ex parte Starkie*, 3 Sim. 339 ; but see Dan. Ch. Pr. 1129.

estate, it would seem that he must be entitled to some control over the property.¹

Testamentary
guardians :

The powers of testamentary guardians over the person and property of their ward are independent of the authority of the Court of Chancery, and are based upon those of the guardian in socage. The statute which creates their office defines their powers; but these powers over the real property of the ward are not precisely defined, and they have no estate in it;² but they may, as such, bring actions and avow in their own name, and make leases to take effect during the minority of their ward, but no longer;³ and do other acts as *domini pro tempore*.⁴ But they are amenable to the Court of Chancery, as exercising supreme jurisdiction over trusts, and are bound to render an account of the property received and managed by them. It is a matter of some doubt whether a guardian can assign dower. It has been stated that a guardian in socage cannot assign dower, on the ground that a writ of dower would not lie against him,⁵ and therefore a guardian appointed by the infant himself, or by the Court of Chancery, would not be able to do so. But a guardian in chivalry was enabled to assign it,⁶ and as a testamentary guardian to a considerable extent represents the old guardian in chivalry, such a one might be held capable of assigning it.

subject to the
control of the
court.

Management
by guardian
out of court.

If the infant is not a ward of court, the guardian or other person intrusted with his property must act, as to the real estate, according to his own powers as guardian or trustee; he must also follow any special directions, and he may exercise any powers contained in the instrument under which the infant is entitled; and he must, in the absence of such directions or powers, call in the money due to the infant, and invest it in trustee investments,⁷ or in the purchase of any existing charge on the infant's real estate; or he may leave it out, if he finds it on good mortgage security; but if he lays it out on mortgage of any other real estate than the infant's, or if he leaves it out, or, having got it in, invests it upon personal security, he does so at his own risk, even though he has express authority to lay out the money in such manner as he shall think most for the infant's advantage, and though the borrower is unquestionably solvent at the time. It is scarcely necessary to add that the infant's money must not be allowed to remain in trade. The investment of an infant's money on mortgage may, if beneficial to him, receive the retrospective sanction of the court.⁸

¹ 2 Dan. Ch. Pr. 1120, 1128.

³ *Roe dem., Parry v. Hodgson*, 2 Wils. 129.

⁵ 1 Rep. H. & W. 389.

⁷ See 52 & 53 Vict. c. 32.

² *Gardner v. Blane*, 1 Ha. 381.

⁴ Simp. Inf. 223.

⁶ Co. Litt. 35 a, 38 b

⁸ Macph. Inf. 270, and the cases there cited.

Where co-trustees have to receive money, they must all give a receipt for it, and it may be paid to *one*, who may hold it for a short time without any responsibility on the part of the others, but he ought not to retain the money longer than is absolutely necessary. The money ought to be deposited to their joint account in some bank of credit, if practicable.¹

Many of the powers now exercised by guardians, chancery and testamentary, did not originally exist, either as incident to their office, or as conferred upon them by the Court of Chancery; for the court itself had no inherent right to confer them.² It was found necessary to pass Acts of Parliament conferring jurisdiction upon the court to authorize or approve of the exercise of such powers by guardians of all kinds.

The subject-matter of this chapter will now be discussed in greater detail, and for that purpose will be thus divided:—

(1) Rights and duties of guardians in respect of the real estate of the ward.

(2) Rights and duties of guardians in respect of the personal estate of the ward.

(1) A guardian, it has been seen, must not convert the property of the ward, unless specifically authorized to do so. It has been laid down as a general rule that the nature of an infant's property must not be changed either by a guardian or a trustee out of court, or by the court itself, so as to convert personal into real, or real into personal estate.³ The reason for this rule is that the guardian has not the power, nor the Court of Chancery an inherent jurisdiction, to convert the ward's realty into personalty, merely because it would be beneficial.⁴ The infant himself is under a legal incapacity to enter into a binding contract to sell or purchase property; and to enable the guardian or trustee so to act, a special power must be given him in the instrument under which he is to act; and to enable the court so to act legislative interference is necessary.⁵ As regards personal property, the reason assigned is that as formerly an infant who had attained the age of twelve (if female), and fourteen (if male), could make a valid will of personalty, but not of realty, to convert his personal property into real property would be to deprive him of his power of testamentary disposition. The Wills Act, 1837,⁶ has taken away from an infant his power of making a will, and so the reason for the rule; yet it still remains.

Rights and duties of guardians in respect of the real estate of ward. Ward's property must not, as a rule, be converted.

¹ See *Walker v. Symonds*, 3 Swanst. 1.

² See *Taylor v. Philips*, 2 Ves. Sen. 23; *Russell v. Russell*, 1 Moll. 525.

³ Macph. Inf. 278.

⁴ *Field v. Moore*, 25 L. J. Ch. 66; *Calvert v. Godfrey*, 6 Beav. 97.

⁵ *Darley v. Darley*, 2 Jo. & Lat. 752, 758. See 44 & 45 Vict. c. 41, s. 5.

⁶ 1 Vict. c. 26, s. 7.

When conversion permitted.

The court will, however, allow personalty to be converted into realty if clearly for the benefit of the infant; and what the court will allow to be done by its own order, trustees or guardians will be allowed to do.¹ But the conversion will be one *sub modo*, and not to all intents and purposes; and if the infant owner died under twenty-one, the land purchased with his personalty would go to his legal personal representative, and not to his heir.²

A guardian cannot elect for his infant ward to change the nature of his property; thus, where money is directed to be laid out in land, and the person entitled to it is an infant, the guardian cannot elect to take it as money any more than the infant himself.³

Powers of sale conferred upon guardians may be exercised by them.

Where trustees or guardians have conferred upon them by the instrument under which they act a power of sale of realty, then they can exercise it; and if a particular time for the sale is appointed, they in their discretion can postpone the sale if for the infant's benefit;⁴ but even for his benefit they cannot anticipate it;⁵ and if they have a discretionary power to postpone a sale, a *bonâ fide* exercise of their discretion as to the time and mode of sale will not be interfered with.⁶ Where there is a power for sale, the trustees have an implied power to give receipts, otherwise the intention of the donor could not be carried out.⁷ Even when there was no power of sale under which the trustees or guardians could act, the Court of Chancery used to direct sales of infants' realty in suits by mortgagees, or in administration suits; and infants will be bound by the decrees of the court in such suits just as if they were adults; thus, where the predecessor in title of an infant had mortgaged his lands and died without discharging the incumbrance, and the mortgagee desired to foreclose, the court could order a sale of the lands when it was to the infant's advantage to sell rather than be foreclosed;⁸ and since realty has been made assets for the payment of all kinds of debts, though the heir or devisee be an infant, the court can direct the lands of the ancestor or devisor to be sold.⁹ It has now also jurisdiction to raise money by way of mortgage for the payment of debts.¹⁰ The court was formerly enabled to decree a conversion by way of sale or mortgage of the estate of an infant where he was absolutely entitled (but not otherwise), by declaring

When the court will direct a sale in the absence of a power. In suits for foreclosure and administration:

also by charging costs on the inheritance.

¹ *Inwood v. Twyne*, Amb. 417.

² *Ashburton v. Ashburton*, 6 Ves. 6.

³ See *Seeley v. Jago*, 1 P. Wms. 389.

⁴ *Morris v. Morris*, 6 W. R. 493.

⁵ *Johnstone v. Baber*, 8 Beav. 233; and see *Want v. Stallibrass*, L. R. 8 Ex. 175.

⁶ *Re Blake, Jones v. Blake*, 29 Ch. D. 913.

⁷ *Bredon v. Bredon*, 1 Russ. & Myl. 413.

⁸ 15 & 16 Viet. c. 86, s. 48. *Siffken v. Davis*, Kay, Appdx. 21.

⁹ 4 Geo. IV. & 1 Wm. IV. c. 47, s. 11; *Brook v. Smith*, 2 R. & M. 73.

¹⁰ 2 & 3 Vict. c. 60.

certain costs incidental to the management of his estate to be a charge on the inheritance, and directing them to be raised and discharged;¹ but this practice was principally followed where the property was small.² It is now provided that "if in any cause or matter relating to real estate, it shall appear necessary or expedient that the real estate or any part thereof should be sold, the court or a judge may order the same to be sold, and any party bound by the order and in possession of the estate or in the receipt of the rents and profits thereof, shall be compelled to deliver up such possession or receipt to the purchaser, or such persons as may be thereby directed."³

R.S.C. 1883,
Ord. LI r. 1.

Where an infant's realty has been sold under an order of court, and he has died under age, questions often arise between his heir-at-law and personal representative as to whom the proceeds belong. If it has been rightly converted there is no equity on the part of the infant's heir-at-law or remainderman to take the property in any other form than that in which it is found at his death. "Where the court has power to sell an infant's real estate, and orders it to be sold, the order operates as a conversion, and the estate then becomes personalty";⁴ and the court may obtain that power either through an express trust or by the infant himself appearing and consenting to his realty being sold,⁵ or by his guardian *ad litem*.⁶ But the mere fact of an infant being one of several plaintiffs in an action brought under the Partition Act of 1876, in which he is represented by next friend and counsel, in which action a request for sale is made by the parties does not amount to an election on the part of the infant that his share of the proceeds should be converted into personalty;⁷ but rather where an infant by a next friend is one of several plaintiffs by counsel requesting a sale, and a sale is ordered upon this request, the proceeds of the infant's share ought to be earmarked as real estate.⁸

Proper sale by
court converts,
though infant
die.

In order to meet the growing requirements of the times, which tend more and more to render the transfer of land easy and expeditious, and to assimilate it in that respect to personalty, various statutes have been passed for that purpose, of which the following are the most important: Partition Act, 1868.⁹ By section 3 it is enacted that

Statutes enlarging the
jurisdiction of
the court and
the powers of
guardians in
the matter of
sales.
Partition Act,
1868.

¹ *Glorer v. Barlow*, Chamb. Inf. 568; and 21 Ch. D. 788 n; and see *Jackson v. Talbot*, 21 Ch. D. 786.

² *Davis v. Turvey*, 8 L. T. 378.

³ Rules of the Supreme Court, 1883, Ord. LI. r. 1. This rule is based upon 15 & 16 Vict. c. 86, s. 55 (Chancery Procedure Act, 1852), but does not confer any new power on the court to order a sale. *Re Robinson, Pickard v. Wheeler*, 31 Ch. D. 247.

⁴ *Per Jessel, M.R.*, in *Wallace v. Greenwood*, 16 Ch. D. 365.

⁵ *Hyett v. Mehin*, 25 Ch. D. 735.

⁶ *Rimington v. Hartley*, 14 Ch. D. 630.

⁷ *Re Norton, Norton v. Norton*, [1900] 1 Ch. 101.

⁸ *Howard v. Jalland*, W. N. [1891] p. 210; *Re Norton, Norton v. Norton* (*ubi sup.*).

⁹ 31 & 32 Vict. c. 40.

"in a suit for partition, where, if this Act had not been passed, a decree for partition might have been made, then if it appears to the court that by reason of the nature of the property to which the suit relates . . . or of the disability of some of those parties, or of any other circumstance, a sale of the property and a distribution of the proceeds would be more beneficial for the parties interested than a division of the property between or among them, the court may, if it thinks fit, on the request of any of the parties interested, and notwithstanding the dissent or disability of any others of them, direct a sale of the property accordingly, and may give all necessary or proper consequential directions."

This applies to copyholds or customary freeholds. The court can deal with the interests of persons unborn, or not *sui juris*, by declaring them to be trustees within section 30 of the Trustee Act, 1850.¹ At one time it was a matter of doubt whether in a partition suit an infant (being under a disability) could pray for a sale of the property instead of a partition;² accordingly by the Partition Amendment Act, 1876,³ it was provided, to lay any such doubt, that in an action for partition a request for sale may be made, or an undertaking to purchase given on the part of an infant by the guardian or other person authorized to act on behalf of the infant. But it was further provided that the court should not be bound to comply with any such request or undertaking on the part of an infant unless it appeared that the sale or purchase would be for his benefit.⁴ Where an infant brings an action for sale in lieu of partition, and the sale is deemed advantageous for him, he, on the sale taking place, will be declared to be a trustee for the purchaser, to whom the next friend will be directed to convey.⁵ Where children not yet *in esse* may become entitled to real property, the court has no power to order either a partition or a sale of such property, unless the parties applying prove to the satisfaction of the court that it is necessary or expedient that the property or any part of it should be sold, in which case the court has power to make such an order; but if it is not shown that it is necessary or expedient, it has no such power.⁶ A tenant for life may make a partition of the property under the Settled Land Acts, 1882⁷ and 1884.⁸ A sale under these Acts does not effect a conversion of the infant's real estate; the proceeds of a sale of his lands under the Act will be treated as realty.⁹

Partition
Amendment
Act, 1876.

¹ 13 & 14 Vict. c. 60; *Lees v. Coulton*, L. R. 20 Eq. 20; *Basnett v. Moxon*, L. R. 20 Eq. 182.

² See *Young v. Young*, L. R. 13 Eq. 175 n; *France v. France*, L. R. 13 Eq. 173; *Davey v. Wietlisbach*, L. R. 15 Eq. 269; *Grove v. Comyn*, L. R. 18 Eq. 387.

³ 39 & 40 Vict. c. 17, s. 6.

⁴ *Rimington v. Hartley*, 14 Ch. D. 630. See Simp. Inf. 364-367.

⁵ *Davis v. Ingram*, [1897] 1 Ch. 477.

⁶ R.S.C., Ord. LI. r. 1; *Miles v. Jarvis*, W. N. [1883] 203.

⁷ 45 & 46 Vict. c. 38, ss. 3, 45.

⁸ 47 & 48 Vict. c. 18, s. 5.

⁹ *Foster v. Foster*, 1 Ch. D. 588.

Under the Settled Estates Act, 1877,¹

"it shall be lawful for the court, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement,² and subject to the provisions and restrictions in this Act contained from time to time to authorize a sale of the whole or any parts of any settled estates, or of any timber (not being ornamental timber) growing on any settled estates, and every such sale shall be conducted and confirmed in the same manner as by the rules and practice of the court for the time being is or shall be required in the sale of lands sold under a decree of the court."

Sale : Settled
Estates Act
1877.

Power of court
to authorize
sales of settled
estates.

"It shall be lawful for the court, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in this Act contained, from time to time to direct that any part of any settled estates be laid out for streets, roads, paths, squares, gardens, or other open spaces, sewers, drains, or watercourses, either to be dedicated to the public or not; and the court may direct that the parts so laid out shall remain vested in the trustees of the settlement, or be conveyed to or vested in any other trustees upon such trusts for securing the continued appropriation thereof to the purposes aforesaid, in all respects, and with such provisions for the appointment of new trustees, when required, as by the court shall be deemed advisable."³

The powers given by an order of court under this Act are not affected by section 56 of the Settled Land Act, 1882; and where it is sought to supersede or modify them a petition to that effect should be presented to the court under the earlier Act,⁴ and the court may not see fit to grant the prayer of the petition.⁵ The court has power to order, for good reasons, the sale to take place out of court.⁶ Applications under this Act must be made with the consent of all parties beneficially interested,⁷ unless the court dispenses with the concurrence or consent of such parties.⁸

Large powers of sale are given to the trustees of infants who are possessed of real property under the provisions of the Settled Land Acts, 1882⁹ and 1890.¹⁰

Settled Land
Acts, 1882 and
1890.

Powers of
trustees to sell
lands of
infants.

"Where a person, who is in his own right seised of or entitled in possession to land, is an infant, then for the purposes of this Act the land is settled land, and the infant shall be deemed tenant for life thereof."¹¹

"Where a tenant for life or a person having the powers of a tenant for life under this Act, is an infant, or an infant would, if he were of full age,

¹ 40 & 41 Vict. c. 18, s. 16.

² For what is a "settlement" under this Act, see *post*, p. 700.

³ Sect. 20.

⁴ *Re Poole's Settlement*, 50 L. T. 585.

⁵ *Re Barr-Haden's Settled Estates*, 49 L. T. 661.

⁶ Ord. LI. r. 1 a; for the procedure in sales by the court, see the above Order.

⁷ Sect. 24.

⁸ Sects. 25 and 28.

⁹ 45 & 46 Vict. c. 38.

¹⁰ 53 & 54 Vict. c. 69, s. 10, sub-s. 2; *Bruce v. Marquis of Ailesbury*, [1892] App. Cas. 356.

¹¹ Sect. 59. This includes an owner in fee subject to an executory limitation over sect. 58, sub-s. 2; see *Re Morgan*, 24 Ch. D. 114. An appointment of trustees for the purposes of the Act may be made on the application of a next friend. *Re Wells*, 31 W. R. 764.

be a tenant for life, or have the powers of a tenant for life under this Act the powers of a tenant for life under this Act may be exercised on his behalf by the trustees of the settlement, and if there are none, then by such person and in such manner as the court, on the application of a testamentary or other guardian or next friend of the infant, either generally or in a particular instance, orders.”¹

These two sections apply to infants domiciled abroad, who have property in this country, and where it would be to the interests of such infants that their property in this country should be sold, the court will appoint fit persons to be trustees under the Act notwithstanding their foreign domicile.² This provision, however, does not constitute the trustees trustees with power of sale of the settled land under section 42 of the Conveyancing and Law of Property Act, 1881,³ so as to entitle them to possession during the minority of the infant.⁴

Powers exercisable by tenant for life.

The powers of a tenant for life under this Act, which may be exercised by trustees or guardians on behalf of an infant, are thus defined in section 3 :—

Sale.

(i) “He may sell the settled land, or any part thereof, or any easement, right, or privilege of any kind over or in relation to the same; and

(ii) “Where the settlement comprises a manor—may sell the seignory of any freehold land within the manor, or the freehold and inheritance of any copyhold or customary land, parcel of the manor, with or without any exception or reservation of all or any mines or minerals, or of any rights or powers relative to mining purposes, so as in every such case to effect an enfranchisement; and

Exchange.

(iii) “May make an exchange of the settled land, or any part thereof, for other land, including an exchange in consideration of money paid for equality of exchange; and

Partition.

(iv) “Where the settlement comprises an undivided share in land, or under the settlement, the settled land has come to be held in undivided shares—may concur in making partition of the entirety, including a partition in consideration paid for equality of partition.

(1) “Every sale shall be made at the best price that can reasonably be obtained.

(2) “Every exchange and every partition shall be made for the best consideration in land or in land and money that can reasonably be obtained.

(3) “A sale may be made in one lot or in several lots, and either by auction or by private contract.

(4) “On a sale the tenant for life may fix reserve biddings and buy in at an auction.

(5) “A sale, exchange, or partition may be made subject to any stipulations respecting title, or evidence of title, or other things.

¹ Sect. 60. All applications to the court under the Act may be made by summons in Chambers. Settled Land Act Rules, 1882, r. 2.

² *Re Simpson, Re Whitechurch*, [1897] 1 Ch. 256.

³ 44 & 45 Vict. c. 41.

⁴ *Re Helyar, Helyar v. Beckett*, [1902] 1 Ch. 391.

(6) "On a sale, exchange, or partition any restriction or reservation with respect to building on or other user of land, or with respect to mines and minerals, or with respect to or for the purpose of the more beneficial working thereof, or with respect to any other thing, may be imposed or reserved and made binding, as far as the law permits, by covenant, condition, or otherwise, on the tenant for life and the settled land, or any part thereof, or on the other party and any land sold or given in exchange or on partition to him.¹

(7) "An enfranchisement may be made, with or without a re-grant of any right of common or other right, easement, or privilege, theretofore appendant or appurtenant, to be held or enjoyed with the land enfranchised, or reputed so to be.

(8) "Settled land in England shall not be given in exchange for land out of England."

Before the Settled Land Act, 1882, there was no power in the Court of Chancery to order the sale of heirlooms simply on the ground of benefit of the parties;² but now a tenant for life may sell such heirlooms or any part of them,³ where the sanction of the court is obtained.⁴ Heirlooms that devolve with a dignity, as well as with land may be sold.⁵ The tenant for life may bid at the sale.⁶ The court may refuse to order their sale.⁷ The discretion to be exercised by the tenant for life in the matter of the sale of heirlooms as in all other matters connected with the Settled Land Act,⁸ should be that of a fair and honest trustee acting for himself and all the other members of the family whose interests he holds in trust; and the like principles should guide the court in the exercise of its discretion in granting or withholding its consent to a sale.⁹ Trustees having power to sell settled lands have power to sell heirlooms.¹⁰ But the Act does not make saleable any property which vested in a tenant in fee simple would be unsaleable and inalienable.¹¹ Where heirlooms are sold, the money arising from their sale may be applied in discharge of incumbrances on the settled land without keeping such incumbrances on foot for the benefit of the infant remainderman, in whom the heirlooms would vest on attaining majority.¹² The money arising from the sale of heirlooms is capital money and to be invested or applied as other capital money arising under the Act, or may be invested in the purchase of other chattels to be settled and held on the same trusts as the original

Heirlooms.

Proceeds of sale capital.

¹ See 53 & 54 Viet. c. 69, s. 5.

² *D'Eyncourt v. Gregory*, 3 Ch. D. 635.

³ Sect. 37 (1).

⁴ *Ibid.* sub-s. 3. *Re Brown's Will*, 27 Ch. D. 179; *Re Houghton Estate*, 30 Ch. D. 102; *Re Duke of Marlborough's Settlement*, *Duke of Marlborough v. Marjoribanks*, 32 Ch. D. 1; *Re Stafford's (Lord) Settlement and Will*, *Gerard v. Stafford*, [1904] 2 Ch. 72.

⁵ *Re Rivett Carnac's Will*, 30 Ch. D. 136.

⁶ *Re Brown's Will* (*ubi sup.*).

⁷ *Re Beaumont's Settled Estates*, 58 L. T. 916.

⁸ See sect. 53.

⁹ *Re Earl of Radnor's Will Trusts*, 45 Ch. D. 402.

¹⁰ *Constable v. Constable*, 32 Ch. D. 233.

¹¹ *Re Rivett Carnac's Will* (*ubi sup.*).

¹² *Re Duke of Marlborough's Settlement*, *Duke of Marlborough v. Marjoribanks* (*ubi sup.*).

heirlooms; ¹ and if invested in land, the land so purchased is not subject to any charges created by the original settlement settling the land in a particular way and providing that the chattels should devolve with the settled land as heirlooms.²

The aim and scope of the Act is to increase the powers of the tenant for life, but less for his benefit than the well-being of the settled land, though the benefit of the former is not to be neglected by the trustees, who are to carry out the purposes of the Act; ³ and where the owner of the land (whether tenant in fee or in tail or for life) is an infant, the option of putting the provisions of this Act in force (to be personally exercised by an adult tenant for life) must be exercised by the trustees of the settlement on his behalf.⁴ Trustees without a specific power of sale (so as to become trustees with power of sale under the Conveyancing Act, 1881 (section 42)), are not entitled to possession of the settled land as against a testamentary guardian during the infancy of the ward.⁵ Where an infant tenant for life under the Act has testamentary guardians appointed for him with certain powers of sale and leasing, and there are also trustees under a settlement with certain powers to be exercised at the request and by the directions of the testamentary guardians, the testamentary guardians can only exercise their powers with the consent of the trustees of the settlement; and the latter can put in force their powers under the settlement only at the request and by the direction of the testamentary guardians during minority; but where the trustees of the settlement can under the Act exercise powers purely statutory, that is, such as are conferred upon them solely by the Act, the consent of the testamentary guardians is not requisite.⁶ The trustees who may so act are either the trustees of the settlement (with a power of sale) or persons appointed in pursuance of this Act. A separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property, notwithstanding that no new trustees or trustee are or is to be appointed for other parts of the trust property, and any existing trustee may be appointed or remain one of such separate set of trustees, or if only one trustee was originally appointed, then one separate trustee may be so appointed for the first-mentioned part.⁷ It shall not be obligatory to appoint

¹ Sect. 37, sub-s. 2.

² *Re Duke of Marlborough and Governors of Queen Anne's Bounty*, [1897] 1 Ch. 712. ³ *Bruce v. Marquis of Ailesbury*, [1892] App. Cas. 356.

⁴ This, as has been seen, is effected by turning an infant who is in his own right seised of or entitled in possession to land into a tenant for life for the purposes of the Act (sect. 59). See *ante*, p. 695.

⁵ *Re Helyar, Helyar v. Beckett*, [1902] 1 Ch. 391.

⁶ *Re Duke of Newcastle's Estates*, 24 Ch. D. 129.

⁷ 56 & 57 Vict. c. 53, s. 10, sub-s. 2 (f).

more than one new trustee where only one trustee was originally appointed, or to fill up the original number of trustees where more than two trustees were originally appointed, but except where only one trustee was originally appointed, a trustee shall not be discharged under this section from his trust unless there will be at least two trustees to perform the trust.¹ The court will not appoint as trustees under this Act the tenant for life,² the solicitor of the tenant for life,³ but if such solicitor has been appointed out of court, and is a proper person, then the court may ratify his appointment; ⁴ or persons who are nearly related to each other,⁵ nor a remainderman.⁶ But a woman may be appointed where she appears to have exceptional qualifications.⁷ Where there are no trustees of the settlement within the definition of this Act, persons appointed under section 60 may sell the settled land, though in such case the purchase-money must be paid into court.⁸

To put in force the powers of the court under the Settled Estates Act, 1877, the application to the court must be by petition;⁹ but under the Conveyancing and Law of Property Act, 1881,¹⁰ and the Settled Land Act, 1882, it may be by way of summons at chambers, or by petition.¹¹

Where an infant's real or personal estate has for his benefit been converted, either by direction of the court, or by trustees and guardians, there is no equity on the part of the heir-at-law, or of the legal personal representative, to take the property in any other form than that in which it is found at the death of the infant. It is otherwise where the conversion has been altogether wrongful, or an equity for reconversion arises under the provisions of the Settled Estates Act, 1877.¹² Under the Rules of the Supreme Court, 1883,¹³ the Court of Chancery has no new power of sale of an infant's real estate conferred upon it, and can only order a sale when it is necessary or expedient for the purposes of the action before it that the property should be sold; and the court, as a rule, can only approve of a sale which the executors or trustees of the will or deed to which the proceedings before

Procedure in putting the Acts in motion.

Equity for conversion in infants heir-at-law or personal representative.

¹ 56 & 57 Vict. c. 53, s. 10, sub-s. 2 (c).

² *Re Harrop's Trusts*, 24 Ch. D. 717.

³ *Re Kemp's Settled Estates*, 24 Ch. D. 485; and see *Re Spencer's Settled Estates*, [1903] 1 Ch. 75.

⁴ *Re Marquis of Ailesbury*, [1893] 2 Ch. 360; *Re Stamford (Earl of)*, *Payne v. Stamford*, [1896] 1 Ch. 288.

⁵ *Re Knowles' Settled Estates*, 27 Ch. D. 707.

⁶ *Re Paine's Trusts*, 28 Ch. D. 725.

⁷ *Re Peake's Settled Estates*, [1894] 3 Ch. 520.

⁸ *Re Countess of Dudley's Contract*, 35 Ch. D. 338.

⁹ 45 & 46 Vict. c. 38, s. 23.

¹⁰ Sect. 69, sub-s. 3. See *Re Lillwall's Settlement*, 30 W. R. 343.

¹¹ Sect. 46, sub-s. 3.

¹² 40 & 41 Vict. c. 18, ss. 34-36. See *Foster v. Foster*, 1 Ch. D. 588. In this case *Steed v. Preece*, L. R. 18 Eq. 192 was distinguished.

¹³ Ord. LI. r. 1; Ord. LV. r. 3 (f).

the court relate could have made themselves;¹ and where a sale is ordered in lieu of a partition, the court is very strict in protecting the interests of the infant.²

Leasing
powers of
trustees or
guardians :
originally of a
limited nature.

The leasing powers of trustees or guardians of their wards' estates will now be discussed. The powers of guardians, testamentary,³ or in socage,⁴ to deal with their wards' real estate (in which they had an interest) by way of granting or taking leases was very limited; and at law they had no power to give a stranger any interest in their wards' land beyond the period at which their own control over it ceased. A guardian appointed by the court had no power of making a lease valid at law, because he had no estate in the ward's property; and the court itself had no inherent jurisdiction to grant leases of an infant's property to last beyond his minority.⁵ The first step towards enlarging the powers of trustees and guardians of infants was made in 1830, in which year an Act⁶ was passed enabling the guardians of infants entitled to leases for a life or lives, or for any term of years, to apply to the Court of Chancery to surrender such leases and renew them;⁷ and where infants held under covenants to renew leases, they and their guardians under the direction of the court might execute new leases of the same premises.⁸ So, too, where it was for the infant's benefit, the court might authorize leases of their lands to be made for various purposes.⁹ Under this Act a lease might be granted to extend beyond minority.¹⁰

11 Geo. IV. and
1 Wm. IV.
c. 65.

Leases.

This enactment left the powers of guardians still very much restricted, and in order still further to widen them, the Settled Estates Act, 1856,¹¹ was passed; this was an Act to facilitate leases and sales of settled estates. This statute and its amending Acts have been repealed, and their provisions consolidated into one by the Settled Estates Act, 1877.¹² A "settlement" under this Act is thus defined:—

Settled
Estates Act,
1877.

Definition of
"settlement."

"A settlement shall signify any Act of Parliament, deed, agreement, copy of court roll, will, or other instrument, or any number of such instruments, under or by virtue of which any hereditaments of any tenure or any estates or interests in any such hereditaments stand limited to or in trust for any such persons by way of succession, including any such instruments affecting the estates of any one or more of such persons exclusively."¹³

Definition of
"settled
estates."

"The term 'settled estates' as used in this Act shall signify all

¹ *Re Robinson, Pickard v. Wheeler*, 31 Ch. D. 247.

² *Willis v. Willis*, 61 L. T. 610.

³ *Ante*, p. 622.

⁴ *Ante*, p. 613.

⁵ *Simp. Inf.* 367 and the cases there cited.

⁶ 11 Geo. IV. and 1 Wm. IV. c. 65.

⁷ *Sect. 12.* This applies to leases to which the infants are beneficially entitled.

Re Griffiths (Infants), 29 Ch. D. 248.

⁸ *Sect. 16.*

⁹ *Sect. 17.*

¹⁰ *Anstey v. Hobson*, 2 W. R. 46. See *Simp. Inf.* 368, 369.

¹¹ 19 & 20 Vict. c. 120.

¹² 40 & 41 Vict. c. 18.

¹³ *Sect. 2.*

hereditaments of any tenure, and all estates or interests in any such hereditaments which are the subject of a settlement.”¹

“All powers given by and all applications to the court under this Act, and consents to, and notifications respecting such applications may be executed, made, or given by, and all notices under this Act, may be given to a guardian on behalf of an infant.”²

A father is not a guardian, though he has no adverse interest and concurs;³ neither is a testamentary guardian.⁴

The chief provisions of this Act in reference to the powers of leasing by trustees and guardians are as follows:—

Powers of
leasing under
the Act.

“It shall be lawful for the court, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled⁵ under the settlement, and subject to the provisions and restrictions in this Act contained, to authorize leases of any settled estates, or of any rights or privileges over or affecting any settled estates, for any purpose whatsoever, whether involving waste or not, provided the following conditions be observed:—

“First, every such lease shall be made to take effect in possession at or within one year next after the making thereof, and shall be for a term of years not exceeding for an agricultural or occupation lease, so far as relates to estates in England twenty-five years, or so far as relates to estates in Ireland thirty-five years, and for a mining lease,⁶ or a lease of water mills, way leaves, water leaves, or other rights or easements forty years, and for a repairing lease sixty years, and for a building lease ninety-nine years: Provided always, that any such lease (except an agricultural lease) may be for such term of years as the court shall direct, where the court shall be satisfied that it is the usual custom of the district and beneficial to the inheritance to grant such a lease for a longer term than the term hereinbefore specified on that behalf.

“Secondly, on every such lease shall be reserved the best rent or reservation in the nature of rent, either uniform or not, that can be reasonably obtained, to be made payable half-yearly or oftener without taking any fine or other benefit in the nature of a fine: Provided always, that in the case of a mining lease, a repairing lease, or a building lease, a peppercorn rent or any smaller rent than the rent to be ultimately made payable may, if the court shall think fit so to direct, be made payable during all or any part of the first five years of the term of the lease.

“Thirdly, where the lease is of any earth, coal, stone, or mineral, a certain portion of the whole rent or payment reserved shall be from time to time set aside and invested as hereinafter mentioned, namely, when and so long as the person for the time being entitled to the receipt of such rent is a person who by reason of his estate or by virtue of any declaration in the settlement is entitled to work such earth, coal, stone, or mineral for his own benefit, one-fourth part of such rent, and otherwise three-fourth parts thereof. And in every such lease sufficient provision shall be

¹ Sect. 2.

² Sect. 49.

³ *Re Caddick's Estate*, 7 W. R. 334.

⁴ *Re James*, L. R. 5 Eq. 334; *Re Nolleston*, cited 2 Ch. D. 39.

⁵ “Entitled” means beneficially entitled. *Grey v. Jenkins*, 26 Beav. 351.

⁶ Mining leases may now be increased to sixty years. 45 & 46 Vict. c. 38, s. 6.

made to ensure such application of the aforesaid portion of the rent by the appointment of trustees or otherwise as the court shall deem expedient.

"Fourthly, no such lease shall authorize the felling of any trees except so far as shall be necessary for the purpose of clearing the ground for any buildings, excavations, or other works authorized by the lease.

"Fifthly, every such lease shall be by deed, and the lessee shall execute a counterpart thereof, and every such lease shall contain a condition for re-entry on non-payment of the rent for a period of twenty-eight days¹ after it becomes due, or for some less period to be specified on that behalf.²

"Subject and in addition to the conditions hereinbefore mentioned, every such lease shall contain such covenants, conditions, and stipulations as the court shall deem expedient with reference to the special circumstances of the demise.³

"The power to authorize leases conferred by this Act may be exercised by the court either by approving of particular leases or by ordering that powers of leasing, in conformity with the provisions of this Act, shall be vested in trustees in manner hereinafter mentioned."⁴

Court may vest its leasing powers in trustees.

The court may thus vest its own powers of leasing in trustees, and leases properly executed by them shall be as valid as if executed by the court itself.⁵

Conveyancing and Law of Property Act, 1881.

Under the Conveyancing and Law of Property Act, 1881,⁶ "where a person in his own right seised of or entitled to an estate in fee simple, or for any leasehold interest at a rent, is an infant, the land shall be deemed to be a settled estate within the Settled Estates Act, 1877."⁷ This includes land devised to trustees upon trust for an infant.⁸ The effect of this is to confer upon the court or the infant's trustees wide and considerable powers of leasing; and the power of leasing can be exercised when the infant is seised in fee in reversion.⁹

Settled Land Acts, 1882 & 1890.

Under the Settled Land Acts, 1882¹⁰ and 1890,¹¹ the powers of trustees and guardians in the matter of leases are still further increased. When an infant who is in own right seised of or entitled in possession to land is turned into a tenant for life under the Act,¹² the statutory powers of a tenant for life are to be exercised by his trustees.¹³ Thus, they may lease the settled land, or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same, for any purpose what-

Powers of leasing under the Act.

¹ The period for re-entry is now thirty days instead of twenty-eight. 45 & 46 Vict. c. 38, s. 7 (3).

² Sect. 4.

³ Sect. 5.

⁴ Sect. 10. Under this section the court may (1) either approve of particular leases, (2) or vest powers of leasing in trustees. Where the lease is approved by the court, and the court appoints a lessor to execute the lease, the covenants entered into by the lessor enure for the infant's benefit (sect. 12).

⁵ Sect. 13.

⁶ 44 & 45 Vict. c. 41.

⁷ Sect. 41.

⁸ *Re Sparrow's Settled Estate*, [1892] 1 Ch. 412.

⁹ *Re Letchford*, 2 Ch. D. 719.

¹⁰ 45 & 46 Vict. c. 38.

¹¹ 53 & 54 Vict. c. 69.

¹² Sect. 59.

¹³ Sect. 60. An infant whose interest is vested but liable to be divested on his death under twenty-one is within this section. *Re James*, 32 W. R. 898.

ever, whether involving waste or not, for any term not exceeding—(i) in case of a building lease, ninety-nine years; (ii) in case of a mining lease, sixty years; (iii) in case of any other lease, twenty-one years.¹ The court may authorize an extension of the above terms for building and mining purposes if the custom or requirements of the district in which the land is situated require a longer period;² but the court will exercise this power with circumspection; and where an infant tenant in tail was eighteen years old, and opposed a scheme by which a portion of his estate was to be let for two hundred years for building purposes, the court refused to grant the trustees general authority to make leases for such a term.³

Their leasing power is still further increased;⁴ thus, it extends to the making of:—

(i) “A lease for giving effect to a contract entered into by any of his predecessors in title for making a lease, which if made by the predecessor, would have been binding on the successors in title; and

(ii) “A lease for giving an effect to a covenant of renewal, performance whereof could be enforced against the owner for the time being of the settled land.

(iii) “A lease for confirming, as far as may be, a previous lease, being void or voidable; but so that every lease, as and when confirmed, shall be such a lease as might at the date of the original lease have been lawfully granted, under this Act, or otherwise, as the case may require.”

A tenant for life has further powers under the Settled Land Act, 1890, in respect of ordinary leases,⁵ mining leases,⁶ land granted for building purposes,⁷ and mansion-house and park.⁸

(1) “A tenant for life may accept, with or without consideration, a surrender of any lease of settled land, whether made under this Act or not in respect of the whole land leased, or any part thereof, with or without an exception of all or any of the mines and minerals therein, or in respect of mines and minerals, or any of them.

Surrenders.
Power to
accept sur-
render

(2) “On a surrender of a lease in respect of part only of the land or mines and minerals leased, the rent may be apportioned.

(3) “On a surrender, the tenant for life may take of the land or mines and minerals surrendered, or of any part thereof, a new or other lease, or new or other leases in lots.

(4) “A new or other lease may comprise additional land or mines and minerals, and may reserve any apportioned or other rent.

(5) “On a surrender, and the making of a new or other lease, whether for the same or for any extended or other term, and whether or not subject to the same or to any other covenants, provisions, or conditions, the value of the lessee’s interest in the lease surrendered may be taken into account in the determination of the amount of the rent to be reserved, and of any

¹ Sect. 6.

² Sect. 10.

³ *Cecil v. Langdon*, 54 L. T. 418.

⁴ Sect. 12.

⁵ Sect. 7.

⁶ Sect. 8.

⁷ Sect. 9.

⁸ Sect. 10. See *Bruce v. Marquis of Ailesbury*, [1892] App. Cas. 356.

fine to be taken, and of the nature of the covenants, provision, and conditions to be inserted in the new or other lease.

(6) "Every new or other lease shall be in conformity with this Act."

A fine on a lease granted under the Settled Land Act, 1882, is to be deemed capital money arising under that Act.¹ A building lessee under this Act may exercise an option after not less than ten years from the granting of the lease to purchase the property;² and the purchase-money is to be deemed for all purposes capital money arising under the Settled Land Act, 1882.³

Powers of
management
of ward's real
estate.

The trustees or guardians of infants, whether tenants for life or tenants in tail by purchase, were as a rule empowered under the settlement constituting their wards tenants for life, to exercise certain powers of management, but they were compelled to exercise those powers strictly within the terms of their authority, on pain of being rendered liable for a breach of trust if any damage was sustained by their wards. The Legislature, to increase these powers, and to supply them where they did not exist, invested the Court of Chancery with power to authorize them (on application to it) to exercise the powers defined by the various Acts passed for that purpose.

Conveyancing
and Law of
Property Act,
1881.

Guardians and trustees have now wide powers of management of the real estate of their wards conferred upon them by the Conveyancing and Law of Property Act, 1881.⁴ Section 42 of that Act provides as follows:—

(1) "If and as long as any person who would but for this section be beneficially entitled to the possession of any land is an infant, and, being a woman, is also unmarried, the trustees appointed for this purpose by the settlement, if any, or if there are none so appointed, then the persons, if any, who are for the time being under the settlement trustees with power of sale of the settled land, or of part thereof, or with power of consent to or approval of the exercise of such a power of sale, or if there are none, then any persons appointed as trustees for this purpose by the court, on the application of a guardian or next friend of the infant, may enter into and continue in possession of the land, and in every such case the subsequent provisions of this section shall apply."⁵

Trustees for the purposes of the Settled Land Act are not trustees within this section so as to be entitled to possession of the settled land as against a testamentary guardian.⁶

(2) "The trustees shall manage or superintend the management of the land, with full power to fell timber or to cut underwood from time to time in the usual course for sale, or for repairs or otherwise, and to erect, pull

Management
of land;
cutting and
selling of
timber.

¹ 47 & 48 Vict. c. 18, s. 4.

³ 52 & 53 Vict. c. 36, s. 3.

⁵ This sub-section, dealing with the management of land of an infant during minority, applies where the infant takes by descent. See *Re Cwley*, [1901] 1 Ch. 38.

⁶ *Re Helyar, Helyar v. Beckett*, [1902] 1 Ch. 391.

² 52 & 53 Vict. c. 36, s. 2.

⁴ 44 & 45 Vict. c. 41.

down, rebuild, and repair houses and other buildings and erections, and to continue the working of mines, minerals, and quarries which have usually been worked, and to drain or otherwise improve the land or any part thereof, and to insure against loss by fire, and to make allowances to and arrangements with tenants and others, and to determine tenancies, and generally to deal with the land in a proper and due course of management, but so that where the infant is impeachable for waste, the trustees shall not commit waste, and shall cut timber on the same terms only and subject to the same restrictions on and subject to which the infant could, if of full age, cut the same.

(3) "The trustees may from time to time, out of the income of the land, including the produce of the sale of timber and underwood, pay the expenses incurred in the management, or in the exercise of any power conferred by this section, or otherwise in relation to the land, and all outgoings not payable by any tenant or other person, and shall keep down any annual sum, and the interest of any principal sum, charged on the land.

(4) "The trustees may apply at discretion any income which, in the exercise of such discretion, they deem proper, according to the infant's age, for his or her maintenance, education, or benefit, or pay thereout any money to the infant's parent or guardian, to be applied for the same purposes.

(5) "The trustees shall lay out the residue of the income of the land in investment on securities on which they are by the settlement, if any, or by law, authorized to invest trust money, with power to vary investments; and shall accumulate the income of the investments so made in the way of compound interest, by from time to time similarly investing such income and the resulting income of investments, and shall stand possessed of the accumulated fund arising from income of the land and from investments of income on the trusts following, namely:—

Residue to be invested in authorized securities.

(i) If the infant attains the age of twenty-one years, then in trust for the infant.

(ii) If the infant is a woman and marries while an infant, then in trust for her separate use, independently of her husband, and so that her receipt after she marries, and though still an infant, shall be a good discharge; but

Infant married woman.

(iii) If the infant dies while an infant, and being a woman without having been married, then, where the infant was under a settlement tenant for life, or by purchase tenant in tail or tail male or tail female, on the trusts, if any, declared of the accumulated fund by that settlement, but where no such trusts are declared or the infant has taken the land from which the accumulated fund is derived by descent, and not by purchase, or the infant is tenant for an estate in fee simple, absolute or determinable, then in trust for the infant's personal representatives, as part of the infant's personal estate;

Accumulations during minority.

but the accumulations, or any part thereof, may at any time be applied as if the same were income arising in the then current year.

(6) "Where the infant's estate or interest is in an undivided share of land, the powers of this section relative to the land may be exercised

jointly with persons entitled to possession of, or having power to act in relation to, the other undivided share or shares.

(7) "This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(8) "This section applies only where that instrument comes into operation after the commencement of this Act."¹

Trustees'
receipts.

Under the Settled Land Act, 1882,² provision is made for the giving of receipts by trustees; thus,

"the receipt in writing of the trustees of a settlement, or where one trustee is empowered to act, of one trustee, or of the personal representatives or representative of the last surviving or continuing trustee, for any money or securities paid or transferred to the trustees, trustee, representatives, or representative, as the case may be, effectually discharges the payer or transferrer therefrom, and from being bound to see to the application or being answerable for any loss or misapplication thereof, and in case of a mortgagee or other person advancing money, from being concerned to see that any money advanced by him is wanted for any purpose of this Act, or that no more than is wanted is raised."

Protection of
each trustee
individually.

Provision is also made for the protection of trustees both individually and generally, and for the reimbursement of the expenses incurred by them in carrying out their trust. Each person who is for the time being trustee of a settlement is answerable for what he actually receives only, notwithstanding his signing any receipt for conformity, and in respect of his own acts, receipts, and defaults only, and is not answerable in respect of those of any other trustee, or of any banker, broker, or other person, or for the insufficiency or deficiency of any securities, or for any loss not happening through his own wilful default.³

Protection of
trustees
generally.

The trustees of a settlement, or any of them, are not liable for giving any consent, or for not making, bringing, taking, or doing any such application, action, proceeding, or thing, as they might make, bring, take, or do; and in case of purchase of land with capital money arising under this Act, or of an exchange, partition, or lease, are not liable for adopting any contract made by the tenant for life, or bound to inquire as to the propriety of the purchase, exchange, partition, or lease, or answerable as regards any price, consideration, or fine, and are not liable to see to or answerable for the investigation of the title or answerable for a conveyance of land, if the conveyance purports to convey the land

¹ The effect of this section is to supersede the ordinary form of management clauses in settlements of real estate, and trustees or guardians acting under such settlements can exercise these statutory powers though omitted or only partially inserted in the instrument.

² 45 & 46 Vict. c. 38, s. 40.

³ Sect. 41.

in the proper mode, or liable in respect of purchase-money paid by them by direction of the tenant for life to any person joining in the conveyance as a conveying party, or as giving a receipt for the purchase-money, or in any other character, or in respect of any other money paid by them by direction of the tenant for life on the purchase, exchange, partition, or lease.¹ The trustees of a settlement may reimburse themselves or pay and discharge out of the trust property all expenses properly incurred by them.²

Trustees' reimbursement.

As an infant owner in fee is liable to keep down the interest on incumbrances, the guardians may devote the rents and profits of his realty to that purpose; and in the case of a mortgage, but no other real incumbrance, to reduce the principal.³ But he need not pay off a charge on the estate; and it is the practice to make an inquiry whether it would be for the benefit of the infant to pay off the charge.⁴ When the charge is paid off, it will not merge in the inheritance, but remain personalty,⁵ unless the merger can be shown to be beneficial.⁶ The tenant for life may sell or mortgage the settled land, or any part, for the purpose of discharging an incumbrance on it.⁷

Duty of trustees to keep down charges.
Owner of fee.

Though an adult tenant in tail is not bound to keep down the interest on charges except as against the remainderman, yet it is the duty of those who receive the rents and profits for the infant to apply them in keeping down the interest during the minority.⁸ This liability of the infant tenant in tail is only as against the remainderman, and his real and personal representatives have no equity against each other to vary the state of things as it existed at his death.⁹

Tenant in tail.

As the infant tenant for life is bound to keep down the interest on incumbrances, it is the duty of his guardians so to keep them down.¹⁰

Tenant for life.

A trustee or guardian in receipt of rents of an infant's property must pay out of them the succession duty.¹¹

Succession duty.

Under the Conveyancing and Law of Property Act, 1881, trustees and guardians have, it has been seen,¹² wide powers conferred upon them of managing the lands of their wards, including

Necessary expenses and repairs.

¹ Sect. 42.

² Sect. 43.

³ See *Palmer v. Danby*, 1 Eq. Cas. Abr. 261; S. C. Prec. Ch. 137.

⁴ *Norbury v. Norbury*, 4 Madd. 191.

⁵ *Forbes v. Moffatt*, 18 Ves. 384; *Dowling v. Bolton*, 1 Fl. & Kel. 462. In *Leys v. Price*, 7 Mod. 217, Lord Hardwicke observed (p. 221): "Where an infant is entitled to a personal estate, and also to a real one which is incumbered with debts and mortgages, the court will direct the personalty to go in discharge of the incumbrances: yet it will not order the mortgages to be assigned to attend the inheritance, but still to be considered distinctly as personal estate for the benefit of the infant."

⁶ See *Burgess v. Mawbey*, T. & R. 167, 175.

⁸ 53 & 54 Vict. c. 69, s. 11.

⁷ 53 & 54 Vict. c. 69, s. 11.

⁹ *Bertie v. Earl of Abingdon*, 3 Mer. 560.

¹⁰ *Revel v. Watkinson*, 1 Ves. Sen. 93.

¹¹ See *Brown v. Smith*, 46 L. J. Ch. 866.

¹² *Ante*, pp. 704 et seq.

the execution of necessary repairs and improvements. To manage properly, and perform the many duties laid upon owners of property, requires the outlay of money from time to time; and in his account the guardian or trustee will be allowed necessary expenses. Thus, where the infant is bound to renew leases, and the guardian renews them, he will be allowed the cost of renewal, and even has a lien on the estate for the cost.¹ The amount to be expended is quite a matter of discretion.²

A guardian need not be specifically authorized to expend sums on repairs or improvements, but if his expenditure is needful and proper, he will be allowed it;³ and not only actual guardians and trustees, but also those who have been in possession of the infant's property and made to account as bailiffs will be allowed expenses for proper repairs and improvements.⁴ In order to keep the estate in proper repair the guardian may apply surplus rents and profits, or the accumulations;⁵ and may be authorized to advance part of the personal estate to cultivate the real estate, if for the benefit of the infant's maintenance.⁶ Where the repairs have been necessarily incurred, but the income is insufficient to defray the expenses, the court will authorize the raising of the amount so expended by a mortgage of the estate;⁷ also by a sale.⁸ Where the infant is absolutely entitled, the court will direct a mortgage even for prospective repairs, but such repairs must be in the nature of salvage;⁹ but where the remainderman is an infant, the tenant for life must make out a strong case of salvage, if he desires to expend capital money on the settled estate or premises.¹⁰ Where the settled money is not capital money under the Settled Land Acts, the court would seem to have larger jurisdiction to expend such money on repairs.¹¹ But in case of land settled in favour of infants the court has no jurisdiction to sanction the raising of money by mortgage of the settled land for the purposes of pulling down and rebuilding houses thereon; though the value of the settled property would be greatly increased.¹² The inherent jurisdiction, however, of the Court of Chancery to sanction the expenditure by trustees of an infant's money on his property for purposes other than those sanctioned by the Settled Land Acts¹³ for the application of

Allowed,
though guar-
dian not
specifically
authorized to
expend.

Infant owner
in fee.

¹ *Davies v. Home*, 2 Sch. & Lef. 354.

² See *Bennett v. Wyndham*, 29 L. T. (O.S.) 138.

³ *Umbleby v. Kirk*, 1 C. P. Coop. 254.

⁴ See *Pelley v. Bascombe*, 11 W. R. 766.

⁵ *Cotham v. West*, 1 Beav. 381; *Griggs v. Gibson*, 21 W. R. 818.

⁶ *Re Household, Household v. Household*, 27 Ch. D. 553.

⁷ *Allan v. Backhouse*, 2 V. & B. 65; *Frith v. Cameron*, L. R. 12 Eq. 169.

⁸ *Garmstone v. Gaunt*, 1 Coll. 557.

⁹ *Re Jackson, Jackson v. Talbot*, 21 Ch. D. 786; *Glover v. Barlow*, cited in *Re Jackson, Jackson v. Talbot*.

¹⁰ *Re De Teissier's Settled Estates, De Teissier v. De Teissier*, [1893] 1 Ch. 153.

¹¹ See *Conway v. Fenton*, 40 Ch. D. 512.

¹² *Re Montagu's Settlement, Derbishire v. Montagu*, [1897] 1 Ch. 685.

¹³ 45 & 46 Vict. c. 38, s. 21; 53 & 54 Vict. c. 69, s. 13 (ii).

capital money has not been taken away by those Acts.¹ Mere ornamental improvements will not be allowed for unless they are substantial and beneficial in their nature.² Where the trustees do not assent to a scheme of improvement under the Settled Land Act, 1882, the tenant for life may apply to the court under section 44 of the Act.³

Where the infant is tenant in tail under a settlement, and is under no covenant to insure the settled premises, and his guardian devotes a portion of the rents and profits of the estate to paying on a policy of insurance of the premises against fire, and the premises are destroyed by fire, and it is subsequently found not beneficial for those interested in the settled property that the premises should be rebuilt or restored, the insurance money will belong to the infant tenant in tail as his personal estate, and will not be treated as real estate for the benefit of all persons interested in the settled estate.⁴

Infant limited owner not under covenant to insure

A tenant for life is bound to keep the property in a proper state of repair, and will not be allowed by the court to be recouped in respect of money spent in repairs;⁵ but as under the Settled Land Act, 1882, a tenant for life is empowered to sell and use the capital money in the execution of certain permanent improvements specified in that Act,⁶ the guardians or trustees of an infant tenant for life will be allowed to exercise the powers of an adult tenant for life in carrying out the improvements sanctioned by the Act.⁷ This now applies to improvements made before the passing of the Settled Land Act, 1882;⁸ and the court may order capital money to be applied in or towards payment of any improvement authorized by the Settled Land Act, 1882.⁹ Where under the Lands Clauses Act, 1845,¹⁰ the purchase or compensation money may be devoted to such purposes as redeeming the land tax, or discharging debts or incumbrances on the property or in the purchase of other lands to be settled to the same uses and trusts,¹¹ compensation money under the Act has been expended in erecting new buildings in the case of infants entitled as absolute owners.¹² But in other cases the guardians or trustees of infants will not be permitted to charge the inheritance, nor has the court power to do so.¹³ Where, however, trustees were empowered to manage an estate, and out of the income to repair and erect new and additional buildings, and to make such outlay for the

Infant tenant for life bound to keep premises in repair.

Effect of Settled Land Act, 1882.

When guardians not allowed to charge the inheritance.

¹ *Re Hawker's Settled Estates*, *Duff v. Hawker*, 66 L. J. Ch. 341.

² See *Bridge v. Brown*, 2 Y. & C. C. C. 181.

³ *Re Broadwater Estate*, 54 L. J. Ch. 1104.

⁴ *Seymour v. Vernon*, 16 Jur. 189; *Warwick v. Bretnall*, 23 Ch. D. 188.

⁵ See *Re Leigh's Estate*, L. R. 6 Ch. App. 887.

⁶ Sect. 25.

⁷ Sects. 3, 21, 25 and 60.

⁸ 50 & 51 Vict. c. 30, Settled Land Acts (Amendment) Act, 1887.

⁹ 53 & 54 Vict. c. 69, s. 15.

¹⁰ 8 & 9 Vict. c. 18.

¹¹ Sect. 69.

¹² *Ex parte Shaw*, 4 Y. & C. Exch. 506; and see *Re Budyard*, 2 Giff. 394.

¹³ *Floyer v. Banks*, L. R. 8 Eq. 115.

improvement of the estate as they should think fit, the court allowed payments for draining purposes.¹ The court will not at the instance of the tenant for life allow expenditure for repairs and improvements out of personal estate directed to be invested in land to the same uses as the realty;² it will only allow expenditure in the erection of new buildings.³ The state of the law seems to be this—a tenant for life, infant or adult, will not be allowed to charge the inheritance with expenditure for mere repairs which are not permanent improvements within the Act;⁴ but under certain statutory provisions, the tenant for life (and if an infant his trustees or guardians) may sell the settled land or any part of it, and devote the proceeds to various purposes, including improvements.

Cutting of
timber.

Timber forms an important adjunct to real property, and many important questions have arisen as to the right of cutting it, as to the person entitled to the proceeds when felled or blown down, and as to the nature of the proceeds in the eye of the law. The cutting and taking the proceeds of timber has always depended upon the rule against the conversion of real estate into personal, and to cut down and sell trees is just as much a conversion of one kind of property into another, as to sell the land upon which the trees have grown. To cut too much timber, when the cutting is allowed, is as much "waste" as to cut it at all when not allowed.

Infant tenant
in fee.

In cutting timber, the guardian or trustee is bound to act for the benefit of the infant; and when once it is cut for the infant's benefit, it becomes and remains as between his heir and personal representative personal estate, even though he die before he attain twenty-one.⁵

Tenant in
tail.

An infant tenant in tail in possession has the same right to cut down timber as an owner in fee; and it seems that his guardians have a like right to cut it down on their ward's estate,⁶ but they must do it properly, and in due course of management.⁷

Tenant for life
unimpeach-
able for waste
restrained
against
equitable
waste.

A tenant for life, unimpeachable for waste, was at law entitled to deal with his property as though he were a tenant in fee or in tail, but was restrained by the Court of Chancery from committing what was known as "equitable waste," such as cutting ornamental timber, or pulling down the mansion-house, or injuring the inheritance in a capricious or extravagant manner.⁸ By the

¹ *Re Leslie's Settlement Trusts*, 2 Ch. D. 185.

² *Brownskill v. Caird*, L. R. 16 Eq. 493; *Drake v. Trefusis*, L. R. 10 Ch. App. 364.

³ *Drake v. Trefusis* (*ubi sup.*); *Re Houghton Estate*, 30 Ch. D. 102. It is really difficult to see how the exception in favour of new buildings came to be made.

⁴ *Clarke v. Thornton*, 35 Ch. D. 307.

⁵ *Dyer v. Dyer*, 32 Beav. 504. Ornamental timber, however, may not be cut in such a case; *Turner v. Wright*, 2 De G. F. & J. 234.

⁶ *Saville's Case*, Cas. t. Talb. 16.

⁷ *Hussey v. Hussey*, 5 Madd. 44. See *Attorney-General v. Duke of Marlborough*, 3 Madd. 498; *Simp. Inf.* 390.

⁸ See *Garth v. Cotton*, 1 Ves. Sen. 524, 546.

Judicature Act, 1873, a tenant for life unimpeachable for waste has no longer any legal right to commit "equitable waste," unless an intention to confer such right shall expressly appear by the instrument creating such estate;¹ but he must exercise his powers in a husbandlike and proper manner. The guardians or trustees of an infant tenant for life unimpeachable for waste have no greater powers than those of an adult tenant for life, and if they exceed them, where they are not authorized by the instrument creating their trust, or do not obtain the sanction of the court to the exercise of them, they will be liable to account for the proceeds, and be personally and pecuniarily responsible for any damage or loss occasioned by their conduct. A tenant for life, unimpeachable for waste, may cut ornamental timber and take the proceeds of it, where the court itself would have directed the timber so cut to have been cut for the preservation of the remaining ornamental timber. But the court may, at the instance of the remainderman, grant an injunction restraining the tenant for life from cutting any ornamental timber which ought to be cut, and direct that the cutting shall be done under its supervision.²

When the tenant for life is not impeachable for waste, he may cut timber in the same way as a tenant in tail;³ and if he discharge incumbrances on the estate with the proceeds of the timber he is entitled to charge the inheritance with the amount realized by the sale of the timber;⁴ and so trustees who are not impeachable for waste may cut timber, though the court will take care that they exercise their rights for the benefit of the *cestui que trust*.⁵ Where an infant tenant for life under the Settled Land Act, 1882, is unimpeachable for waste, and the trustees of the settlement are directed to appropriate the proceeds of the sale in a particular way, the directions of the settlement and not of the Act are to be followed.⁶

A tenant for life, impeachable for waste, cannot injure the inheritance by cutting timber,⁷ though he may cut "timber-like" trees (that is, trees nearly approaching but not quite reaching the size at which they can be styled "timber"), in a due course of

What tenant for life may cut when not impeachable for waste.

When impeachable for waste.

¹ 36 & 37 Vict. c. 66, s. 25, sub-s. 3. It has been seen (*ante*, p. 705) that the trustees of an infant tenant for life have under the Conveyancing and Law of Property Act, 1881, wide powers of dealing with the timber on their ward's estate, but their powers are curtailed where the infant is impeachable for waste, and they can do no more than the infant so circumstanced could do if he were an adult (sect. 42, sub-s. 2).

² *Baker v. Sebright*, 13 Ch. D. 179.

³ *Bowles' Case*, 11 Rep. 796.

⁴ *Davies v. Westcomb*, 11 Sim. 425.

⁵ *Marquis of Downshire v. Lady Sandys*, 6 Ves. 107.

⁶ *Re Duke of Newcastle's Settled Estates*, 31 W. R. 782.

⁷ But see the Settled Land Act, 1882 (45 & 46 Vict. c. 38, s. 35), which enables a tenant for life impeachable for waste to cut timber ripe and fit for cutting with the consent of the trustees of the settlement, or by order of the court, and to set apart three-fourths of the proceeds as capital money under the Act. For the limitation of the rights of the tenant for life under this section, see *Re Llewellyn, Llewellyn v. Williams*, 37 Ch. D. 317.

cultivation, for the purpose of improving the growth, or allowing the development of timber trees; but he "can cut all that is not timber with certain exceptions. He cannot cut ornamental trees, and he cannot destroy 'germins,' as the old law calls them, or stools of underwood; and he cannot destroy trees planted for the protection of banks, and various exceptions of that kind; but, with those exceptions which are waste, he may cut all trees which are not timber, with again an exception, that he must not cut those trees which, being under twenty years of age, are not timber, but which would be timber if they were over twenty years of age. If he cuts them down, he commits waste, as he prevents the growth of the timber."¹ Where the timber is the crop itself, and felled at usual intervals, the tenant for life will be absolutely entitled to the proceeds, as being of the nature of rents and profits.² An equitable tenant for life is not entitled to windfalls.³ But where by custom certain trees (such as beeches) are "timber" and by local usage are "seasonable," that is, can be cut at seasonable times for use in the locality, the tenant for life is entitled to cut at such seasonable times a fair and proper quantity which does not amount to waste.⁴

Mines and
minerals.
Tenants in fee
and in tail.

Tenants for
life.

Tenants in fee and in tail in possession have full powers of opening new and working and developing old mines, and generally making the most of their mineral resources; and the guardians of those so entitled have the like powers, which they must exercise for the benefit of their wards. Tenants for life impeachable for waste may not open and work new mines, but may work and take the produce of open mines,⁵ or only dormant ones.⁶ The powers of the guardians or trustees of infant tenants for life will be regulated and controlled as their wards or *cestuis que trustent* are or are not made punishable for waste.⁷

Drainage.

Under 8 & 9 Vict. c. 56, s. 3, the guardian or next friend of an infant may petition the Court of Chancery for leave to make permanent improvements in land in their possession by way of drainage. So under the Settled Land Act, 1882, the guardians of an infant tenant for life may sell a portion of the settled estate, and devote the proceeds to the improvement of the property by way of drainage.⁸ Also under the Agricultural Holdings Act, 1883,⁹ where a landlord or tenant is an infant

¹ Per Jessel, M.R., in *Honywood v. Honynwood*, L. R. 18 Eq. 306, 310.

² *Honywood v. Honynwood* (*ubi sup.*).

³ *Re Harrison's Trusts, Harrison v. Harrison*, 28 Ch. D. 220.

⁴ *Dashwood v. Magnice*, [1891] 3 Ch. 306.

⁵ *Viner v. Vaughan*, 2 Beav. 466; *Miller v. Miller*, L. R. 13 Eq. 263.

⁶ *Bagot v. Bagot*, 11 L. T. 437.

⁷ Under the Conveyancing and Law of Property Act, 1881, the trustees of an infant tenant for life may work mines, minerals, and quarries, but they must be such as have been usually worked; and they have no power under the Act any more than they had under the general law to open and work new mines, &c.

⁸ See sect. 25, sub-ss. 1 and 3.

⁹ 46 & 47 Vict. c. 61, s. 25.

without a guardian, the County Court judge (who by the Act is the judge seised of such questions) may appoint a guardian of the infant for the purposes of the Act, one of which is the drainage of the lands of the infant owner or tenant.

Under the Inclosure Act, 1801,¹ guardians may accept allotments made in respect of the inclosure on behalf of their wards, but the latter are not prejudiced by the non-acceptance of the former, provided that they themselves accept their allotments within twelve months of their attaining twenty-one.² The guardians of infants may charge the lands allotted or exchanged to an amount not more than £5 per acre, and if the guardians are in possession of the lands on behalf of their wards, and advance the amount or share with which they are liable to be charged, the commissioners may mortgage the land in question for the reimbursement of their advance.³ Under the Inclosure Act, 1845,⁴ where a person interested in the land to be allotted or exchanged is an infant, the commissioners are empowered to nominate and substitute the guardian for the purposes of the Act in the place of the person so interested.⁵

Inclosure of commons, &c.

To carry out the purposes of the Tithe Commutation Act, 1836,⁶ where the patron of any benefice, or owner of lands or tithes, is an infant, his guardian (or if he has no guardian, a person nominated by the commissioners for the purpose) is substituted in the place of the infant patron or owner.⁷ Under a later Act the guardian of an infant tithe-owner may consent on his behalf to the redemption of the rent-charge in lieu of tithes of any parish which does not exceed £15 in amount, and which has not been apportioned; but the price to be paid must not be less than twenty-four times the amount of such rent-charge.⁸

Tithe Commutation Act, 1836.

Under 42 Geo. III. c. 116, guardians and all persons having authority to act for infants may contract and agree on their behalf for the redemption of any land-tax made redeemable which such infants could have redeemed if they had not been under an incapacity.⁹ Where guardians of infants are seised or possessed of any manors, messuages, lands, tenements, and hereditaments, in trust, and have authority to act for infants or issue unborn, they may on behalf of such, and under the restrictions and regulations contained in the statute mortgage, convey or grant any rent-charge out of any manors, &c., belonging to or limited or settled to the use or for the benefit of any such infants or issue unborn, which the latter might have sold, mortgaged or charged with any rent-charge for the purpose of redeeming any land-tax

Land Tax.

¹ 41 Geo. III. c. 109.

⁴ 8 & 9 Vict. c. 118.

⁷ Sect. 15.

² Sect. 18.

⁵ Sect. 20.

⁸ 9 & 10 Vict. c. 73, s. 1.

³ Sect. 30.

⁶ 6 & 7 Wm. IV. c. 71.

⁹ Sect. 14.

in respect of their estate or interest therein, if they had not been under incapacity.¹ Guardians who have contracted or shall contract on behalf of their infant wards for the redemption of land-tax charged on manors, &c., may transfer to the Commissioners for the Reduction of the National Debt so much of Government stock which shall be standing in the name or names of such infants, &c., as shall be sufficient for the redemption of the land-tax contracted for.² Where any person who has contracted for the redemption or purchase of any land-tax dies without completing his contract, his assets shall be liable to make good the contract; and if the person entitled to his estate is an infant, the executor, guardian, or trustee shall be indemnified against the infant for making good the instalments necessary to make good the contract.³

Lands Clauses
Consolidation
Act, 1845.

Where land belonging to infants is required for works and undertakings of a public nature (whether to be acquired by the promoters voluntarily or compulsorily), the guardians or trustees of the infants may, under the Lands Clauses Consolidation Act, 1845,⁴ sell and convey,⁵ or enfranchise copyholds, and release the lands from any rent-charge or incumbrance.⁶ The notice to treat must be given to the guardian of the infant, and not to his next friend, in cases where the promoters of the undertaking desire to take land compulsorily.⁷ If the purchase-money or compensation for lands conveyed by a guardian who could not have conveyed it except for the Act amounts to or exceeds £200, it is to be paid into court and remain deposited there for the various purposes enumerated in the Act.⁸ If it exceed £20 but does not reach £200, it may be either paid into the Bank of England or paid to two trustees nominated by the guardians of the infant (in case of infancy), if approved of by the promoters of the undertaking.⁹ If the sum is less than £20, then it is to be paid to the guardian or trustees of the infant.¹⁰

Powers of
guardians to
convey ward's
lands for vari-
ous special
purposes.

Guardians may sell, give, or convey the lands of their wards for the following purposes: For the sites of churches, or if the lands are copyholds, may enfranchise for that purpose;¹¹ for school sites, but the amount conveyed must not exceed one acre;¹² for churchyard and burial-places;¹³ for the erection of a house for charitable purposes;¹⁴ for any institution for the promotion of literature, science, fine art, &c.;¹⁵ but the site must not exceed one acre in extent.¹⁶

¹ Sect. 53.

² Sect. 128.

³ Sect. 166.

⁴ 8 Vict. c. 18.

⁵ Sect. 7.

⁶ Sect. 8.

⁷ *Earl of Harrington v. Metropolitan Railway Co.*, 13 L. T. 658.

⁸ Sect. 69.

⁹ Sect. 71.

¹⁰ Sect. 72.

¹¹ 58 Geo. III. c. 45, s. 36.

¹² 4 & 5 Vict. c. 38; and see 12 & 13 Vict. c. 49; 14 & 15 Vict. c. 24; and 15 & 16 Vict. c. 49.

¹³ 30 & 31 Vict. c. 133; and 31 & 32 Vict. c. 47.

¹⁴ 16 & 17 Vict. c. 137, s. 27.

¹⁵ 17 & 18 Vict. c. 112, s. 33.

¹⁶ Sect. 1.

A guardian should apply to the court where necessary, for directions as to repairs, drainage, investments in the purchase or mortgage of land, renewal of leases, admissions to copyholds, leases, cutting and selling timber, and the like.¹ For further powers of guardians in this matter, Mr. Simpson's book on the Law of Infants may be consulted.²

Application to court for directions.

Under the Copyhold Act, 1894,³ the guardians of an infant lord of a manor or copyhold tenant have full power to do what is acquired by the Act to be done by such infant lord or tenant.⁴ Trustees of a settlement with a right of presentation to a benefice are not thereby constituted patrons of the living.⁵

Copyhold Act, 1894.

(2) Guardians must not convert the personal estate of their wards into realty (just as they must not convert their realty into personalty), unless there is an express trust for conversion. The court itself has not this power except through the authority of the person directing the conversion. If the ward's personal property is converted into realty, the latter will be treated as personalty until he attains twenty-one.

Rights and duties of guardians in respect to the personal estate of ward.

Rule against conversion.

Conversion will be allowed under certain circumstances, such as where the property is of a wasting nature, as, for instance, leaseholds. In such a case the court implies the intention that such property should be converted into one of a more permanent character, and so become capable of succession. It will, accordingly, in such an instance, direct a sale and conversion into Government stock. Trustees acting out of court are bound to observe the same rule in their administration of property out of court, and if they fail to do so, will be liable as for a breach of trust.⁶ But if in the instrument creating the trust there is an intention that conversion should not take place in such cases effect will be given to the intention.⁷

When conversion allowed.

Guardians and trustees must use equal care in the management of their ward's and *cestui que trust's* personal estate as in the management of his real-estate. Their fiduciary position compels them on the one hand to be most careful of it, and on the other not to make any personal profit out of it. "A trustee who takes another man's money into his hands is bound, whatever other duties he may have to discharge, to take care that the money shall be preserved, and not to deal with it or to do anything with it which a prudent and reasonable man would not do with his own money."⁸ Thus, they must collect and call in all outstanding debts due to their ward, and generally realize his estate; and, if necessary, bring actions to enforce his claims and rights.

Duties of guardians as to the personal estate of their wards.

¹ R.S.C. Ord. LV. r. 2 (13); Simp. Inf. 357.

² P. 402.

³ 57 & 58 Vict. c. 46, s. 45.

⁴ Sect. 39.

⁵ *Leigh v. Leigh*, [1902] 1 Ch. 400.

⁶ Lewin, 330.

⁷ *Ibid.*

⁸ Per Bacon, V.C., in *Speight v. Gaunt*, 22 Ch. D. 727, 736.

If the trust fund be a chose in action, as a debt which may be reduced into possession, it is the trustee's duty to be active in getting it in; and any unnecessary delay in this respect will be at his own personal risk.¹ The guardian may compound or release a debt, and the infant ward is bound if the act appears to have been for the benefit of the trust estate.² He must not allow the trust funds to remain outstanding upon personal security, even though the borrower may be solvent at the time.³ But where the fund is invested on good mortgage security, the trustee or guardian need not call it in;⁴ but he must ascertain that there is no reason to suspect the goodness of the security.⁵

Parents, guardians, trustees, executors, receivers, and all persons whatever who hold, with or without authority, any property belonging to infants, though their powers over the estate may be various, are yet equally bound to secure, to manage, and to account for such parts of it as come within their reach; and are subject to all the rules by which trustees are required to be guided, and to some others having peculiar reference to the infancy of those for whom they act.⁶ It is not only their duty to call in and realize the personal estate of the ward, but to render it productive; they should therefore invest it in those securities which are authorized by the instrument creating their trust, or in default of such authorization in those which are sanctioned by the Court of Chancery. If the money be not properly invested and lost, the trustee will be liable;⁷ if he employ the fund for any purposes of his own, any profit made thereby will belong to the *cestui que trust*, while the loss will fall upon himself.⁸ Where the ward's money has been improperly embarked, the ward has an option either to take the profits, or to charge the trustee with five per cent. interest.⁹ Trustees are either authorized to invest their ward's funds in certain specified securities, or not authorized to invest them in any particular security, or they are allowed a wide range of choice. Where their discretion is uncontrolled they will be held harmless, if they have acted *bonâ fide*.¹⁰ If they are tied down to certain investments, they must not travel beyond the limit of their authority, or they will be rendered liable for a breach of trust; but if losses are incurred in carrying out their directions, they are not personally responsible for them. If they are not so authorized, then they should invest in those securities which are now sanctioned by Parliament, which from their nature are

Property
should be in-
vested in
authorized
securities.

¹ *Caffrey v. Darby*, 6 Ves. 488. See *Cann v. Cann*, 51 L. T. 770.

² *Blue v. Marshall*, 3 P. Wms. 381.

³ *Terry v. Terry*, Gilb. Eq. 16.

⁴ *Orr v. Newton*, 2 Cox, Eq. Cas. 274.

⁵ See *Ames v. Parkinson*, 7 Beav. 384.

⁶ Macph. Inf. 265.

⁷ *Fletcher v. Walker*, 3 Madd. 73.

⁸ *Docker v. Somes*, 2 Myl. & K. 655.

⁹ *Westover v. Chapman*, 1 Coll. 177.

¹⁰ *Re Brown, Brown v. Brown*, 29 Ch. D. 889.

subject to less variation than other stocks, and consequently to less depreciation in value.¹ Where they have a wide range of choice, they must exercise their discretion in a fair and honest manner; and they will be held liable for a reckless investment which a prudent man would have avoided.²

Where a testator dies leaving his capital or part of it embarked in trade, the trustees, unless distinctly authorized to carry on the trade, are bound to call in the money;³ at any rate, unless they are expressly so authorized, they should not carry on the trade without the sanction of the court.⁴ If the fund so embarked in trade is difficult to call in, the court will in proper cases allow the business to be carried on, but only on terms beneficial to the infant ward;⁵ but except on a creditor's suit, or the testator's will sanctions it, the court has no jurisdiction to authorize the continuance of the business.⁶ If the trustees, however, have acted *bonâ fide*, they will not be held responsible for not immediately converting the money;⁷ but this *onus* of justifying the non-conversion is thrown upon them.⁸ A trustee is personally liable for all debts incurred by him in carrying on the business, and he can only recoup himself out of the specific assets directed to be employed in the business.⁹

Duty of trustees where ward's property is embarked in trade.

So far is it the duty of a trustee to make his ward's estate productive, that if it is properly invested, and he improperly withdraw it, he will be charged with interest on the amount.¹⁰ While the money is awaiting immediate investment, the guardian should deposit it temporarily in a bank, but in such a manner that the *cestui que trust* may follow the fund into the hands of the bankers;¹¹ and it is no objection that the bank allows interest on the deposits.¹² But if the trustee pay the money to his own credit, and not to the separate account of the trust estate,¹³ or if he allow the drafts of another person to be honoured who draws upon the account and misapplies the money, the trustee will be personally liable for the consequences;¹⁴ and the trustee must not lodge the money in such a manner as to put it out of his own control, though it be not under the control of another.¹⁵

Ward's estate must be made productive.

¹ See Trustee Act, 1893 (56 & 57 Vict. c. 53).

² See *Re Brown, Brown v. Brown* (*ubi sup.*). ³ *Kirkman v. Booth*, 11 Beav. 273.

⁴ *Drake v. Fortune*, 1 Moll. 201; *Martindale v. Martindale*, 1 Jur. (N.S.) 932; *Perry v. Perry*, 17 W. R. 815. ⁵ *Perry v. Perry* (*ubi sup.*).

⁶ *Land v. Land*, 43 L. J. Ch. 311.

⁷ *Garrett v. Noble*, 6 Sim. 504.

⁸ See *Grayburn v. Clarkson*, L. R. 3 Ch. App. 605.

⁹ For the rights and liabilities of trustees and executors carrying on a business, see *Re Johnson, Shearman v. Robinson*, 15 Ch. D. 548; *Re Evans, Evans v. Evans*, 34 Ch. D. 597; and *Re Gorton, Dowie v. Gorton*, 40 Ch. D. 536.

¹⁰ *Mosley v. Ward*, 11 Ves. 581.

¹¹ *Ex parte Kingston, Re Gross*, L. R. 6 Ch. App. 632.

¹² *Re Marcon's Estate*, W. N. [1871] 148.

¹³ *Wren v. Kirton*, 11 Ves. 377; *Mathew v. Brise*, 6 Beav. 239.

¹⁴ *Evans v. Bear*, L. R. 10 Ch. App. 76.

¹⁵ *Lewin*, 327. *Salway v. Salway*, 2 R. & M. 215; *S. C. White v. Baugh*, 3 Cl. & Fin. 44.

But as the obligation of a guardian is to conduct the business of the trust in the same way as an ordinary prudent man of business and no further, if he has money of his ward's to invest, he may employ brokers and agents in cases in which they are employed in the ordinary course of business; and if the latter embezzle the trust funds made over to them in the ordinary course of business, the guardian will not be held responsible for the loss thereby occasioned. To render him liable negligence must be proved.¹ If a trustee lends trust money on a legitimate security, he is not to be charged with a breach of trust if loss ensues under various circumstances, provided when he made the loan he acted as a prudent and cautious person.² Under the Judicial Trustees Act, 1896,³ a trustee who has become personally liable for a breach of trust may be wholly or partly relieved from such liability, but only where he has acted honestly and reasonably, and ought fairly to be excused for the breach of trust, or for omitting to obtain the directions of the Court of Chancery in the matter of such breach.⁴ But the *onus* of proof of honest and reasonable action is on the trustee;⁵ and the mere fact that he acted honestly is not sufficient.⁶ The agent must not be employed out of the ordinary scope of his employment.⁷ To allow a solicitor to hold the securities on which the trust funds are invested may amount to such negligence.⁸

Infants as well as adults are, it seems, bound by the composition or release of a debt by a guardian, executor, or trustee, if the act appears to have been for the benefit of the trust estate.⁹

Specific duties
of guardians.

It is the duty of a trustee or guardian to secure and at the same time render productive the funds committed to his charge. In the first place, where there are directions to invest, he must strictly conform to them. He must not lend his ward's money on personal security,¹⁰ unless he is expressly authorized to do so.¹¹ He may invest on real securities in England, Ireland, and Wales, unless expressly forbidden to do so.¹² If he is negligent, and delays investing the trust funds in his hands, he will be held responsible, and be made to pay interest on them. The principles upon which those in a fiduciary position are chargeable with

When trustee
charged with
interest.

¹ *Speight v. Gaunt*, 9 App. Cas. See *ante*, p. 715.

² 56 & 57 Vict. c. 53, s. 8. This section institutes a standard by which reasonable conduct is to be judged. *Re Stuart, Smith v. Stuart*, [1897] 2 Ch. 583.

³ 59 & 60 Vict. c. 35, s. 3 (1).

⁴ See *Re Turner, Barker v. Iimey*, [1897] 1 Ch. 536.

⁵ See *Re Kay, Mosley v. Kay*, [1897] 2 Ch. 518; *Re Stuart, Smith v. Stuart*, (*ubi sup.*).

⁶ *Re Barker, Ravenshaw v. Barker*, 77 L. T. 712.

⁷ *Fry v. Topson*, 28 Ch. D. 268.

⁸ *Re Dewar, Dewar v. Brooke*, 54 L. J. Ch. 830.

⁹ Macph. Inf. 272.

¹⁰ *Walker v. Symonds*, 3 Swanst. 1, 80.

¹¹ See *Paddon v. Richardson*, 26 L. T. (O.S.) 33.

¹² 22 & 23 Vict. c. 35, s. 32; 44 & 45 Vict. c. 41, s. 42.

interest in respect of their trust funds have been thus laid down:¹ If an executor has retained balances in his hands which he ought to have invested, the court will charge him with simple interest at four per cent. on these balances; even if no case of wilful default is made out against him;² if, in addition to such retention, he has committed a direct breach of trust, or if the fund has been taken by him from a proper state of investment in which it was producing five per cent., he will be charged with interest after the rate of five per cent. per annum; if, in addition to this, he has employed the money so obtained by him in trade or speculation for his own benefit and advantage, he will be charged either with the profits actually so obtained by him from the use of the money, or with interest at five per cent. per annum, and also with yearly rests, that is, with compound interest.³ It seems only right and proper that in the last instance given, the guardian should be charged with compound interest, for his act is a gross form of breach of trust.

In cases where it is apprehended that the fund is in peril from the misconduct of trustees, or likely to be lost, the fund will be ordered to be paid into court; and not only can this course be ordered under such circumstances, but also under less serious state of affairs the *cestui que trust* has the right to have it paid into court. Where he proves his title to or interest in the fund (it is otherwise if he do not prove his title or interest),⁴ the court may call upon the person who admits directly or indirectly that he holds a fiduciary position in regard to the fund, to pay it into court;⁵ and if the trustee does not dispute the allegation of the *cestui que trust*, even though he does not appear, it is a sufficient admission upon which the court can act.⁶ Trustees or the majority of them having in their hands or under their control moneys or securities belonging to a trust may pay the same into court to be dealt with according to the orders of the court.⁷

If a legacy is directed to be paid to the trustee or guardian of an infant ward, the executor may safely pay it to the guardian or trustee, whose receipt will discharge the executor;⁸ and the legacy the guardian should advantageously invest. It is different where the legacy is directed to be paid to the ward himself, or there is no direction to pay it to his trustee or guardian; the

When trust fund ordered to be paid into court.

Payment of legacies due to ward.
Guardian's receipt.

¹ Per Sir John Romilly in *Jones v. Foxall*, 15 Beav. 388, 392.

² *Re Barclay, Barclay v. Andrew*, [1899] 1 Ch. 674.

³ See *Raphael v. Boehm*, 11 Ves. 92; *Knott v. Cottee*, 16 Beav. 77; *Re Barclay, Barclay v. Andrew* (*ubi sup.*). In this case the negligent trustees were charged compound interest at the rate of three per cent. on the balances. There is a tendency on the part of the court (though no rule) to charge a lesser rate of interest than 4 or 5 per cent., owing to lowering of the current rates of interest.

⁴ *Hagell v. Currie*, L. R. 2 Ch. App. 449.

⁵ *London Syndicate v. Lord*, 8 Ch. D. 84; *Freeman v. Cox*, 8 Ch. D. 148.

⁶ *Freeman v. Cox* (*ubi sup.*).

⁷ 56 & 57 Vict. c. 53, s. 43.

⁸ 1 Rep. Leg. 771; *Robinson v. Tickell*, 8 Ves. 142.

Payment of
ward's legacy
to testamen-
tary guardian.

infant ward cannot give a valid receipt, therefore the executor cannot safely pay it over to him, nor is there any one else to whom it can be paid. A legacy bequeathed to an infant domiciled abroad may be paid when he comes of age by the law of England or of his domicile, whichever is the earlier date.¹ Though a testamentary guardian has, under 12 Car. II. c. 24, the "custody, tuition, and management of the infant's goods, chattels, and personal estate," this right has been considered by some text-writers as not authorizing a trustee or executor to pay to the guardian a capital sum to which the infant is entitled.² But Lord Chancellor Brady, in an Irish case,³ held that the analogous Irish statute abolishing the Court of Wards and Liveries⁴ enabled the testamentary guardian to give a good receipt, and that a payment, during the minority of the ward, of a part of the *corpus* of the personal estate of the testator by the executor to the guardian was a valid payment. But it has been since decided that he is not entitled to obtain payment out of court of funds, the property of his infant ward, which have been paid into court under the Legacy Duty Act.⁵ This decision was based upon the ground that the testamentary guardian was not a person entitled to the funds paid into court within the meaning of the thirty-second section of the Legacy Duty Act, and was not in any way intended to impugn the accuracy of the Irish decision. Thus it may be said, that if the Irish case is rightly decided, under ordinary circumstances a testamentary guardian is entitled to give a receipt for funds coming to his infant ward, but not to have funds paid out to him which have been paid into court under the Legacy Duty Act. If the executor pay the legacy to an unauthorized person, he will, on the infant becoming of age, be liable to make good the amount of the legacy.⁶

Legacy Duty
Act, 1796.

Duties of
executors.

Appropriation
by executor.

To meet the difficulty in the way of executors, the Legacy Duty Act, 1796,⁷ provided that where an infant was entitled to a legacy, or the residue of any personal estate, the executor or administrator may pay the legacy into court.⁸ If the executor or administrator keep the money in his own hands, he will be decreed to make it good, with interest at four per cent.⁹ Where the executor appropriates a specific fund to answer the legacy, which afterwards turns out insufficient, or is lost, he must make it good.¹⁰ If he purports to appropriate specifically a sum to meet the legacy, which turns out insufficient or is lost, as between

¹ *Re Hellman's Will*, L. R. 2 Eq. 363.

² Macph. Inf. 273, 274; Lewin, 406.

³ *M'Creight v. M'Creight*, 13 Ir. Eq. Rep. 314.

⁴ 14 and 15 Car. II. c. 19.

⁵ *Re Cresswell*, 45 L. T. 468.

⁶ *Dagley v. Tolferry*, 2 P. Wms. 285.

⁷ 36 Geo. III. c. 52, s. 32.

⁸ Sect. 32. If the sum paid or transferred into court does not exceed £300 cash or £300 stock, the transfer and payment out may be applied for by *ex parte* summons at chambers. Cons. Ord. xxxv. 1 (2).

⁹ *Rimmell v. Simpson*, 18 L. J. Ch. 55.

¹⁰ *Byrchell v. Bradford*, 6 Madd. 13.

the infant and the residuary legatees, the former will not be made to bear the loss, because it is impossible for him to have assented to the appropriation.¹ On reaching majority the infant ward who is entitled absolutely to a fund on attaining twenty-one will have the fund paid out to him.² If a legacy is given to an infant charged on real estate payable at twenty-one, whether the trustee would be safe in accepting payment of the legacy before the infant attains twenty-one, is a question of construction of the instrument of donation; if the apparent intention of the charge is that the estate shall remain a continuing security for it, the trustee cannot safely receive payment of the legacy and invest it in Consols, for they may decline in value.³ But where a legacy is given to an infant, payable *in futuro*, the court, or the executor of his own authority, may lay out in the purchase of Government stock a sum equal to the legacy, and this appropriation binds all parties, and the legatee must abide by the rise or fall in the value of the funds.⁴ Where the appropriation is under the direction of the court, it binds the legatee, who must on the one hand bear all losses that flow from it, and on the other is entitled to all profits derived from it.⁵ But such appropriation must be reasonably sufficient for the purpose at the time it is made. Trustees or executors have the power, *virtute officii*, to appropriate specific assets to answer settled shares of residue, though the interests of infants are concerned.⁶ But it would be advisable, if the circumstances of the case were intricate and complicated, to obtain the sanction of the court to the appropriation.

Appropriation
by the court
binds legatee.

Where an infant on attaining majority is entitled absolutely to a fund which is in court, on reaching it, the court will order the fund to be paid out to him.⁷ If the payment out has been obtained by fraud or negligence, the guilty or negligent party will be held liable to replace the fund, and make good all loss.⁸

Receivers.

As a matter cognate to the subject of this chapter, it has been thought advisable to append a short account of that species of *quasi-trustees* or guardians known as receivers. They are now less frequently than formerly appointed to the care and management of infants' estates.

¹ *Baker v. Farmer*, L. R. 3 Ch. App. 537.

² *Isaac v. Gompertz*, 1 Ves. 44. ³ *Simp. Inf.* 413, and the cases there cited.

⁴ *Macph. Inf.* 275; *Green v. Pigot*, 1 Bro. C. C. 103.

⁵ *Green v. Pigot* (*ubi sup.*); *Burgess v. Robinson*, 3 Mer. 7; *Rock v. Hardman*,

4 Madd. 253. ⁶ *Re Nickels, Nickels v. Nickels*, [1898] 1 Ch. 630.

⁷ *Isaac v. Gompertz* (*ubi sup.*). If the sum to be paid out is over £1000 the application must be by petition. *Re Coore*, W. N. [1883] 169. If under that amount, by originating summons. R.S.C. Ord. LV. r. 2 (4).

⁸ See *Simp. Inf.* 432; *Re Dangar's Trusts*, 41 Ch. D. 178.

A receiver is appointed by the Court of Chancery for the purpose of protecting the property of those whose interests in it are the subject-matter of a suit, and his possession is that of the court itself,¹ or of the persons found entitled in the suit.² A receiver is an indifferent person between the parties appointed by the court to receive the rents and profits of real estate, or to get in and collect personal estate, or other things in question pending the suit, where it does not seem reasonable to the court that either party should do so, or where a party is incompetent to do so, as in the case of an infant.³ As regards the estate of an infant, the court will appoint a receiver without suit on petition or summons.⁴ A receiver may be appointed by an interlocutory order of the court in all cases in which it shall appear to the court to be just or convenient that such order should be made, and any such order may be made either unconditionally or upon such terms and conditions as the court shall think just.⁵

Receiver appointed without suit in the case of an infant.

When receiver appointed without suit in the case of an infant's estate.

The principle upon which a receiver is appointed is for the preservation of property until the question between the parties claiming it shall have been decided, but without prejudice to the right of possession of a party claiming by an interest paramount to the litigants.⁶ In the case of infants the court considers chiefly what will be most beneficial to their interests. In the following cases a receiver has been appointed:⁷ A receiver has been appointed where there is no guardian,⁸ or the guardian is abroad;⁹ where the trustees neglect to get in the personalty, so that the infant is deprived of maintenance;¹⁰ where the trustee is guilty of misconduct, or becomes bankrupt or insolvent;¹¹ so, if he refuses to act;¹² where the father insists on taking the profits of real estate and not applying them for the infant's benefit;¹³ where the tenant for life mismanages the estate, as by cutting timber improperly,¹⁴ or refusing to renew leases.¹⁵ The existence of a testamentary guardian is no objection to the court appointing a receiver, as the precise extent of such a guardian's powers over the property of the infant is by no means certain, and he is frequently unable to act without the assistance of the court.¹⁶ The same reasoning applies to a socage guardian, whose powers are the same as those

Receiver can be appointed when there is a testamentary guardian :

Guardian socage.

¹ *Angel v. Smith*, 9 Ves. 335.

² *Shap v. Carter*, 3 P. Wms. 379; *Portman v. Mill*, 8 L. J. Ch. 161.

³ *Dan. Ch. Pr.* 1664.

⁴ *Re. Leeming, Re. Gascoigne*, 20 L. J. Ch. 550. This is an exception to the usual rule.

⁵ 36 & 37 Vict. c. 66, s. 25, sub-s. 8.

⁶ *Berney v. Sewell*, 1 J. & W. 648.

⁷ *Simp. Inf.* 436.

⁸ *Hicks v. Hicks*, 3 Atk. 274.

⁹ *Westby v. Westby*, 2 C. P. Coop. 210.

¹⁰ *Richards v. Perkins*, 3 Y. & C. Exch. 299.

¹¹ *Dan. Ch. Pr.* 1670; *Waterlow v. Sharp*, W. N. [1867] 64.

¹² *Pulmer v. Wright*, 10 Beav. 234.

¹³ *Kiffin v. Kiffin*, cited 1 P. Wms. 705.

¹⁴ *Aburrow v. Aburrow*, 10 Sim. 602.

¹⁵ *Bennet v. Colley*, 5 Sim. 181, 192.

¹⁶ *Gardner v. Blane*, 1 Ha. 381.

of a testamentary one; unless, therefore, there are properly constituted trustees to manage an infant's real estates, the court generally appoints either a receiver, or a guardian of the estate who is in the nature of a receiver. Under special circumstances the trustee was appointed receiver with a salary; he had been receiver for many years, and the testator appointed him trustee; the estates being large, the court continued him as receiver.¹ Where infants are entitled to a share of property, and a receiver is appointed of the whole for their benefit, with the consent of the co-owners, the expense falls on the infants' shares.²

As a rule, a receiver when appointed must give security for the proper performance of his duties,³ which is usually double the amount of the annual income⁴ or value of the property likely to be got in by him during the currency of his periodical account.⁵

Where a receiver has been appointed to real estate, the tenants (if any) are ordered to attorn to him, and to pay him their rents in arrear, as well as the growing rents.⁶ After a tenant has attorned, the receiver may distrain in his own name for rent accrued during such tenancy;⁷ he may distrain at his own discretion for rent in arrear within the year, but if in arrear for more than a year, then an order of the court is necessary.⁸ For his further powers of letting and demising, see Daniel's Chancery Practice.⁹ The receiver may expend small sums on such matters as ordinary repairs without leave;¹⁰ but if a large outlay is required, recourse must be had to the court for leave,¹¹ and he should not defend an action without such leave.¹²

It is the duty of a receiver appointed to get in outstanding personal estate, to get in all that he can reach, and the court will assist him in enforcing the claims.¹³ A receiver should not attempt to bring an action to recover a debt without the consent of the court.¹⁴ When he has got it in, it is his duty to pay it into court at the appointed times; he must not pay anything out without the order of the court; for he "has no right *ex mero motu* to apply the money in his hands in payment of debts due either to himself or to other persons; he has no right to apply such moneys otherwise than as the court or tribunal appointing him may direct";¹⁵ but where he is ordered to keep down incumbrances, or make any other payments, he must comply with such order, and the sums so paid by him will be allowed in his accounts.¹⁶

¹ *Bury v. Newport*, 23 Beav. 30.

³ R.S.C. 1883, Ord. L. r. 16.

⁵ Dan. Ch. Pr. 1687.

⁶ *Codrington v. Johnstone*, 1 Beav. 520, 524; *Hobson v. Sherwood*, 19 Beav. 575.

⁷ Woodf. L. & T. 458.

⁹ Pp. 1699 *et seq.*

¹¹ Dan. Ch. Pr. 1700.

¹³ Dan. Ch. Pr. 1701.

¹⁵ Per Kindersley, V.C., in *Coope v. Cresswell*, L. R. 5 Eq. 106, 115.

¹⁶ Dan. Ch. Pr. 1701.

² *Smith v. Lyster*, 4 Beav. 227.

⁴ Set. Judg. & Ord. 654.

⁸ *Brandon v. Brandon*, 5 Madd. 473.

¹⁰ *Thornhill v. Thornhill*, 14 Sim. 600.

¹² *Bristowe v. Needham*, 2 Ph. 190.

¹⁴ See *Re Hopkins, Doid v. Hawtin*, 19 Ch. D. 61.

Receiver's
liabilities.

He will be liable for any loss which may be occasioned to the estate by his wilful default, as by placing money in improper hands,¹ or by so placing the fund as to deprive himself of absolute control over it;² but where he has *bond fide* deposited the fund at his bankers to a separate account, under circumstances in which it could not properly have been paid into court, he will not be liable for the failure of the bankers.³

Discharge of
receiver.

A receiver cannot be discharged from his office without showing some reasonable cause for the change,⁴ and being appointed for the benefit of all parties, he will not be discharged on the *ex parte* application of the party at whose instance he was appointed;⁵ nor where he has been appointed on behalf of infant tenants in common, will he be discharged as to the share of one of them who has attained twenty-one.⁶ A receiver may be discharged from his office on an application made by petition, motion, or summons,⁷ and his recognizances will be vacated on proper affidavit of payment to the party entitled to receive the balance, or on the Chancery paymaster's, or chief clerk's certificate;⁸ but in the case of a receiver appointed to an infant's estate, his recognizances will not be vacated till a year after the infant has attained his majority.⁹ Since a receiver is in a fiduciary position towards those for whose money and property he has to account, he cannot, in respect of such money or property which he has not accounted for, and which is due from him, avail himself of the Statute of Limitations, though his final account has been passed, and his recognizances vacated.¹⁰

Passing
accounts

A receiver must pass his accounts at the proper times fixed for him to do so; and if he neglect this duty, he will have his salary disallowed,¹¹ and be charged with compound interest;¹² so, too, he will be charged with interest on money improperly retained by him, even though his accounts have been passed as satisfactory.¹³

¹ *Knight v. Lord Plimouth*, 3 Atk. 480.

² *Salway v. Salway*, 2 R. & M. 214; S. C. *White v. Baugh*, 3 Cl. & Fin. 44; *Wren v. Kirton*, 11 Ves. 377.

⁴ See *Richardson v. Ward*, 6 Madd. 266.

⁶ *Smith v. Lyster*, 4 Beav. 227.

⁷ Dan. Ch. Pr. 1716.

⁹ See 2 Madd. Ch. Pr. 298, and *Kilbee v. Sneyd*, 2 Moll. 233.

¹⁰ *Seagram v. Tuck*, 18 Ch. D. 296.

¹² *Hicks v. Hicks*, 3 Atk. 274; *Potts v. Leighton* (*ubi sup.*).

¹³ *Fletcher v. Dodd*, 1 Ves. 85.

³ *Salway v. Salway* (*ubi sup.*).

⁵ *Faulkner v. Daniel*, 3 Ha. 204.

⁸ Set. Judg. & Ord. 679.

¹¹ *Potts v. Leighton*, 15 Ves. 273.

CHAPTER VII.

RIGHTS OF THE WARD ON THE TERMINATION OF THE GUARDIANSHIP.

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A GUARDIAN who is appointed by the court to the estate of an infant (whether appointed also to his person or not) ordinarily gives security to account for the rents and profits of the ward's estate received by him, and the court can fix the amount of the security and the times at which he is to render his accounts, and in this respect the guardian of the estate is in the position of a receiver;¹ and he passes his account in the same manner as a receiver.² When the ward of court comes of age he will be put in possession of his property on bringing the fact of his attaining his majority properly before the court.

But where there is a guardian or trustee of the estate of an infant who has not been appointed by the court, the ward ought to be put by his guardian into possession of his property on attaining his majority, and to have an account of its management rendered to him. On the other hand, the guardian is entitled to be discharged and released of his duties on the termination of his office.³ The court will look with considerable suspicion upon a

Duty of guardian to account.
Guardian appointed by the court.

Guardian not appointed by the court.

Guardian entitled to discharge and release.

¹ Dan. Ch. Pr. 1120, 1703.

² See *ante*, p. 724.

³ It is usual to give this release to the guardian, but it is a matter of some doubt whether in strict law he is entitled to his formal under seal release, Lewin, 411.

release that has been granted within a few days of the ward's coming of age,¹ and will set it aside unless the ward can be shown to have fully understood the accounts;² for such release, to be binding, must be made by the ward with full information as to what his rights are,³ and without any undue pressure.⁴ Where the accounts have been settled a reasonable time after the ward has attained his majority, the court would require special circumstances to be shown before it would set them aside.⁵ Even before the ward attains twenty-one, and mismanagement is suspected, he is entitled to call his guardian to account. Till he attained his majority, or as long as the guardianship continued, he was at common law unable to bring his action of account (which action has now fallen into disuse), but in equity he was able to do so by suing through his next friend;⁶ and the guardian, on the other hand, was restrained from suing his ward before he had passed his accounts.⁷ By the Judicature Act, 1873,⁸ all causes and matters for taking accounts are now assigned to the Chancery Division.

Guardian allowed a sum for maintenance not usually called to account.

The principle upon which the court acts is, that the guardian of the estate is a trustee who must faithfully perform the trust reposed in him towards his infant *cestui que trust*, and is therefore bound to render an exact account of the discharging of his office. But to this rule there is a species of exception; thus, where an allowance has been ordered by the court for the maintenance of an infant, the guardian is so far confided in, that he is not bound to account specifically for that allowance. But if a fraud is practised on the court, as if a guardian, getting £100 a year, maintains the infant at the rate of only £20, the court will check any such abuse by making an order on the guardian to account for the application of the maintenance money.⁹ The accounts of guardians are to be passed and verified in the same manner as those of receivers.¹⁰

Stranger may inform court of suspected mismanagement.

In cases where mismanagement of the property is suspected, a stranger may bring the fact to the notice of the court, which may order an examination of the accounts;¹¹ and the accounting party cannot obtain an acquittance and discharge by merely paying into court the funds to which the infant is entitled.¹² All improper advantages taken by the guardian over his ward will be set aside by the court.

¹ *Steadman v. Pulling*, 3 Atk. 423.

² *Wedderburn v. Wedderburn*, 4 Myl. & Cr. 41.

³ *Walker v. Symonds*, 3 Swanst. 1.

⁴ *Lloyd v. Attwood*; 3 De G. & J. 614.

⁵ *Lambert v. Hutchinson*, 1 Beav. 277.

⁶ *Gage v. Bulkeley*, Ridg. t. Hardw. 279; *Cory v. Bertie*, 2 P. Wms. 119. See *post*, Part IV., Infancy, chap. vii.

⁷ *Anon.*, 3 Atk. 618.

⁸ 36 & 37 Vict. c. 66, s. 34, sub-s. 3.

⁹ *Macph. Inf.* 348; *Re Oldfield*, 2 Moll. 291.

¹⁰ R. S. C. Ord. L. r. 4.

¹¹ See *Earl of Pomfret v. Lord Windsor*, 2 Ves. Sen. 472, 484, citing *Lord Dudley's Case*.

¹² *Bencraft v. Ritch*, 1 Bro. C. C. 56.

The connection between guardian and ward is so close, the guardian's opportunities of acquiring knowledge of the ward's property, and influence over his mind, are so many and various, that where a man acts as guardian, or trustee in nature of guardian, for an infant, the court is extremely watchful to prevent that person's taking any advantage, either by a hasty and ill-considered settlement of accounts, or by way of direct bounty, immediately upon his ward or *cestui que trust* coming of age, and at the time of settling the account, or delivering up the trust. This rule is applicable wherever the connection and influence of guardianship has continued, though the ward may have been of age for some time before the date of the transaction. Undoubtedly, if after the ward or *cestui que trust* comes of age, and has been put into possession of the estate, he thinks fit, when *sui juris*, and at liberty, to grant a reward for care and trouble, the court could never set aside such a transaction; but the court guards against its being done at the very time of accounting and delivering up the estate as the terms on which the guardian will perform that duty; and so far has this vigilance been carried, that the relations of guardian and ward are in equity decisive against the validity of transactions which between strangers could not be impeached; and it is scarcely possible in the course of the connection of guardian and ward, any more than in that of attorney and client, or trustee or *cestui que trust*, that a transaction shall stand, purporting to be bounty for the execution of an antecedent duty.¹ Thus, in settling accounts out of court, the protection afforded to infants is continued after they have attained twenty-one, until they have acquired all the information which might have been had in adult years; and accounts settled and releases given under the influence of those relations which exist between guardian and ward, or upon imperfect information, will not be allowed to stand.² So, where accounts were settled between a guardian and his ward a few months after the latter came of age, and were signed by her without having been examined by any one on her behalf, and without any delivery of vouchers; the accounts, too, being applicable only to a part of the receipts and expenditure, and waived by the guardian's delivering in a subsequent account, purporting to be an account from the commencement of the guardianship, the accounts settled between the guardian and ward were set aside.³ It is regarded as a suspicious circumstance that the accounts have been settled or a release given within a few days after the ward has attained his majority;⁴ and though an account has been settled and closed between the guardian and

Protection of ward after he has attained twenty-one.

Accounts settled between guardian and ward opened.

¹ Macph. Inf. 260.

² *Ibid.* 350. See *Kilbee v. Sneyd*, 2 Moll. 186, 233.

³ *Wych v. Packington*, 3 Bro. P. C. 44; and see *Mellish v. Mellish*, 1 L. J. Ch. 32, 120.

⁴ *Steadman v. Palling*, 3 Atk. 423.

his ward, it will be ordered to be reopened where there is fraud, or there are errors, whether caused by mistake or fraud; and fewer errors will induce the court to reopen the account where there is a fiduciary relation between the parties than where there is not;¹ and where a fraudulent transaction is set aside as against the ward, he will be entitled to follow his property so fraudulently disposed of into the hands of third parties, who have notice, actual or constructive, of the fiduciary position of the guardian.² After the death of the ward or *cestui que trust*, his representative may have the fraudulent transaction set aside.³ A guardian will be charged with interest on his ward's money retained in his hands, and it is no answer to say that no use has been made of it, for it is the duty of the guardian in his fiduciary capacity to employ his ward's estate and money to the best advantage.⁴

When guardian charged with interest.

Office of guardian honorary and gratuitous;

Guardians are allowed, on taking accounts, for all proper outgoings,⁵ and will be reimbursed all their necessary expenses, such as expenses out of pocket, if rightly incurred;⁶ but they cannot claim for remuneration for their personal toil and trouble, their office and duties being purely honorary and gratuitous.⁷ They are also not allowed to charge for expenses which may have been incurred by them in bringing up and educating their wards, unless expressly authorized to do so; for as they are not bound by any legal obligation to support them, they cannot make a legal claim to remuneration; but they should take steps to have a proper allowance made to them out of the ward's fortune for their maintenance and education. The rule enforcing the gratuitous nature of a guardian's office has been long established in England, for the old guardian in socage was only allowed his reasonable costs and expenses when called upon to account for his office.⁸ This rule does not apply to the case of receivers, who are officers of the court, and are allowed a salary or some other remuneration for their care and pains in the execution of their duties.⁹ But it does apply, broadly speaking, to solicitors who have been appointed trustees. A solicitor who is a trustee, whether expressly or constructively, cannot charge for his professional labours, but will be allowed only his costs out of pocket,¹⁰ unless their be a special contract or direction to that effect.¹¹ It

not so in the case of receivers,

but is in that of solicitors, unless otherwise provided for.

¹ Dan. Ch. Pr. 484.

² Lewin, chap. xxx.

³ See *Aylward v. Kearney*, 2 Ba. & B. 463.

⁴ *Dawson v. Massey*, 1 Ba. & B. 219.

⁵ *Rex v. Sutton*, 3 Ad. & El. 597.

⁶ Lewin, 770; 45 & 46 Vict. c. 38, s. 43.

⁷ A different rule prevails in most of the United States of America; St. Eq. Jur. s. 1268, and note, s. 1268 a; Sch. Dom. Rel. s. 375. It also prevails in some of the Australian Colonies; Victoria, 15 Vict. Act x. s. 16. The difficulty of getting persons to undertake the office is the reason.

⁸ Litt. 123. "Salvis ipsis custodibus rationabilibus misis suis." 52 Hen. III. c. 17, Statute of Marlbridge. See *Home v. Pringle*, 8 Cl. & Fin. 264, 287, per Lord Cottonham; and *Barrett v. Hartley*, L. R. 2 Eq. 789.

⁹ Dan Ch. Pr. 1696 *et seq.*

¹⁰ *Broughton v. Broughton*, 23 L. J. Ch. 190.

¹¹ *Re Sherwood*, 3 Beav. 338.

was formerly held that even then he could not charge for matters not strictly professional;¹ but in a late case where a testator appointed his solicitor one of his trustees and executors, and declared that it should be lawful for any of his trustees or executors who might be a solicitor to transact any business occasioned by the trusts or provisions of his will, whether such business was usually within the business of a solicitor or not, and that he should be allowed to make the usual professional or other proper or reasonable charges for all business done and time expended in relation thereto, notwithstanding his being a trustee or executor; and the solicitor-trustee carried in for taxation a bill in which he made some charges for business done by him not of the nature of the ordinary professional business of a solicitor, the taxing-master disallowed all such charges. North, J., however, held that under the terms of the will he was entitled to make such charges, and referred the matter back to the master to review his taxation.²

There is no rule of law preventing infant wards on coming of age from ratifying and confirming the acts of their guardians done during minority, and the transactions of a guardian on behalf of his infant ward are valid, if within the scope of his general powers, or authorized by the courts of equity; they are sustainable though neither within the scope of his powers, nor previously authorized, if the court afterwards deems them prudent or beneficial to the ward; in other cases, subject to the ward's own disaffirmance on reaching majority. Herein consists the infant's right of election. Few acts of the guardian can be pronounced valid, except in the sense that they are authorized, either generally or specially, by the court which exercises supervision; and few of his transactions can be so utterly without authority as to be absolutely void *per se*. The general rule of election recognizes, then, two principles: first, the privilege of the infant ward, on attaining full age, to avoid his guardian's transaction; secondly the right of courts of equity to control this privilege by interposing to pronounce the transaction good. The whole doctrine, therefore, seems in strict accordance with that more general rule, that the accounts of the guardian are open to the inspection of the ward at majority, and may be disputed down to the smallest item. These principles suffice for general application to compromises, submissions to arbitration, investments and re-investments of personal property, and similar transactions, undertaken by the guardian on the strength of a previous order of court, or at the risk of its subsequent approval.³ Thus, there are many acts

Election of ward to be bound by the acts of the guardian.

¹ *Harbin v. Darby*, 2 L. T. 531.

² *Re Ames, Ames v. Taylor*, 25 Ch. D. 72. It may be stated that solicitors as a body are now anxious that this rule should be altered in their favour.

³ Sch. Dom. Rel. s. 385.

and transactions in reference to the ward's property which when done by the guardian may be disaffirmed by the ward on coming of age, but which may be equally confirmed by him; but he must have full knowledge of the effect of his confirmation;¹ and if the original act be fraudulent the alleged confirmation of it will be keenly scrutinized.² If the guardian improperly deal in his own name with his ward's property, a resulting trust in favour of the ward at once arises; and the latter may, on attaining majority, elect to keep the property in the form in which he finds it. If the ward does not ratify an unauthorized investment the guardian will become liable for any loss that may accrue. All advantageous bargains which a guardian makes with the ward's funds are also considered subject to the ward's election, either to repudiate or to uphold the contract and take the profits. This applies, in general, to improper acts, as where the guardian speculates with the trust funds, or invests them in his own business, or, in a word, converts them to his own use; and the ward may either take the investment as he finds it, with all the profits, or demand the original fund with interest.³

In *Docker v. Somes*,⁴ Lord Brougham laid down the following equitable principles on this subject: "Wherever a trustee, or one standing in the relation of a trustee, violates his duty, and deals with the trust estate for his own behoof, the rule is, that he shall account with the *cestui que trust* for all the gain which he has made. Thus, if trust money is laid out in buying and selling land, and a profit made by the transaction, that shall not go to the trustee who has so applied the money, but to the *cestui que trust*, whose money has been thus applied. In like manner (and cases of this kind are more numerous), where a trustee or executor has used the fund committed to his care in stock speculations, though if the loss, if any, must fall upon himself, yet for every farthing of profit he may make he shall be accountable to the trust estate. So, if he lay out the trust money in a commercial adventure, as in buying or fitting out a vessel for a voyage, or put it in the trade of another person, from which he is to derive a certain stipulated profit, although I will not say that this has been decided, I hold it to be quite clear that he must account for the profits received by the adventure or from the concern. In all these cases, it is easy to tell what the gains are; the fund is kept distinct from the trustee's other moneys, and whatever he gets, he must account for and pay over. It is so much fruit, so much increase on the estate or chattel of another, and must follow the ownership of the property and go to the proprietor. So it is also where one not expressly a trustee has bought or

¹ *Kay v. Smith*, 7 H. L. Cas. 750.

³ Sch. Dom. Rel. s. 386.

² *Morse v. Royal*, 12 Ves. 355.

⁴ 2 Myl. & K. 655, 664.

trafficked with another's money. The law raises a trust by implication, clothing him, though a stranger, with the fiduciary character, for the purpose of making him accountable. If a person has purchased land in his own name with my money there is a resulting trust for me; if he has invested my money in any other speculation without my consent, he is held a trustee for my benefit; and so an attorney, guardian, or other person standing in a like situation to another, gains not for himself, but for the client, or infant, or other party whose confidence has been abused." Improper dealings with the ward's property will be set aside as against innocent third parties, unless acquiesced in by the ward on attaining his majority.

Since, then, the position of guardian and ward is fiduciary, the right of the ward to open up accounts between them is not barred by the Statute of Limitations,¹ but lasts as long as that relationship exists between them,² and the account may be taken from its commencement.³ But after the fiduciary relationship is at an end, then the guardian may avail himself of the Trustee Act, 1888,⁴ which gives him the rights and privileges of the Statutes of Limitations,⁵ of pleading lapse of time in any action or other proceeding brought against him for breaches of trust, except where the claim is founded upon any fraud or fraudulent breach of trust to which he was a party or privy, or is to recover trust property, or the proceeds thereof still retained by him, or previously received by him and converted to his own use.⁶ This privilege is applicable to actions or proceedings for taking the accounts of guardians or trustees.⁷ A retiring trustee is liable for a breach of trust committed by his successor, if such breach was not only the outcome or rendered easy, but was contemplated by the former trustee when he retired and his successor was appointed.⁸ Trustees who have committed a breach of trust and have caused a loss by investing trust funds in an unauthorized security cannot require their *cestui que trust* when an infant to transfer the unauthorized security to them in order to indemnify themselves against the loss caused by their breach of trust.⁹ As between co-trustees, the defence of the Statute of Limitations does not begin to run until the claim of the *cestui que trust* has been established against one of them.¹⁰ During infancy the ward cannot in any way authorize a breach of trust,¹¹

Acquiescence of ward after attaining majority.

¹ *Mathew v. Brise*, 14 Beav. 341. See 36 and 37 Vict. c. 66, s. 25 (2), which provides that "no claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be bound by any Statute of Limitations."

² *Aylward v. Kearney*, 2 Ba. & B. 463.

³ *Wedderburn v. Wedderburn*, 4 Myl. & Cr. 41.

⁴ 51 & 52 Vict. c. 59.

⁵ Sect. 8 (a). See *Re Davies, Ellis v. Roberts*, [1898] 2 Ch. 142.

⁶ Sect. 8 (1).

⁷ *Re Page, Jones v. Morgan*, [1893] 1 Ch. 304; *How v. Earl Winterton*, [1896]

2 Ch. 626.

⁸ *Head v. Gould*, [1898] 2 Ch. 250.

⁹ *Ibid.*

¹⁰ *Robinson v. Harker*, [1896] 2 Ch. 415.

¹¹ *Overton v. Bannister*, 3 Ha. 503.

but he may be bound by acquiescence after attaining twenty-one.¹ Acquiescence is no bar to a claim by the ward to set aside a release while the relation of trustee and *cestui que trust* or the influence caused by it continues, or the circumstances remain unaltered under which the transaction in question took place.² An account settled within a month after an infant came of age himself, and one who was not an actual guardian, but only in the nature of one, was opened, though vouchers had been delivered up.³ This protection is not confined to merely infant wards, but where the fiduciary relationship is carried on after the latter have attained their majority; for where a guardian, after his ward attains full age, continues to manage the property at the request of the ward, and before the account of his receipts and payments during minority are settled, it is, in effect, a continuance of guardianship as to the property; and he must account on the same principle as if they were transactions during the minority; and under such circumstances an injunction will be granted (on terms) to restrain a guardian from proceeding in an action to recover the balance claimed by him on account of the transactions after his ward comes of age.⁴ But a ward, after attaining twenty-one, by acquiescence in or confirming the acts of the guardian, may be barred from obtaining any relief against them; but such acquiescence or confirmation must be accompanied by a full knowledge of his rights on the part of the ward.⁵

Protection extended as long as fiduciary relation of guardian and ward continues.

What is acquiescence. Direct.

Indirect.

There are two kinds of acquiescence: First, direct where the act complained of was done with a full knowledge and express approbation of another, in which case a court of equity will not allow that other to seek relief against the very transaction to which he was himself a party. Secondly, indirect, where a person having a right to set aside a transaction, stands by and sees another dealing with property in a manner inconsistent with that right, and makes no objection; when also a court of equity will not relieve. But in the latter case the court not only looks to the conduct of the person who stands by, but also considers how far the person in possession of the property has any just claims to the protection of the court. Where, for instance, the possessor lays out his money with a full knowledge that the property which he improves belongs to another, then it is said he makes the outlay to his own cost. "If," observed Turner, L.J., "a man places his property on the land of another

¹ See *Steadman v. Pulling*, 3 Atk. 423.

² *Wedderburn v. Wedderburn* 4 Myl. & Cr. 41.

³ *Rerett v. Harrey*, 2 L. J. Ch. 39; and see *Wych v. Packington*, 3 Bro. P. C. 44.

⁴ *Mellish v. Mellish*, 1 L. J. Ch. 32, 120.

⁵ *Earl of Pomfret v. Lord Windsor*, 2 Ves. Sen. 472; *Kay v. Smith*, 7 H. L. Cas. 750.

with full knowledge of that person's title, how can the fact that the landowner assented to its being placed there give an equity to have it restored? If it did, the doctrine would come to this, that whenever a man lays out money on another person's land with the consent of the owner, he has an equity to have it repaid."¹ Where, however, the act complained of has been completed without any knowledge or assent on the part of the person seeking relief, there can be no acquiescence in the strict sense of the word, which has been defined as "quiescence under such circumstances as that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words, or conduct. When once the act is completed without any knowledge or assent upon the part of the person whose right is infringed, a right of action has vested in him, which, at all events as a general rule, cannot be divested without accord and satisfaction, or release under seal. Mere submission to the injury for any time short of the period limited by statute for the enforcement of the right of action cannot take away such right, although under the name of laches it may afford a ground for refusing relief under some particular circumstances."² Laches on the part of the ward after coming of age will, if it is gross, disentitle him to relief, but mere knowledge of his rights of a few years' standing, as, for instance, three or ten years, will not take away his right to impeach the transaction.³

Laches.

It has been seen that it is a maxim of equity that a guardian must not make a profit out of his ward's estate;⁴ thus, if he buy up incumbrances on his ward's estate, he must not charge the ward with more than he paid;⁵ and where he purchases the estate of his ward under suspicious circumstances, the court will not hesitate to set aside the purchase, even though the sale professed to have been made under an order of the Court of Chancery.⁶ It is a like maxim of equity that the guardian must not use his influence with the ward for the purpose of obtaining benefits at his hands; consequently, transactions of such a nature are closely scrutinized; and the court, if it deems proper, will not hesitate to set them aside, where the natural influence of the one has been exercised over the other; for a guardian cannot take anything from his ward pending the guardianship, or at the close of it, or at any period until his influence has ceased to exist.⁷ The court will not, of course, undertake to set aside every gift that a ward may make to his guardian, but the rule is that where a person standing in the relation of guardian to ward takes a gift

Gifts between guardian and ward.

When undue influence presumed.

¹ *Rennie v. Young*, 2 De G. & J. 136, 142.² Per Thesiger, L.J., in *De Bussche v. Alt*, 8 Ch. D. 314.³ *Ibid.* 1059, and the cases there cited.⁵ *Henley v. —*, 2 Ch. Cas. 245.⁴ See *ante*, p. 687.⁶ *Cary v. Cary*, 2 Sch. & Lef. 173.⁷ Per Lord Eldon in *Wood v. Downes*, 18 Ves. 120, 127.

from, or makes a bargain with the latter, the proof lies upon him that he has dealt with him exactly as a stranger would have done, taking no advantage of his influence or knowledge, putting the other party on his guard, and bringing everything to his knowledge which he himself knew.¹ It is an element of undue influence that the ward had not independent advice as to the nature and effect of the transaction into which he has entered. The connection between guardian and ward is so close, the guardian's opportunities of acquiring knowledge of the ward's property and influence over his mind are so many and various, that where a man acts as guardian, or trustee in nature of a guardian, for an infant, the court is extremely watchful to prevent that person's taking any advantage, either by a hasty and ill-considered settlement of accounts, or by way of direct bounty, immediately upon his ward or *cestui que trust* coming of age, and at the time of settling the account, or delivering up the trust. This rule is applicable wherever the connection and influence of guardianship has continued, though the ward may have been of age some time before the date of the transaction.² But where an infant lives with a relative, who is not in the position of a guardian, nor exercises any undue influence, he may make a gift to that relative a few months before death, and the gift will be upheld.³ Though a gift made to a person standing in a fiduciary relation to the donor may be voidable, yet if, after the confidential relation has ceased to exist, the donor intentionally elects to abide by the gift, it cannot be impeached after his death, even though he were unaware of the voidable nature of the gift.⁴

If, after the ward becomes of age and actually *sui juris*, and has been put into possession of his property, he chooses to make a gift to his guardian as a reward for the trouble and care expended on his behalf, the gift will not be set aside. But the court, as before stated, looks with suspicious eyes on such transactions when done at the very time of accounting and delivering up the estate; and where it was claimed by the guardian as a bounty for the execution of his duty, the court would not allow it to stand.⁵ So, where the right is made or benefit conferred upon the guardian so soon after the ward comes of age that the influence derivable from the superior age and knowledge and experience of the guardian seems to have been exercised upon the youthful ward, the court will relieve him from the pressure that has been put upon him. Thus, "where a man acts as guardian, or trustee in nature of a guardian, for an infant, the court is extremely watchful to prevent that person's taking any advantage imme-

When undue influence not presumed.

Gifts and transactions, &c., after ward has attained majority.

When set aside.

¹ Per Lord Brougham in *Hunter v. Atkins*, 3 Myl. & K. 113, 135.

² Macph. Inf. 260, 261.

³ *Taylor v. Johnston*, 19 Ch. D. 603.

⁴ *Mitchell v. Homfray*, 8 Q. B. D. 587.

⁵ *Hatch v. Hatch*, 9 Ves. 292.

diately upon his ward or *cestui que trust* coming of age, and at the time of settling account or delivering up the trust; because an undue advantage may be taken. It would give an opportunity either by flattery or by force, by good usage, or by bad usage imposed, to take such advantage; and therefore the principle of the court is of the same nature with relief in this court on the head of public utility, as in bonds obtained from young heirs, and rewards given to an attorney pending a cause, and marriage brokerage-bonds. All depend upon public utility; and therefore the court will not suffer it, though perhaps in a particular instance there may not be an actual unfairness. Upon that ground I went in the case cited;¹ in which I have added at the end of my note taken at the hearing of the cause, *to be absolutely set aside, being between a guardian and his ward just come of age, and on reason of public utility. . . . The rule of the court as to guardians is extremely strict, and in some cases does infer some hardship, as where there has been a great deal of trouble, and he has acted fairly and honestly, that yet he shall have no allowance; but the court has established that on great utility and necessity, and on this principle of humanity, that it is a debt of humanity that one man owes to another, as every man is liable to be in the same circumstances. Undoubtedly, if after the ward or cestui que trust comes of age, and after actually put into possession of the estate, he thinks fit, when sui juris and at liberty, to grant that or any other reasonable grant by way of reward for care and trouble, when done with eyes open, the court could never set that aside; but the court guards against doing it at the very time of accounting and delivering up the estate, as the terms; for the court will not suffer them to make that the terms of doing their duty."*²

Gifts set aside on ground of public utility.

Ward when of age may recompense guardian.

In the case of *Hatch v. Hatch*,³ the plaintiff, Mrs. Hatch, at the age of four years, upon the death of her father, became seised in fee of the manor and rectory of Sutton, the former worth about £15,000, the latter about £200 a year, capable of improvement. G. Hatch, who had married her sister, was her guardian. She lived with him till her marriage, and he received £130 a year for her maintenance. The rectory becoming vacant during her minority, G. Hatch was presented. In October 1779, she came of age, and on the 20th of January 1780 she executed a conveyance of the advowson, in consideration, as it was expressed, of her great friendship, kindness and regard for him, the care taken of her by him, love and affection, and so forth. J. Hatch, who was an attorney, and brother of G. Hatch, prepared the deed, and was one of the attesting witnesses. She continued

¹ *Pierce v. Waring*, 1 Ves. Sen. 380.

² Per Lord Hardwicke in *Hylton v. Hylton*, 2 Ves. Sen. 547, 548.

³ *Ubi sup.*

to live with G. Hatch, who deducted the same allowance for her maintenance, till 1784, when she married J. In 1800, after the death of G., they filed the bill, charging fraud in obtaining the conveyance, that she was very deaf, and intended only to grant the next presentation. An account was settled between her and G. Hatch. The conveyance was ordered to be set aside. In the course of that case Lord Eldon remarked: "This case proves the wisdom of the court in saying it is almost impossible in the course of the connection of guardian and ward, attorney and client, trustee and *cestui que trust*, that a transaction shall stand, purporting to be bounty for the execution of antecedent duty. There may not be a more moral act, one that would do more credit to a young man beginning the world, or afford a better omen for the future, than if, a trustee having done his duty, the *cestui que trust*, taking it into his fair, serious, and well-informed consideration, were to do an act of bounty like this. But the court cannot permit it, except quite satisfied that the act is of that nature, for the reason often given, and recollecting that in discussing whether it is an act of rational consideration, an act of pure volition, uninfluenced, that inquiry is so easily baffled in a court of justice; that instead of the spontaneous act of a friend, uninfluenced, it may be the impulse of a mind misled by undue kindness, or forced by oppression; the difficulty of getting property out of the hands of the guardian or trustee thus increased; and, therefore, if the court does not watch these transactions with a jealousy almost invincible, in a great majority of cases it will lend its assistance to fraud; where the connection is not dissolved, the account not settled, everything remaining pressing upon the mind of the party under the care of the guardian or trustee."¹

*Aylward v.
Kearney.*

In *Aylward v. Kearney*,² a man of weak understanding came of age on the 16th of October 1779, and within a fortnight from that time executed a lease of lands, at an inadequate rent, in favour of a son of his guardian. He married in 1780, and died in 1792, but continued during his life under the original dominion and control of the guardian and his family. His son came of age in 1807, and filed a bill in 1812 to have the lease set aside. The decree was in his favour, and the length of time was held, under the circumstances, no bar to his claim. In *Maitland v. Irving*,³ the plaintiff, having lost her mother when she was very young, was placed by her father under the care and protection of the defendant Maclean, her uncle by marriage, and had resided with him and his wife ever since. In 1842 her father died, and she being still an infant, and entitled to considerable property, Maclean was appointed her guardian by the Court of

*Maitland v.
Irving.*

¹ 1 P. 296.

² 2 Ba. & B. 463.

³ 15 Sim. 437.

Chancery. In September 1844 she attained twenty-one. In January 1846, Maclean, who had agreed to pay £5000 on the 25th of that month to Irving and Brown (who were partners as coal merchants) for the purchase of their business, &c., obtained and gave them the plaintiff's guarantee for the payment being made on the 14th of February then next, in consideration of their having consented to postpone the payment until that time. Afterwards another arrangement was made between Maclean and Irving and Brown, in pursuance of which the latter delivered up the guarantee, and Maclean procured and gave them the plaintiff's cheque for £3000, &c. Under the circumstances the Court of Chancery granted and afterwards continued an injunction restraining the holders of the cheque from prosecuting an action against the plaintiff to recover the £3000.¹ The court not only enforces its controlling and correcting powers in cases where the parties are in the actual and full relationship to one another of guardian and ward, but where the person whose influence has been unduly exercised is *in loco tutoris*, or quasi-guardian to the person affected and controlled by his influence. Thus, in *Archer v. Hudson*,² a niece, two months after she came of age, and after her guardians had fully accounted to her, entered into a voluntary security for her uncle, by whom she had been brought up, and who was considered by the court as standing *in loco parentis*. The court set it aside.

Two principles can be extracted from this case, namely, that where a transaction takes place between parent and child, just after the child has attained twenty-one, and prior to what may be called a complete emancipation, without any benefit moving to the child, the presumption is that an undue influence has been exercised to procure that liability on the part of the child, and a party seeking to maintain such a transaction must show that the presumption is adequately rebutted; and that, though courts of equity do not interfere to prevent an act even of bounty between parent and child, yet they will see that the child is placed in such a position as will enable him to form an entirely free and unfettered judgment, independent altogether of any sort of control. So, where in one case a promissory note appeared to have been signed by a lady in her twenty-second year, as surety for her stepfather, in whose house she had been residing with her mother for many years previously, the court restrained execution against her on a judgment obtained by the payee.³

This undue influence may be held to continue for many years after the actual or *quasi*-relation of guardian and ward has

¹ See also *Maitland v. Backhouse*, 16 Sim. 58, where the plaintiff was the same as in the case in the text, and the transaction of a similar nature.

² 7 Beav. 551.

³ *Espey v. Lake*, 10 Ha. 260.

terminated, and the latter has passed his majority; and any transactions carried out between them in which that undue influence was brought to bear will be set aside. Accordingly, where the plaintiff, a young woman, who was living with her mother and stepfather in 1859, shortly after she came of age, at the solicitation of her stepfather, executed a bond as security to secure the repayment of a sum of money advanced by the defendant, payable at the end of six years. In 1866 the defendant brought an action and recovered judgment against the plaintiff's stepfather on the bond, and to avoid an execution, the plaintiff, who was then twenty-nine years of age, but who still resided principally with her stepfather, was induced by him to execute a second bond as surety to secure the amount of the judgment and costs. Both bonds were prepared by the stepfather's solicitor, and the plaintiff had no independent advice. In 1872 the defendant brought an action against the plaintiff on the bonds; she thereupon filed her bill to set them aside, and it was held by the court that the second bond must be taken as connected with the first, and that, as there was no proof that the plaintiff was aware of the invalidity of the first bond, the execution of the second bond was not a confirmation of the first, and that both bonds must be set aside against her; and that, under the circumstances, she was not barred by laches, notwithstanding the time which had elapsed before she asserted her right to relief.¹ But where the relationship between the guardian and the ward is totally at an end, and the influence that the one may have over the other is removed, gifts and conveyances between them may be maintained; and though it may be improper, and a suspicious thing for a guardian to purchase his ward's estate immediately upon his coming of age, yet if he gives full consideration for it, it is not voluntary, nor can it be set aside.²

Where influence of guardian over ward removed, gifts and transactions between them maintainable.

Where fiduciary relationship is at an end.

Where the fiduciary relationship of guardian and ward is at an end, and the latter after a lapse of more than six years brings an action against his guardian, but does not found his claim on fraud, or fraudulent breach of trust by the guardian, or the trust property or its proceeds sought to be recovered is not retained by the guardian, or has been received by him and converted to his own use, then the guardian can plead the privilege of the statute to such an action.³

The above cases are cited to show the leading principles upon which the court acts; but whether such transactions will be supported or set aside, must in each and every instance depend upon the evidence adduced as to their nature.

¹ *Kempson v. Ashbee*, L. R. 10 Ch. App. 15; and see the principle involved in the case of *Mellish v. Mellish*, 1 L. J. Ch. 32, 120. ² *Oldin v. Sambourn*, 2 Atk. 153.

³ 51 & 52 Vict. c. 59, s. 8 (1); *Re Page, Jones v. Morgan*, [1893] 1 Ch. 304; *How v. Earl Winterton*, [1896] 2 Ch. 626.

PART IV.

INFANTS.

CHAPTER I.

CAPACITIES, DISABILITIES, AND IMMUNITIES OF INFANTS.

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AN infant,¹ in the legal intendment of the term, is one that has not yet arrived at majority, which period in England is fixed for both sexes at twenty-one years, except for the Sovereign, who attains it at eighteen, though for legislative purposes the king is never in minority,² though it is usual to appoint a guardian for him if of tender age. Popularly, it means one of tender age, who is quite incapable of taking care of himself, a child, in fact, under seven years of age; and one who has reached years of discretion but not of majority is usually styled a minor, though the English law does not recognize any such distinction; and the "child of nineteen is as the child of five years old."³ But, as will shortly be seen, in some respects the capacity of minors to transact their own and other persons' affairs is recognized. In Roman law full age, *perfecta ætas*, was reached at twenty-five; pupillage extended

What is an infant.

¹ Derived through the French "*enfant*" from the Latin, *infans* that is, one who cannot speak (*in fari*). Compare the Greek *νήπιος*. ² 1 Bl. Com. 248.

³ Per Lord Hardwicke in *Hearle v. Greenbank*, 3 Atk. 695, 703; see also *Morgan v. Thorne*, 7 M. & W. 400.

to fourteen in males and twelve in females, when each sex was deemed respectively to have arrived at puberty. Up to puberty, when the father was dead (naturally or civilly), they were under tutors; after puberty till majority, though arrived at legal years of discretion, they were under curators who were assigned to manage their affairs. This distinction still holds good in Scotland.

The reason for drawing a distinction between mere children in age and those who are more advanced in years, and even close upon majority, is, that the mind and intellect of the young are constantly growing in strength and expanding; and that while there must of necessity be a fixed point at which they reach their full capacity in the eye of the law, yet before that point is reached they have in reality become competent and qualified to exercise many functions. Thus, infants who have arrived at a marriageable age may validly contract marriage;¹ and if of the age of fourteen, and entitled to do so, they may appoint their own guardians; and if of the age of sixteen they may, under certain circumstances, elect, even as against their parents, to live apart from their control and custody. It has been, therefore, frequently found necessary to allow persons who had attained the age of discretion, but not of full majority, to act as though they had attained it; consequently, "by the civil law the *venia ætatis* (or privileges of majority) was grantable by the Sovereign or supreme authority of the State to males who had attained their twenty-first year, and to females who had attained their eighteenth year, if from their conduct they were deemed capable of managing their own affairs."² The civil law did not permit the mere marriage of the minor to operate as an emancipation;³ nor does the English law in the case of a male;⁴ in the case of a female, it does operate to free her from the control of her natural or legal guardians so far as her person is concerned; if she marry without their consent, it is not so clear that their control of her property is terminated, and as under the Married Women's Property Act, 1882,⁴ her property remains her own, and is unaffected by any marital rights, marriage will scarcely be deemed to be an emancipation of their control over her property. Where the infant is a ward of court, her marriage is not allowed to end its authority either over her person or her property.⁵

An infant comes of age on the commencement of the last day

When infant comes of age.

¹ A girl of twelve and a boy of fourteen are deemed to have arrived at a stage of physical maturity which renders them capable of exercising a matrimonial discretion; and a marriage between the sexes at that age is not rendered invalid because of the want of age. If the marriage is between infants below that age, it is inchoate or imperfect, and may be set aside. See *ante*, Husband and Wife, chap. v. pp. 72 *et seq.*

² Burge, For. & Col. Laws, 116. By the civil law the age of majority was twenty-five.

³ Dig. lib. 4, tit. 4, l. 2. By the Code Civil of France (Art. 476) it does so operate.

⁴ *Re Mendes*, 1 Ves. Sen. 91.

⁵ 45 & 46 Vict. c. 75.

⁶ See *post*, chap. v.

which completes his twenty-first year; for in English law *ultimus dies captus pro completo habetur*; in other words, the law takes no heed of a fraction of a day; thus, a man born on the 1st February, 1600, after eleven o'clock at night, was adjudged to be of full age after one o'clock in the morning of the last day of January, 1621.¹

During their minority infants are under disability, as lacking full judgment and mental capacity. But as regards acts which an infant may do, or offices he may fill, this disability does not prevail in all instances. Offices which require only skill and diligence he may fill and execute himself when arrived at the age of discretion, or he may appoint a sufficient deputy to exercise them. Thus, he may fill the offices of a park-keeper, gaoler, forester, &c.;² he may also serve as an officer, or in the ranks, in the army or navy. He may at common law fill a purely ministerial office, as the clerkship of the peace, whether in person or by deputy;³ or one involving skill, such as the office of bishop's registrar.⁴ But as the Local Government Act, 1888,⁵ provides that the clerk of the peace of a county is to be also clerk of the County Council, such office can no longer be said to be merely ministerial, and he has no longer power to appoint a deputy.⁶ The views, too, as to efficient discharge of public offices by their occupants have undergone a change; therefore it may be assumed that no infant would at the present day be appointed to a responsible office. It was held long ago that if an infant appointed to an office of skill which he did not fill, but to which he appointed an insufficient deputy, he forfeited the office.⁷

An infant may be lord of a manor, and make grants of the copyhold land, for the estate of the copyholder is not derived out of the estate or interest of the lord of the manor, for he is but an instrument to make the grant.⁸ He may be a partner, but, generally speaking, when he comes of age he may disaffirm past transactions, if he do so unequivocally and soon after attaining his majority.⁹ He may likewise be a shareholder, though he may be rejected by the company on ascertaining the fact of his infancy.¹⁰ So, too, he may be appointed executor, though he is not liable for any *devastavit* committed by him or his co-executor; and if he be sole executor, a guardian *durante minore ætate* is appointed to administer the estate on his behalf;¹¹ but if he is

What offices
infant may
fill.

¹ *Anon.*, 1 Salk. 44. See *Herbert v. Turball*, Keb. 589.

² Plowd. 379, 381; 9 Rep. 48, 97.

⁴ *Young v. Fowler*, Cro. Car. 555.

⁶ *Ibid.* sub-s. 4.

⁸ *Swayne's Case*, 8 Rep. 63.

¹⁰ *Symon's Case*, L. R. 5 Ch. App. 298; *Re Gardner, Long v. Gardner*, 67 L. T.

552.

¹¹ See *ante*, Guardian and Ward, chap. ii. pp. 623 *et seq.* For the infant's liabilities as partner or shareholder, see *post*, chap. ii.

³ *Crosbie v. Hurley*, 2 Alc. & Nap. 431.

⁵ 51 & 52 Vict. c. 41, s. 83.

⁷ *Young v. Fowler* (*ubi sup.*).

⁹ *Goode v. Harrison*, 5 B. & Ald. 147.

appointed co-executor with adults who prove, he may come in and act on attaining majority without further probate.¹ He may be an agent and bind his principal by his acts.²

What offices
infant may
not fill.

But offices which may, broadly speaking, be said to import the exercise of discretion, he cannot fill, nor can he hold any office of public or pecuniary trust.³ Thus, he cannot be a guardian,⁴ sheriff's bailiff,⁵ factor, or receiver,⁶ or an acting executor or administrator,⁷ or priest, deacon,⁸ barrister, solicitor, or attorney for another in a suit, physician, surgeon, or apothecary.⁹ An infant cannot be a juror,¹⁰ or sit or vote in either House of Parliament,¹¹ or exercise the right of voting for a member of Parliament,¹² or be enrolled as a burgess,¹³ town councillor,¹⁴ alderman,¹⁵ or mayor.¹⁶

Infant ought
not to be
appointed
trustee.

An infant ought not to be made a trustee, for he is deemed to want capacity to carry out the trusts, and exercise powers which require the application of prudence and discretion.¹⁷ If he is so appointed, the court will appoint a fresh one in his place,¹⁸ but without prejudice to an application by him on attaining majority to be restored to the trusteeship,¹⁹ and the "incapacity" within the meaning of the Conveyancing and Law of Property Act, 1881,²⁰ is not that of infancy.²¹

Vesting order
as to real
estate;

Under the Trustee Act, 1893, if in the case of an infant trustee possessed of or entitled to real estate solely or jointly, the court deems it expedient to appoint a new trustee in addition to or in substitution for him, it may make an order vesting the land in the new trustee.²² So, too, where any person entitled to or possessed of land, or entitled to a contingent right in land by way of security for money is an infant, the court may make an order vesting or releasing or disposing of the land or right as though he were an infant trustee.²³

as to personal
estate.

Where the trustee is an infant, and as such entitled alone or jointly with another to stock or a chose in action, the court may make an order vesting the right to transfer or call for a transfer of stock or to receive the dividends or income thereof, or to sue

¹ *Cummins v. Cummins*, 8 Ir. Eq. Rep. 723.

² Co. Litt. 52 a.

³ *Claridge v. Evelyn*, 5 B. & Ald. 81.

⁴ Vin. Abr. Guardian [B].

⁵ *Cuckson v. Winter*, 2 M. & R. 313.

⁶ F. N. B. 118; Roll. Abr. 117.

⁷ 1 Wms. Exors. 159; 38 Geo. III. c. 87, s. 6.

⁸ 44 Geo. III. c. 43.

⁹ Co. Litt. 128 a.

¹⁰ 6 Geo. IV. c. 50, s. 1.

¹¹ 1 Bl. Com. 162. There have been instances in which minors have been returned to Parliament; and the latest most memorable case was that of C. J. Fox, who was returned for Midhurst eighteen months before he attained his majority; and his return was not invalidated.

¹² 7 & 8 Wm. III. c. 25, s. 8. See 48 Vict. c. 15; and *Hargreaves v. Hopper*, 1 C. P. D. 195.

¹³ 45 & 46 Vict. c. 50, s. 9 (2) a.

¹⁴ *Ibid.* s. 11 (2) a.

¹⁵ *Ibid.* s. 14 (3).

¹⁶ *Ibid.* s. 15 (1).

¹⁷ *Hearle v. Greenbank*, 3 Atk. 695, 712.

¹⁸ *Re Porter*, 25 L. J. Ch. 482.

¹⁹ *Re Shelmerdine*, 33 L. J. Ch. 474; *Re Brunt*, W. N. [1883] p. 220.

²⁰ 44 & 45 Vict. c. 41, s. 31.

²¹ *Re Brunt (ubi sup.)*; *Re Tallatire*, W. N. [1885] p. 191.

²² 56 & 57 Vict. c. 53, ss. 25, 26.

²³ *Ibid.* sect. 28. For the effect of a vesting order in the above cases, see sect. 32.

for or recover a chose in action in any person the court may appoint.¹ An infant could not, as a rule, be made liable for his breaches of trust,² unless the breach is of a continuing nature in which he acquiesces after attaining majority.³ If he commit what would amount to a tort in respect of trust moneys, he would be liable to make good such breach of trust.⁴ From this latter fact arises the presumption that where property is given to an infant, it is intended that he should take it beneficially, and not as trustee.⁵

If two infant joint-tenants join in a conveyance and one die, the survivor may by avoiding the conveyance become entitled to the whole; but if one be adult and die, the infant can only recover a moiety;⁶ but the court cannot sever an infant's joint-tenancy.⁷ An infant joint-tenant may sever the tenancy, whether his interest is in possession or reversion; but on coming of age he may avoid his deed;⁸ and such a settlement does not seem to be affected by section 1 of the Infants' Relief Act, 1874.

An infant cannot now make a will, for by the Wills Act, 1837,⁹ it is enacted that "no will made by any person under the age of twenty-one years shall be valid." This applies equally to personal and real estate. Formerly an infant female of twelve and a male infant of fourteen were, broadly speaking, respectively capable of making a will at those ages, but the question is not free from doubt.¹⁰ But if the infant evinced a want of discretion or disposing power, probate would not have been granted. An exception is, however, made in favour of an infant soldier being in actual military service, or any mariner or seaman at sea.¹¹

Infant cannot make a will;

except as soldier or sailor.

An infant may inherit, and take under a will, purchase, grant, or surrender;¹² with this qualification, that except the inheritance he can always repudiate where it is fair and just and to his advantage that he should do so. A gift to him cannot be recalled.¹³ A child *en ventre sa mère* can take in remainder;¹⁴ and where it is to his advantage shall be deemed to be *in esse*.¹⁵

By an Act passed in the reign of Charles II.,¹⁶ a father, although under twenty-one, was empowered by deed or will to

May appoint guardian for children.

¹ *Ibid.* s. 35.

² *Hindmarsh v. Southgate*, 3 Russ. 324.

³ *Sculthorpe v. Tippen*, L. R. 13 Eq. 232.

⁴ *Re Seager*, *Seeley v. Briggs*, 60 L. T. 665; *Re Garnes*, *Garnes v. Applin*,

31 Ch. D. 147.

⁵ *Lamplugh v. Lamplugh*, 1 P. Wms. 112; *Smith v. King*, 16 East, 283.

⁶ Co. Litt. 337 b.

⁷ *Archer Burton v. Archer Burton*, W. N. [1879] p. 217.

⁸ *Burnaby v. Equitable Reversionary Interest Society*, 28 Ch. D. 416.

⁹ 1 Vict. c. 26, s. 7.

¹⁰ Co. Litt. 89 b (Harg.).

¹¹ 1 Vict. c. 26, s. 11. In *The Goods of Hiscock*, [1901] P. 78. See this case for what is "actual military service"; also *Getward v. Kree*, [1902] P. 99.

¹² Simp. Inf. 77. See *O'Shanassy v. Joachim*, 1 App. Cas. 82.

¹³ *Andrews v. Andrews*, 22 W. R. 684.

¹⁴ 10 Wm. III. c. 22.

¹⁵ See *The George and Richard*, L. R. 3 A. & E. 466.

¹⁶ 12 Car. II. c. 24, s. 8.

appoint a guardian of his children after his decease until they should respectively attain twenty-one years. This testamentary power has been taken away from *minors* by the Wills Act, 1837. An appointment by deed of a guardian has been held to be of a testamentary nature, and to be revocable by will,¹ but as the Act itself draws a distinction between a deed and a will, and as it has been held that an appointment of a guardian by will does not require probate,² it would seem that an infant can still appoint a guardian for his children by deed.³ The same principles would apply to the case of an infant mother, for a mother can now appoint a guardian to her infant children by deed as well as by will.⁴

An infant is regarded with especial favour in the eye of the law; thus it has been said: "An infant in all things which sound to his benefit shall have favour and preferment in law as well as another, but shall not be prejudiced by anything to his disadvantage."⁵ So "a deed will pass an interest to an infant even when coupled with a liability, if it be for his benefit to accept it."⁶ An infant cannot by any act of his own alter his status, so as to deprive himself of its immunities, except in such cases as where he fraudulently represents himself to be of age, and obtains credit through such misrepresentation.⁷ For his immunities in actions brought by or against him, see chap. vii.

An infant under the age of seven has an absolute immunity in respect of liability for crime. Under that age he is considered in law to lack sufficient reason so as to be rendered accountable or answerable for his acts. Between *seven* and *fourteen* he is liable for his criminal acts if express malice on his part can be shown, because, as the maxim has it, *malitia supplet aetatem*; in other words, his criminal intent proves that he is not lacking in mind, but only in years, but the evidence of that malice which is to supply age ought to be strong and clear beyond all doubt and contradiction.⁸ Blackstone⁹ mentions cases in which a girl of thirteen and boys of ten, nine, and even eight, were condemned to death and executed for various capital offences. There is an exception to this rule in cases in which a charge of rape or the attempt to ravish¹⁰ is made against youths under fourteen, who are by law deemed to be physically impotent and incapable of committing the crime, and no evidence is admissible to show that they could commit the offence, though they may be convicted upon the

¹ *Lecone v. Sheires*, 1 Vern. 442.

² *Ex parte The Earl of Ilchester*, 7 Ves. 348.

³ 1 Byth. & Jarm. Conv. 798 (4th edit. by Robbins).

⁴ 49 & 50 Vict. c. 27, s. 3.

⁵ *Bassett's Case*, Dyer, 136 a, 137 a.

⁶ Per Page Wood, L.J., in *Lumsden's Case*, L. R. 4 Ch. App. 31, 38.

⁷ See *Ex parte Jones, Re Jones*, 18 Ch. D. 109.

⁸ 4 Bl. Com. 24.

⁹ *Ibid.*

¹⁰ See *Reg. v. Williams*, [1893] 1 Q. B. 320.

Responsibility
of infants for
criminal acts.

Immunity
under seven.

Liability be-
tween seven
and fourteen.

Boy under
fourteen can-
not be con-
victed of rape.

counts charging the minor offence;¹ thus, a male under fourteen cannot be convicted of having carnal knowledge of a girl under thirteen,² though he may be convicted of an indecent assault on her.³ This question of malice supplying age is one of fact. After the infant has attained fourteen, the legal presumption in his favour disappears, and he is as fully responsible for his criminal acts as though he were an adult; thus, if he fraudulently convert goods which have been delivered to him under an agreement for their hire, he can be convicted of larceny as a bailee.⁴ Where an act is made treason or felony, it extends as well to infants, if arrived at years of legal capacity, as to adults, unless there is a provision in the statute creating it, which expressly excepts them.⁵ If the offence charged against an infant in the indictment be a mere non-feasance, then in some cases he shall be privileged by his nonage, if under twenty-one, because laches ought not to be imputed to an infant.⁶

Under the Summary Jurisdiction Act, 1879,⁷ a "child," that is, an infant under twelve, if summarily convicted of any of the offences specified in the first schedule of the Act, may be sent to prison for any period not exceeding a month, or be fined an amount not exceeding forty shillings.⁸ A "young person," that is, an infant between twelve and sixteen, may on like conviction be sent to prison for a term not exceeding three months, or fined an amount not exceeding £10.⁹ Both "children" and "young persons" may be privately whipped.

Punishment of
infants under
Summary
Jurisdiction
Act, 1879.

To save young children from contamination, degradation and the evil surroundings of a prison, a court of summary jurisdiction has now the power to order, when a young person before them is remanded or committed for trial, that he should be remanded or committed to the custody of some fit person willing to receive him, who then becomes responsible for bringing him up for trial.¹⁰ The maintenance of such child is to be repaid to its custodian.¹¹

Youthful
Offenders Act,
1901.

The mere conviction of felony does not now operate to disqualify a young person from being sent to an industrial school, if such young person after such conviction is discharged under section 16 of the Summary Jurisdiction Act, 1879, or section 1 of the Probation of First Offenders Act, 1887, or merely punished with a whipping.¹²

¹ *Reg. v. Phillips*, 8 C. & P. 736; *Rex v. Groombridge*, 7 C. & P. 582.

² *Reg. v. Waite*, [1892] 2 Q. B. 600.

³ *Reg. v. Williams* (*ubi sup.*).

⁴ *Reg. v. Macdonald*, 15 Q. B. D. 323.

⁵ 4 Bl. Com. 24 n.

⁶ Macph. Inf. 451. For a mere non-repair of a road or bridge an infant does not seem to be criminally liable by way of indictment. If he had a guardian in socage or other person in occupation of the land in question, who was in possession of the receipts and profits, the guardian or other person in possession would be criminally liable for the non-repair.

⁷ 42 & 43 Vict. c. 49.

⁸ Sect. 10, sub-s. 1.

⁹ Sect. 11, sub-s. 1.

¹⁰ 1 Edw. VII. c. 20, s. 4 (1).

¹¹ Sect. 4 (7).

¹² 1 Edw. VII. c. 20, s. 1.

Industrial
Schools Act,
1866.

Reformatory
Schools Act,
1866.

Evidence of
infants.
Competency
of infants
based upon
understanding
and not upon
age.

Evidence must
be upon oath.
Exceptions.

Criminal Law
Amendment
Act, 1885.

Prevention of
Cruelty to
Children Act,
1904.

A child under fourteen years of age who comes within section 14 of 29 & 30 Vict. c. 118, may be sent to an industrial school until it reaches the age of sixteen.¹ And a child under sixteen, if convicted either summarily or on an indictment of an offence punishable with penal servitude or imprisonment, and sentenced to be imprisoned for a term of ten days or more, may be sent, at the expiration of his period of imprisonment, to a certified reformatory school to be detained for a period of not less than two nor more than five years.²

There is no fixed age or limit for the reception of the evidence of infants; their competency as witnesses is based upon understanding and not upon age. Their evidence will be received if the presiding judge is satisfied that they understand the nature of an oath, or that punishment will follow on their telling a lie. Thus, if a child under seven seems to understand the nature of an oath, and to have received a just impression of the facts to which he is deposing, and to be relating them truly, then his evidence ought not to be rejected.³ In *Brasier's Case*,⁴ which was on an indictment for assaulting with intent to ravish an infant about five years old, all the judges held that she might have been examined on oath, if on strict examination she had been found to comprehend the danger and impiety of falsehood. But the dying declarations of a child only four years old were rejected on the ground that however precocious her mind might have been, it was quite impossible that she could have had sufficient understanding to render her declarations admissible.⁵

The evidence must be given upon oath.⁶ Under two recent statutes young persons who are deemed too young to take an oath, but not too young to know the duty of speaking the truth, may give evidence, in cases of girls for offences against them under the Criminal Law Amendment Act, 1885;⁷ and young children generally for offences committed against them under the Prevention of Cruelty to Children Act, 1904,⁸ but not on oath. Such evidence must be corroborated by some other material evidence in support of the charge,⁹ and must be confined to offences created by the Acts.¹⁰

A point which awaits judicial decision is whether an infant of tender years can make a declaration instead of taking the oath.

¹ Sect. 18.

² 29 & 30 Vict. c. 117, s. 14.

³ See Indian Evidence Act, 1872, sect. 118, which enacts that "all persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to their questions by tender years," &c.

⁴ 1 East, P. C. 443; S. C. B. N. P. 293.

⁵ *Ree v. Pike*, 3 C. & P. 598.

⁶ *Ree v. Brasier* (*ubi sup.*).

⁷ 48 & 49 Vict. c. 69, s. 4.

⁸ 4 Edw. VII., c. 15, s. 15.

⁹ Oddly enough, under the earlier Act the young girl is liable to be punished for perjury, and under the later Act the young person is liable to the punishment provided by section 11 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49).

¹⁰ *Reg. v. Paul*, 25 Q. B. D. 202.

The infant might claim himself to declare, or it might be claimed for him by his parent or guardian, on the ground that he belonged to a religious community the members of which objected to take an oath, or on the ground that he had no religious belief at all, or his evidence might be objected to on the latter ground. The difficulty is whether a child of so tender an age could properly be said to have any fixed idea one way or the other. Mr. Justice Stephen was of opinion that the infant's evidence or declaration ought to be received, if he evinced proof of understanding the necessity of telling the truth, and was capable of speaking truly to the facts to which he was called to depose;¹ and he omitted want of religious belief in a child as a ground of incompetency;² and held that section 4 of the Evidence Amendment Act, 1869,³ applied *a fortiori* to a child who had received no instructions in a religious faith at all.

As to what weight should be given to the evidence of children, it has been observed, "that when the evidence of children is admitted, it is much to be wished, in order to render the evidence credible, that there should be some concurrent testimony of time, place, and circumstances, in order to make out the fact; and that a conviction should not be grounded on the unsupported accusation of an infant under years of discretion."⁴ But this objection has been met by a writer on evidence,⁵ who has said that "independently of the sanction of an oath, the testimony of children, after they have been subjected to cross-examination, is often entitled to as much credit as that of grown persons; and what is wanted in the perfection of the intellectual faculties, is sometimes more than compensated by the absence of motives to deceive."

An infant, as has been seen, is capable of taking an estate by descent or purchase; and where an estate vests in him by operation of law, and he does not disclaim, he is liable for rent, notwithstanding infancy;⁶ copyholds may be surrendered to his use, and he may be admitted to them.⁷ He may, it is said, do homage, but not fealty,⁸ but that he cannot perform grand serjeanty at the coronation.⁹ And generally, he may do as completely and irrevocably as a person of full age any right and lawful act which he is compellable by any means or in any way to do, albeit he doth it without suit of law.¹⁰

Infant may take estate by descent or purchase.

¹ Digest of the Law of Evidence, note xli. p. 168.

² *Ibid.* Art. 107, p. 110.

³ 32 & 33 Vict. c. 68. By this section a person objecting to take the oath, or objected to as incompetent to take an oath, may be allowed to make a declaration, but is liable to be tried for perjury. Mr. Lely, the editor of the last edition of Best on Evidence (7th edit.), is of opinion that this section does not apply to the case of a young child, and it seems on good grounds.

⁴ 4 Bl. Com. 214.

⁵ Phillips on Evidence (8th edit.) p. 6.

⁶ *Kelly v. Coote*, 5 Ir. Rep. C. L. 469.

⁷ Macph. Inf. 455.

⁸ Co. Litt. 65 b.

⁹ *Ibid.* 107 b.

¹⁰ *Ibid.* 172 a.

The effect of the Statutes of Limitations in protecting the interests of infants will be discussed in a later chapter.¹

A child *en ventre sa mère* is deemed or presumed in law to be a child in being for many purposes. It is capable of having a legacy or surrender of a copyhold estate made to it; it may have a guardian assigned to it, and is enabled to have an estate limited to its use, and to take afterwards by such limitation.² There is an exception to the above in the case of a descent at common law, for the heir-at-law takes the intermediate rents and profits from the time that the devise or limitation takes place to the birth of the child.³ The above presumption is applied generally for the benefit of the child, but it is not the less applicable if it happens to benefit some other person.⁴

Where the rule against perpetuities comes in question, it is a well-established rule of law that a child *en ventre sa mère* is deemed to be a child in being; and when it is born the doctrine of relation back applies, and the child is treated as having been born alive at the date when the instrument of donation came into operation, and it is quite immaterial whether such child is the first life in being or not, and whether the application of the doctrine is for the child's benefit or disadvantage.⁵ When the court has to construe even such words as "born in the lifetime," or "alive at death," there is no distinction to be drawn between a child who is born and alive at the time when the instrument of donation takes effect and a child *en ventre sa mère* to the exclusion of the latter.⁶ If a child *en ventre sa mère* is not to be deemed to be alive, specific words to that effect must be used.⁷

¹ *Post*, chap. vi.

² 1 Bl. Com. 130.

³ See per Arden, M.R., in *Thellusson v. Woodford*, 4 Ves. 335.

⁴ *Re Burrows, Cleghorn v. Burrows*, [1895] 2 Ch. 497.

⁵ *Long v. Blaskall*, 7 T. R. 100; *Re Wilmer's Trusts, Moore v. Wingfield*, [1903] 2 Ch. 411, affirming Buckley J., [1903] 1 Ch. 874, in whose judgment the leading cases on the subject are reviewed and discussed; *Villar v. Gilbey*, [1906] 1 Ch. 583.

⁶ *Villar v. Gilbey*, [1906] 1 Ch. 583, overruling [1905] 2 Ch. 301, and casting doubt on the correctness of the decision in *Blasson v. Blasson*, 2 De G. J. & S. 665.

⁷ *Villar v. Gilbey*, [1906] 1 Ch. 583.

Child *en ventre sa mère*, when deemed to be in existence.

Rule against perpetuities.

CHAPTER II.

ACTS AND CONTRACTS OF INFANTS.

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Infancy personal privilege only.

AN infant is a special favourite of the law whose ægis has been cast about him to protect him from the harm which his own immature judgment, or the designs of unscrupulous men, might bring about. Infancy is a personal privilege, and is used for the purpose of protecting the minor, therefore the incidents arising out of infancy are peculiar to the infant, and cannot be taken advantage of except by the infant or his representatives; thus, if any person of full age enter into an agreement with an infant, he is bound thereby, despite the want of reciprocal responsibility, and it is only at the option of the infant or his representatives to avoid it;¹ so, a third person not a party to the contract cannot take advantage of the infancy of one of the contracting parties to avoid it, unless it be void in its inception;² thus, an infant is not bound by recitals of a deed made during infancy,³ or by a proviso in a deed to which he was not a party, though taking benefits under it.⁴ This personal protection is to be used as a shield, and not as a sword; therefore, where the infant has been guilty of fraudulent misrepresentation as to his age, which has deceived the party dealing with him, he may be bound in equity by his act or contract.

Must not be used as a cloak for fraud.

The benefit of the infant is the only object which the law has in view: it therefore permits him to ratify or avoid certain contracts which may be beneficial to him, or declares void those which it deems to be prejudicial to him, and will even bind him in respect of those contracts which it is an advantage to him that he should be able to make, such as contracts for the necessities of life.

Classification of acts and contracts of infants.

There is a difficulty to be met with at the very threshold of the discussion of the acts and contracts of infants, that of classifying them. There has been much diversity of opinion both among judges and text-writers as to whether the acts and contracts of infants should be classified at common law as *void*, *voidable*, and *valid*, or as *void* and *valid*. The modern tendency, as evidenced

¹ *Coan v. Bowles*, 1 Show. 171.

² *Keane v. Boycott*, 2 H. Bl. 511.

³ *Per Eldon, C.*, in *Milner v. Lord Harewood*, 18 Ves. 259, 274.

⁴ *Capes v. Hutton*, 2 Russ. 357.

by judicial decisions and the opinions of text-writers, is to regard them as *void* or *valid* only; and this seems to be the more accurate opinion. The text-writers who support this view are Addison, Sir F. Pollock, Sir William Anson, and Hilliard (American); those who favour the threefold division are Comyns, Rolle, Bingham, Simpson, Story, and Schouler (American).¹

There is no doubt that much difficulty and apparent inconsistency has arisen from the loose way in which the word "*void*" has been used both by the judges and text-writers; ² it has been used in a sense equivalent to "*voidable*," or under circumstances which show that the judicial decision went no further than to declare that the contract in question could not be enforced against the infant.

There is a wide distinction between an act or contract which is void and one that is voidable. That which is *void* is incapable of being enforced or ratified; it is of no effect from the moment of its inception, not only as regards the infant, but also the adult contracting party; in short, it is a nullity: that which is *voidable* is perfectly valid until set aside by the person who has the right or option to set it aside. Bingham³ thus distinguishes between void and voidable: "Acts which are capable of being legally ratified are *voidable* only; acts which are incapable of being legally ratified are *void*." This distinction does not really remove the difficulty, for the question still remains, what contracts are void and what are voidable. Eyre, C.J.,⁴ thus states the matter: "The conclusion is, that for those things which the court can pronounce to be necessary for the infant, he may bind himself even by deed. . . . We have seen that some contracts of infants even by deed shall bind them. Some are merely void, viz., such as the court can pronounce to be to their prejudice. Others, and the most numerous class, of a more uncertain nature as to benefit or prejudice, are voidable only, and it is in the election of the infant to affirm them or not." This, in truth, does not accurately express the distinction required, for bearing in mind that "*void*" means that which is null and of no effect as regards both parties, a contract which might *prima facie* appear to the prejudice of the infant might really be to his advantage, and consequently it would be open to the adult contracting party at any time after its inception to treat it as of no effect, and the infant never could enforce it, though on attaining majority he might have found it

Distinction between the terms "*void*" and "*voidable*."

¹ Dom. Rel. ss. 406, 407. This writer admits that the tendency of opinion in the United States is towards the twofold division; and he gives many examples of acts and contracts which are there voidable which in England are held to be altogether void and incapable of ratification.

² Sir F. Pollock (Contracts, 53) has pointed out that even in Acts of Parliament it has been used as a term convertible with "*voidable*." See *Magdalen Hospital v. Knotts*, 4 App. Cas. 324.

³ Inf. 234.

⁴ In *Keane v. Boycott*, 2 H. Bl. 511, 514.

"Void" in many cases means "not enforceable against" the infant.

worth his while to treat it as a valid subsisting contract. This dictum of Chief Justice Eyre, moreover, fails to express the true state of the law; for, as there was no impediment in the way of an infant (at any rate until quite recently) ratifying on attaining majority a contract which was clearly to his prejudice, and which when ratified was binding on him, it therefore follows that contracts were not rendered *void* merely by reason of their being prejudicial to the interests of infants. That which was capable of being legally ratified must have had some legal existence; if it had not the ratification would have been ineffectual.¹ The true solution of the difficulty is, that the word *void* must be taken to mean in many cases no more than "*not enforceable against the infant.*" If this were not so, a contract of service clearly to the infant's detriment, as imposing harsh terms on him, would entitle the master of the infant servant to determine at any time their engagement, and to refuse to pay any wages for the services already rendered;² and this would be more to the infant's harm than to hold it as a valid contract, yet one which the infant might determine at his option.

There are two cases which show the convertibility of the two terms. In *Thornton v. Illingworth*,³ it was held by Bayley, J., that an infant's contract to buy goods for the purposes of trade was void; but in *Warwick v. Bruce* both the Court of King's Bench⁴ and the Exchequer Chamber⁵ held that in general the contract of an infant was not void, but that he might avoid it or not at his option.⁶ The point to be decided in the first case was whether a promise made after the commencement of an action was sufficient to sustain a replication that the defendant (who had pleaded infancy) ratified his contract after he had come of age, and it was held in the negative. Bayley, J., however, went on to say that "if he (the infant) makes a promise after he comes of age, that binds him, on the ground of his taking upon himself a new liability upon a moral consideration existing before." This dictum appears to be open to the objection that a contract which is absolutely void cannot be ratified so as to form a consideration, whether moral or legal, upon which a promise to pay can be maintained. Sir W. Anson's⁷ opinion appears to be more consistent with the general tendency of the decisions on the subject, when he says that an infant's ratification is one of a limited class

¹ An absolutely void act of an infant at common law is his warrant of attorney; now if, on attaining his majority, the infant goes through the form of ratifying his act, such ratification would be ineffectual, and both he and his representatives could treat the ratification and matters incident thereto as null and void.

² See *Reg. v. Lord*, 17 L. J. M. C. 181; but compare it with *Leslie v. Fitzpatrick*, 3 Q. B. D. 229. See *post*, p. 764.

³ 2 M. & S. 205.

⁴ 2 B. & C. 824.

⁵ 6 Taunt. 118, *sub nom.* *Bruce v. Warwick*.

⁶ See the remarks of Mr. Benjamin on these two cases; Benj. Sales, 30.

⁷ *Cont.* 107.

of cases in which a past consideration has been allowed to support a subsequent promise. From a comparison of the two cases above cited, it is difficult to avoid the conclusion that a contract has been judicially held to be *void*, which, in reality, was one that was only *voidable* at the option of the infant.

There seems to be authority for holding that there is a valid distinction between what might be called the acts of an infant (as distinguished from mere agreements) and his contracts or agreements. Many acts of an infant were *per se* void and invalid irrespectively of any prejudice which might result to him from them. Again, certain deeds were only voidable if they were solemnly carried out, or were to his manifest advantage, but void if they were not so solemnly carried out, or were to his prejudice. It has been shown that the modern tendency was to regard a few contracts of infants as void by operation of some rule of law or equity, and the majority of their agreements as valid, and only to be set aside at their option, or that of their representatives in blood or estate, on proof of prejudice. But the Infants' Relief Act, 1874,¹ has rendered a large number of contracts formerly valid absolutely void and incapable of ratification, thus taking away the power of exercising his option of avoiding or ratifying which the infant undoubtedly possessed. It is possible to hold that the effect of the statute is so sweeping as to render every contract by an infant which is not specially excepted by the Act null and void. It has not been yet so judicially decided; and recent writers on the subject of contracts treat it as not being intended to have that operation, but hold that infants may yet enter into certain contracts which are not absolutely void, but which on attaining their majority they may avoid or affirm. Effect to that opinion is given in this and the subsequent chapters. The division or classification here followed of the infant's acts and contracts is into (1) Void, and (2) Valid.

Acts of Infants.—Certain acts of an infant were void or valid according as they were carried out with due and proper solemnity, or were wanting in such solemnity. Perkins² lays it down that “all such gifts, grants, deeds made by an infant as do not take effect by delivery of his hand are void; but all gifts, grants, or deeds made by an infant by matter in deed or writing, which take effect by delivery of his own hand, are voidable by himself, his heirs, and those who have his estate.” In *Zouch v. Parsons*³ the foregoing rule was approved, and in effect it was held that where the delivery of the infant's deed amounted to the livery of seisin, and operated as the conveyance of an interest, it was merely voidable, but when it did not take effect as an assurance by delivery of the hand, but required an additional ceremony, as

Distinction between acts and contracts of infants.

Infants' Relief Act, 1874.

Acts of infants.

Rule in Perkins.

¹ 37 & 38 Vict. c. 62.

² Sect. 12

³ Burr 1794.

in a power of attorney, it was then actually void. Comyns¹ considers it possible to gather from this case that "the true ground why an infant's deed is only voidable, is the solemnity of the delivery." But Lord Mansfield, who delivered the judgment of the court, added:² "But be the point upon the solemnity of the delivery as it may (for there are respectable sayings the other way), it is not necessary to our determination. For we are all of opinion that the £109 received, and the other circumstances of the transaction, show a semblance of benefit sufficient to make it voidable only, upon the matter of the conveyance." This case was approved by Lord Eldon,³ and Lord St. Leonards,⁴ who upheld as sound law that a deed which takes effect by delivery, and is executed by an infant, is voidable only; but he added:⁵ "If I am to put my decision on the ground of the benefit arising to the infant from the deed, there is not only such a semblance of benefit, but so much real benefit conferred upon the infant as to bring the case within the branch of the rule laid down by Lord Mansfield in *Zouch v. Parsons*." ⁶ It is true that Comyns says,⁷ "Generally, every deed by an infant, as a grant of rent-charge, annuity, &c., is void"; but his authorities, Perkins⁸ and *Thompson v. Leach*,⁹ do not support his statement, for Perkins himself lays it down that "a grantor cannot against such a deed in pleading say that he did not grant by the deed, for the deed was not void, but voidable";¹⁰ and the case of *Thompson v. Leach*, above cited, was that of a person *non compos*, therefore observations in it as to infants' deeds were mere *obiter dicta*.

But Coke himself has it¹¹ that an infant may make a purchase of land which is voidable only, for "it is intended for his benefit, and at his full age he may either agree thereunto and perfect it, or, without any cause to be alleged, waive or disagree to the purchase." It has been laid down that "all instruments and acts of an infant are voidable only, except those which are necessarily to his prejudice, these last being void."¹² Those acts and deeds which are either by rule of law ineffectual, or can be pronounced by the court to be to the manifest prejudice of the infant are void, and to be set aside by them or his representatives. A joint and several bond or covenant by an adult and an infant is not void by reason of the joinder of the infant.¹³ There seems to be some doubt where the covenant or bond is

¹ Dig. Inf. C. 3.² P. 1808.³ In — v. *Handcock*, 17 Ves. 383.⁴ *Allen v. Allen*, 2 Dr. & W. 307.⁵ P. 341.⁶ *Ubi sup.*⁷ Dig. Inf. C. 2.⁸ Sect. 13.⁹ 3 Mod. 310.¹⁰ By the rules of pleading, the plea to a void deed was *non est factum*; but this was not a plea under which an infant could give evidence of his infancy; but it must have been pleaded specially. *Whelpdale's Case*, 5 Rep. 119; *Zouch v. Parsons* (*ubi sup.*).¹¹ Litt. 2 b.¹² *Simp. Inf.* p. 9. Here the word "void" means no more than "unenforceable against"; for an infant on attaining majority might affirm a contract which on the whole was prejudicial to him.¹³ *Gillow v. Lillie*, 4 L. J. C. P. 222.

A deed that takes effect by delivery and is not to the infant's harm is valid.

joint only,¹ but there does not seem to be any real reason why it should be held void as against the adult.

Void Acts.—A conveyance of his property to his guardian ;² a release of his trustee who has handed over only a part of the trust funds ;³ an appointment of an agent⁴ (a lease by an agent so appointed is void, and the infant may bring an action of ejectment without any notice to quit ;⁵ an appointment or warrant of attorney, but to this an exception has recently been made by the Conveyancing and Law of Property Act, 1881,⁶ in the case of married women ; the Act provides that “a married woman, *whether an infant or not*, shall by virtue of this Act have power, as if she were unmarried and of full age, by deed, to appoint an attorney on her behalf for the purpose of executing any deed or doing any other act which she might herself execute or do ; and the provisions of this Act relating to instruments creating powers of attorney shall apply thereto. This section applies only to deeds executed after the commencement of this Act.” A will,⁷ except as a soldier in actual military service, or a seaman at sea.⁸ A breach of trust, whether authorized⁹ or adopted.¹⁰ Submission to a reference by attorney,¹¹ or his cognovit ;¹² a bond with a penalty and for payment of interest, though it has been given for necessities ; such a bond is held void, as it is clearly not for the infant’s benefit.¹³ An infant cannot give a valid receipt,¹⁴ unless the instrument of donation specially provides that his receipt shall be a discharge.¹⁵ But an infant, who is also a married woman, may, by the provisions of the Conveyancing and Law of Property Act, 1881,¹⁶ give a valid receipt to her trustees of the income of the trust funds paid to her by them. A bond executed by an infant as a surety has been held void in America.¹⁷ An account stated, even for necessities ; this was formerly a voidable act on the part of the infant,¹⁸ but by the Infants’ Relief Act, 1874,¹⁹ it is expressly rendered absolutely void. A bill of exchange, whether drawn or accepted, or endorsed by an infant, or a promissory note made by him, is,

Disadvantageous, and tending to disadvantage of infant.

¹ See *Gillino v. Lillie* (*ubi sup.*).

² *Overton v. Bannister*, 3 Ha. 503.

³ *Ibid.*

⁴ 1 Vict. c. 26, s. 7. See p. 743.

⁵ *Ibid.* s. 11. See *In The Goods of Hiscock*, [1901] P. 78, and *Gattward v. Kneec*, [1902] P. 99.

⁶ *Zambaco v. Cassavetti*, L. R. 11 Eq. 439.

⁷ *Biddle v. Dowse*, 6 B. & C. 255.

⁸ *Oliver v. Woodroffe*, 4 M. & W. 650. In this case Lord Abinger said : “The general principle of law is that a minor is not to be allowed to do anything to prejudice himself or his rights.”

⁹ *Baylis v. Dineley*, 3 M. & S. 477 ; *Ex parte The Unity Joint-Stock Mutual Banking Association, Re King*, 27 L. J. Bk. 33.

¹⁰ See *Stott v. Meanock*, 31 L. J. Ch. 746. For the payment of small sums into a post-office savings bank to the credit of an infant, see *Elliott v. Elliott*, 54 L. J. Ch. 1142.

¹¹ 4 Dav. Prec. 73.

¹² Sch. Dom. Rel. s. 404, and the cases there cited.

¹³ *Williams v. Moor*, 12 L. J. Ex. 253.

¹⁴ Bac. Abr. Inf. 1, 3 ; 1 Roll. Abr. 728.

¹⁵ *Doe v. Roberts*, 16 M. & W. 778.

¹⁶ 44 & 45 Vict. c. 41, s. 40.

¹⁷ *Wilkinson v. Parry*, 4 Russ. 272.

¹⁸ 37 & 38 Vict. c. 62, s. 1.

since the Act of 1874, void,¹ even where it was accepted for the price of necessaries.² Previously to that Act its acceptance might have been ratified on his attaining majority. It seems, however, that the infant may be bound in certain circumstances, if guilty of express fraudulent misrepresentation, by which the other party is deceived.³ But his mere trading as an adult is insufficient to render him liable for trade debts.⁴ Though the infant is not bound, he may yet bring an action on the bill or note.⁵ In an action against the acceptor in which infancy is the defence, the acceptor is bound to prove that he accepted the bill when an infant.⁶ An acceptance is binding if given when the acceptor was an adult, though the bill was drawn while he was an infant.⁷ An infant's void deeds or conveyances may be set aside during his minority, and it is not necessary to wait till he has attained his majority to treat them as null and void.

Valid acts.

All acts and instruments of a solemn nature which are not to an infant's prejudice are valid and binding until set aside by him on attaining majority. The term valid includes voidable, for an infant may avoid all acts done by him during infancy, except such as are binding on him by legislative sanction, or by order of a court of competent jurisdiction. It has been seen that the true test of the validity of an infant's deed is the advantage or absence of prejudice to be derived from it, and that though valid, it is yet voidable at his option on attaining majority; but those persons affected by his acts have not the same privilege. The arrangement here followed will be set out—first, those acts which are voidable at the infant's election; next, those which are absolutely binding on him.

Voidable.

The deeds of infants are, as a rule, voidable;⁸ so, too, grants, whether of corporeal or incorporeal hereditaments, and assignments. Thus, his feoffment is voidable,⁹ or his surrender in ordinary cases;¹⁰ or his grant of a rent charge.¹¹ But a free and voluntary gift by him of personal chattels would seem to be good and effectual;¹² so, too, the engrafting of a trust upon the legal estate by him, though any equitable interest would not be allowed to be enforced against him; and if he died without having avoided the trust, a court of equity would still investigate the transaction and see that no unfair advantage had been taken of him.¹³

Binding acts.

There are certain acts which when done by an infant not only

¹ *Ex parte Kibble, Re Onslow*, L. R. 10 Ch. App. 373.

² *Re Soltyskoff, Ex parte Margrett*, [1891] 1 Q. B. 413.

³ See *Ex parte Jones, Re Jones*, 18 Ch. D. 109.

⁴ *Miller v. Blankley*, 38 L. T. 527.

⁵ *Halliday v. Atkinson*, 5 B. & C. 501.

⁶ *Roberts v. Bethell*, 22 L. J. C. P. 69.

⁷ *Ibid.*; *Stevens v. Jackson*, 4 Camp. 164.

⁸ *Whittingham's Case*, 8 Rep. 43; Co. Litt. 337 b.

⁹ *Zouch v. Parsons*, 3 Burr. 1794.

¹⁰ See *Taylor v. Johnston*, 19 Ch. D. 603.

¹¹ *Martin v. Gale*, 4 Ch. D. 428.

¹² See *Hudson v. Jones*, 3 Mod. 311 n.

¹³ See Lewin, p. 24.

are valid, but are binding upon him; it will be seen that they are such as do not affect his material interests, or are such as acquire their binding force from the statutory intervention of the Court of Chancery, whose enlarged jurisdiction was required by the necessities of commerce and social relations; or such as the justice of the case required should bind him. The acts of an infant which do not touch his interests, but take effect from the authority which he is trusted to exercise, are binding;¹ thus, an infant officer may perform the duty of the office which he may hold, as where an infant patron presents² or nominates³ to a benefice; and no public inconvenience can arise from his presentation or nomination, since the bishop is to judge of the qualification of the clerk presented. "In all cases infants present to livings; that is the common custom of the realm, which is the common law. It is not said in any case that the infant shall be of the age of discretion. In such cases the guardian must present in the name of the infant, or the infant by the consent of his guardian; and so are all infants' affairs transacted. . . . The guardian ought to put the infant's hand to the nomination and not a stranger."⁴

Acts which do not touch infant's interests.

That which an infant is bound to do he can validly do. In the case of *Zouch v. Parsons*⁵ the question arose whether a lease and release executed by an infant was binding on him. Lord Mansfield held under the circumstances of that case that it was, because, among other reasons, as the infant had only done what the Court of Chancery would have compelled him to do, his conveyance was actually binding on him. An infant not only can inherit, but he cannot disclaim the inheritance as the *heres* under the Roman law system was permitted to do;⁶ if, on the contrary, he purchase an estate, he can repudiate his bargain. He may take or accept by will, purchase, or surrender, but he is not bound to take property if it would be to his disadvantage. An infant may accept a grant, but he can avoid it at majority.⁷ An infant by custom may make a feoffment of his gavelkind land at the age of fifteen.⁸ If he take an estate he is liable to pay the rent and perform the services, but he is not liable to pay more than he actually receives as profits from the estate.⁹ He is liable for a customary fine of copyhold if he occupy,¹⁰ for assessment of county rates, &c.,¹¹ or any obligation imposed by

What infant bound to do he can validly do.

¹ See Lewin, p. 37.

² Co. Litt. 246 a; *Hearle v. Greenbank*, 3 Atk. 695, 710.

³ *Arthington v. Culverley*, 2 Eq. Cas. Ab. 518; 8 Osborn MSS. 174.

⁴ Per Lord Chancellor King in *Arthington v. Culverley*, 8 Osborn MSS. 174; and see *Leigh v. Leigh*, [1902] 1 Ch. 400.

⁵ *Ubi sup.*

⁶ Co. Litt. 191 a, n.

⁷ *Ibid.* 2 b, 350 b; Bac. Abr. Inf.

⁸ 2 Dav. Conv. 221.

⁹ *Re Fair*, 13 Ir. Rep. Eq. 278.

¹⁰ *Ecelyn v. Chichester*, 3 Burr. 1717. In this case he had occupied for two years after attaining majority. See pp. 768, 769.

¹¹ 2 Inst. 703.

tenure, as the repair of a bridge, if he be in actual receipt of the rent and profits.¹ An infant takes subject to any contract by the person through whom he claims respecting the estate, as mortgage, contract for sale,² or lease;³ and he is bound by a trust for the conversion of the property, real or personal, that he takes, though absolutely entitled to it.⁴

Infant bound
by conditions
annexed to
property.

An infant is bound by certain conditions imposed upon him; thus, if he take an estate he is bound by any condition annexed to it, and if he cannot perform the condition, he cannot take the estate,⁵ as where he takes an estate upon condition of paying a sum of money which he is unable to pay;⁶ but where the condition is to pay out of rents and profits, and by reason of infancy he is not in possession of rents and profits, the condition will not bind him till he comes into possession.⁷ But he is not bound by a condition on taking an estate which involves a course of conduct on his part which may be overruled by those who have a legal right to prescribe for him a particular course of conduct; thus, where he is devisee of an estate, the interest in which is to cease if the devisee refuses or neglects to reside in the mansion-house, he is not bound by the condition, and so, if he does not reside in the mansion-house, he cannot be said to refuse or neglect so to do.⁸ He is likewise bound by a condition to marry or not to marry a particular person,⁹ though he be unaware of the condition on taking the property.¹⁰ Bonds given by infants under the Customs Act are valid.¹¹

Doctrine of
election applies
to infants.

The doctrine of election applies to infants as well as to adults, and an infant will be compelled to elect whether to take under or against an instrument, and it is applicable alike to real¹² and personal estate.¹³ But if the court sanction it, he may be allowed to take in its unconverted state property which is directed to be converted;¹⁴ or, on the other hand, where he applies by a properly authorized person under section 6 of the Partition Act, 1876, for a sale, the court will make an order for such sale if it deems it for the infant's benefit;¹⁵ and the effect of such order is to convert the real estate into personalty.¹⁶ The court as a rule will direct an inquiry as to how the infant's election should be made.¹⁷

Compromise.

The court has power to compromise the rights and claims of infants, where such are not only equitable,¹⁸ but also legal.¹⁹ A

¹ *Rea v. Sutton*, 3 Ad. & El. 597.

³ *Maddon v. White*, 2 T. R. 159.

⁵ *Cary v. Cary*, 2 Sch. & Lef. 173.

⁷ *Slade v. Tomson*, 3 Bulst. 58.

⁹ *Cary v. Bertie*, 2 Vern. 333.

¹¹ 39 & 40 Vict. c. 36, s. 165.

¹³ *Hervey v. Desbouverie*, *ibid.* 130.

¹⁵ *Rimington v. Hartley*, 14 Ch. D. 630.

¹⁷ See *Walker v. Greenwood*, 16 Ch. D. 362.

¹⁹ *Bennett v. Houldsworth*, 6 Ch. D. 671.

¹⁸ *Brooke v. Lord Mostyn*, 2 De G. J. & S. 373.

¹⁹ *Doe dem. Miller v. Noden*, 2 Esp. 530.

² *Bullock v. Bullock*, 1 J. & W. 603.

⁴ *Van v. Barnett*, 19 Ves. 102.

⁶ *Gundry v. Baynard*, 2 Vern. 278.

⁸ *Partridge v. Partridge*, [1894] 1 Ch. 351.

¹⁰ *Gardiner v. Slater*, 25 Beav. 509.

¹² *Streatfield v. Streatfield*, Cas. t. Talb. 176.

¹⁴ *Robinson v. Robinson*, 19 Beav. 494.

compromise assented to by the infant's counsel is not binding unless sanctioned by the court;¹ but the court itself has no power to force a compromise on the infant's next friend.² If a compromise has been brought about by any suppression or misrepresentation of facts, or fraud, it will be set aside;³ and if the compromise is only for the benefit of the next friend, it will not be allowed to stand.⁴

A judgment in law is binding on an infant until he has it set aside by showing that he was an infant when it was obtained;⁵ the court, however, can inquire into its consideration, and if such is found to be within the mischief of the Infants' Relief Act, 1874, it can be set aside;⁶ but a judgment obtained in an action by the infant's next friend is binding on him, though he has never consented to the action being brought.⁷ But he is not to suffer by negligence or want of knowledge on the part of his next friend, and may impeach a decree or judgment founded on error in the facts, without being required to produce the usual evidence that the facts relied on were not known and could not have been discovered with reasonable diligence.⁸ A decree or order in equity in his own suit is binding, unless fraud, gross negligence,¹⁰ error,¹¹ or new matter is shown,¹² and he must apply within a reasonable time after attaining twenty-one to set it aside.¹³ A judgment against his real estate for necessities would, it seems, bind the inheritance.¹⁴ If an infant were bound over to prosecute and failed to do so, in all probability the court would order a forfeiture of his recognizances.¹⁵ The court as a rule makes an inquiry whether an order will be beneficial for an infant; but if an order is made without that preliminary inquiry, it will be treated as of the same authority as if the inquiry had been made.¹⁶

Judgment in law binding until set aside.

Also decree or order in equity.

Under certain statutes the interests of infants are bound when it is to their advantage, or the necessities of the case require that they should be. The infant is, of course, legally incapable of making a binding sale or disposition of his property, and the Court of Chancery has no intrinsic power or jurisdiction to do that for

¹ *Hargrave v. Hargrave*, 19 L. J. Ch. 261.

² *Re Birchall*, *Wilson v. Birchall*, 16 Ch. D. 41.

³ *Brooke v. Lord Mostyn* (*ubi sup.*).

⁴ *Rhodes v. Swithenbank*, 22 Q. B. D. 577.

⁵ *Henry v. Archibald*, 5 Ir. Rep. Eq. 559; *Cooper v. Cooper*, L. R. 7 H. L. C. 53.

⁶ *Re Onslow's Trusts*, L. R. 20 Eq. 677.

⁷ *Morgan v. Thorne*, 7 M. & W. 400.

⁸ *Re Hoghton*, L. R. 18 Eq. 573.

⁹ *Colcough v. Bolger*, 4 Dow, 54.

¹⁰ *Re Hoghton* (*ubi sup.*).

¹¹ See *Hindmarsh v. Southgate*, 3 Russ. 324.

¹² See *Carew v. Johnston*, 2 Sch. & Lef. 280.

¹³ *Sheffield v. Duchess of Buckingham*, 1 Atk. 629, 631; *Gregory v. Molesworth*, 3 Atk. 626; *Re Hoghton* (*ubi sup.*). See *Money Penny v. Dering*, 33 L. T. (O.S.) 159.

¹⁴ Per James, L.J., in *Re Howarth*, L. R. 8 Ch. App. 418.

¹⁵ See *Ex parte Williams*, 13 Price, 673.

¹⁶ *Brooke v. Lord Mostyn* (*ubi sup.*).

the infant which the law has declared him incapable of doing.¹ It has required the intervention of the Legislature to confer upon it those powers, and within those alone can it act.

Trustee Act,
1850.

Thus, under the Trustee Act, 1850,² where an infant is seised or possessed by way of mortgage or trust of any lands, the court may make a vesting order of such lands; and the order shall have the same effect as if the infant trustee or mortgagee had been of age, and had duly executed a conveyance or assignment of the lands;³ or where an infant is entitled to any contingent right in any lands upon trust or by way of mortgage, the court may make an order releasing the lands from such contingent right;⁴ and a like vesting order will be made in the case of infants possessed of stock upon trust.⁵ The court can treat the infant heir of a person who has died after contracting to sell as a trustee, if the contract has been executed, or there has been a decree for specific performance, or its validity has been otherwise ascertained;⁶ but cannot do so where the facts are otherwise.⁷ Again, under 15 & 16 Vict. c. 86, where an infant holds lands subject to the debts of his ancestor or testator, the court will enable him to convey the lands for the purposes of sale, and the court will direct a sale rather than a foreclosure where it is clearly for the infant's benefit.⁸ The infant cannot now show cause against the decree or order made in his case.

Parol
demurrer.

Formerly when an infant was foreclosed, or had a sale directed against him, he was allowed to show cause against the decree. The old expression for objecting to the decree was called "the parol demurring"; but this privilege was strictly confined to infant heirs when sued on the specialty of their ancestors.⁹ Under that process the infant heir pleaded his infancy, and that he ought not to answer till he was of age; proceedings were then stopped till he attained his majority. This was abolished by 11 Geo. IV. & 1 Wm. IV. c. 47 s. 10. This section was thought to have deprived the infant of his right to show cause against the decree on reaching majority; but it has been decided that it did not in all cases have that effect.¹⁰

Day to show
cause.

This day for showing cause (which was a day six months after

¹ *Culvert v. Godfrey*, 9 Beav. 97; *Field v. Moore*, 25 L. J. Ch. 66. See *ante*, p. 691. ² 13 & 14 Vict. c. 60. ³ Sect. 7.

⁴ Sect. 55.

⁵ 15 & 16 Vict. c. 55, s. 3.

⁶ *Re Cumming*, L. R. 5 Ch. App. 72; *Re Bradley's Settled Estates*, 54 L. T. 43.

⁷ See *Re Cumming* (*ubi sup.*); *Re Colling*, 32 Ch. D. 333.

⁸ Sect. 55.

⁹ *Plasket v. Beeby*, 4 East, 485, in which case it was held that an infant devisee sued by a specialty creditor of his ancestor could not pray the parol to demur by reason of his nonage. This privilege was at first confined to infant heirs in chivalry, but was subsequently extended to all heirs by descent, and so became their common law privilege.

¹⁰ *Scholefield v. Heafield*, 7 Sim. 669, 8 Sim. 470; *Price v. Carver*, 3 Myl. & Cr. 157. In this latter case Lord Cottenham held that the parol demurring, and giving a day to show cause, were not synonymous terms.

he came of age) was held to be the infant's privilege only where he was bound to make a conveyance of the legal estate, as in the case of an equitable mortgage;¹ that is, where the decree required some act to be performed by the infant, such as the execution of a conveyance in a suit for foreclosure of an equitable mortgage, then a day to show cause was allowed him;² but when the legal estate was in the mortgagee (as in the case of a legal mortgage), it has been held that the infant was not so entitled to it, because no conveyance was required of the infant mortgagor.³ The infant on having a day to show cause was only allowed to show error in the judgment;⁴ or make out a claim paramount to the mortgage.⁵

It has been stated that "the Trustee Act of 1850 puts the infant heir or devisee of the right of redemption of an equitable mortgage in the same position in this respect as if the mortgage were legal; for it enables the court to make the conveyance, and thereby to complete the mortgagee's title without waiting for the infant's majority. His whole right, both legal and equitable, can now be bound by the decree and order of the court, and the right to the day to show cause should cease with the reason upon which it was founded."⁶ However, in the light of more recent cases, this statement can hardly be said to be a complete exposition of the law; and in the case of a foreclosure suit, whether the legal estate be or be not vested in the infant, the usual practice is still to insert in the judgment a clause allowing him to show cause six months after he comes of age, against the judgment, unless he be a simple trustee.⁷ The law on this point would seem to be as follows: In a foreclosure suit, in the case both of a legal and equitable mortgage, the ordinary form of judgment should give the infant a day to show cause;⁸ and where the mortgage is an equitable one, should direct the infant to convey when he attains the age of twenty-one.⁹ But where the mortgage is legal, because the legal estate is not in the infant, the court may grant judgment for an immediate foreclosure against the infant, under such circumstances as the following: Where the mortgagee offers to pay the infant's costs as between solicitor and client, and the infant's counsel does not

Day allowed
in a foreclosure
suit against
infant who
has not the
legal estate.

When no day
to show cause
given.

¹ *Price v. Carver* (*ubi sup.*).

² *Walsh v. Trevanion*, 16 Sim. 181.

³ *Clinton v. Bernard*, 6 Ir. Rep. Eq. 355.

⁴ *Williamson v. Gordon*, 10 Ves. 114.

⁵ *Anon.*, Mos. 66.

⁶ See *Foster v. Parker*, 8 Ch. D. 147.

⁷ *Dan. Ch. Pr.* 177; *Scholefield v. Heafield* (*ubi sup.*); *Newbury v. Marten*, 16 L. T. (Q.S.) 482; *Foster v. Parker* (*ubi sup.*); *Set. Judg. & Ord.* 831. "Although in the case of a foreclosure of a legal mortgage, a conveyance from the infant is not required, the right of an infant to a day to show cause was in *Newbury v. Marten* (*ubi sup.*) held to be unaffected by the Trustee Act, 1850; and notwithstanding what is said by Stuart, V.C., in *Bennett v. Harfoot* (24 L. T. 86), this case has been followed in practice, and has not been distinctly overruled." *Cootte, Mortg.* 995; *Gray v. Bell*, 45 L. T. 521.

⁸ *Mellor v. Porter*, 25 Ch. D. 158.

⁹ *Ibid.*

When sale directed, no day to show cause.

seek to redeem; where the infant's guardian *ad litem* is of opinion that such order should be made, and where the mortgage debt greatly exceeds the value of the property.¹ Where the judgment against an infant is for an immediate conveyance, section 30 of the Trustee Act, 1850, should apply.² If a sale be directed instead of a foreclosure the infant has no day to show cause, because the mortgagee being a creditor of the deceased mortgagor is entitled to ask the court to exercise the powers conferred by the Trustee Act, 1850, under which the estate of the infant may be conveyed notwithstanding infancy.³ Where an infant plaintiff brings his action by his guardian to redeem, and a day is given for that purpose, and default is made in payment, and the action consequently dismissed, which is equivalent to a foreclosure, it does not seem clear whether the infant will be bound, or will have six months after he comes of age to show cause.⁴

Writ of *subpena* to show cause.

Where an infant has had a day given him to show cause against the judgment, a writ of *subpena* calling upon him to show cause must be served upon him after he attains twenty-one, and he must show cause within six months.

Lands Clauses Act, 1845.

Under the Lands Clauses Act, 1845,⁵ an infant may be bound by a conveyance of his land to a railway company, or other public undertaking.⁶

Partition Act, 1868.

Infants' Settlement Act, 1855.

By the Partition Act, 1868,⁷ the court may under certain specified circumstances direct a sale of an infant's property. So, too, by the Infants' Settlement Act, 1855,⁸ an infant may with the sanction of the court make a valid and binding settlement of his or her real or personal estate in contemplation of marriage;⁹ and in various special cases, infants and their guardians are enabled by statute to sell and convey land for purposes connected with religion, charity, instruction, literature, science, and the fine arts, or works of a public nature.¹⁰

Powers.

An infant may execute a power simply collateral, if he "is a mere conduit-pipe, as it has been termed, of the will of the donor of the power, so that when the estate is created, the infant (as was said in the case in *Bridgman*) is merely the instrument by whose hands the testator or donor acts. The donor, it is said, may use any hand, however weak, to carry out his intentions."¹¹ But an infant cannot be empowered, at least as against himself,

¹ *Wolverhampton and Staffordshire Banking Co. v. George*, 24 Ch. D. 707; *Younge v. Cocker*, 32 W. R. 359.

² *Younge v. Cocker* (*ubi sup.*).

³ Dan. Ch. Pr. 177.

⁴ See *Gregory v. Molesworth*, 3 Atk. 625; Coote, Mortg. 997.

⁵ 8 & 9 Vict. c. 18, s. 17.

⁶ Dan. Ch. Pr. 179.

⁷ 31 & 32 Vict. c. 40.

⁸ 18 & 19 Vict. c. 43.

⁹ See *post*, chap. iv., Marriage Settlements of Infants.

¹⁰ Dart. V. & P. 2, and the statutes there cited.

¹¹ Per Wood, V.C., in *King v. Bellord*, 1 H. & M. 343, 348; Sugd. Pow. 177.

to contract for the sale of land, or to do any act which requires an exercise of discretion, or would affect his own interests. An infant in exercising a general power of appointment for the purpose of making a settlement is enabled by the Infants' Settlement Act, 1855,¹ to make an absolute appointment, so that on failure of the limitations of the settlement, the appointed property will become his own, whether he dies under age or not.² An infant may exercise a power which is only collateral over real and personal estate; a power in gross (that is, where coupled with an interest affected by it) over personal but not real property,³ if there is an intention that it should be exercisable during minority; but he cannot exercise at all a power appendant or appurtenant.⁴

Contracts of Infants.—The division or classification of contracts will be the same as that of the acts of infants, that is, into (1) Void, and (2) Valid. If those cases are put aside in which the term "void" is clearly used as convertible with and equivalent to "voidable," there is much authority for saying that formerly very few contracts entered into by infants were void, but rather the majority of them were voidable at his option. "The promise of an infant is, generally speaking, absolutely void as against himself";⁵ as, for instance, his executory promise can be rescinded by him at any time before it is completed; but the mere fact that a contract cannot be for his benefit does not render it absolutely void. The Court of Exchequer Chamber, in *Warwick v. Bruce*,⁶ held that "the general law is that the contract of an infant may be avoided or not at his own option," and Parke, B., delivering the judgment of the Court of Exchequer in *Williams v. Moor*,⁷ said: "The argument on behalf of the defendant was, that an account stated by an infant is not merely voidable, but actually void, so that no subsequent ratification can make it of any avail. But we can see no sound or sensible distinction in this respect between the liability of an infant on an account stated, and his liability for goods sold and delivered, or on any other contract." His lordship thus concluded: "The general doctrine is, that a party may, after he attains the age of twenty-one years, ratify and so make himself liable on contracts made during infancy. We think that, on principle unopposed by authority, this may be done on a contract arising on an account stated, as well as on any other contract." In *Regina v. Lord*,⁸ an agreement which compelled an infant servant to serve at all times

Contracts of infants.

Few contracts formerly absolutely void.

¹ 18 & 19 Vict. c. 43.

² *Re Scott, Scott v. Hanbury*, [1891] 1 Ch. 298; and see *Re D'Angibau, Andrews, v. Andrews*, 15 Ch. D. 228.

³ *Re Cardross' Settlement*, 7 Ch. D. 728.

⁴ 6 Byth. & Jar. 154.

⁵ Macph. Inf. 477. Here "void" is convertible with "voidable."

⁶ 6 Taunt. 118. In Cam. Scac. *Bruce v. Warwick*.

⁷ 12 L. J. Ex. 253.

⁸ 17 L. J. M. C. 181.

during the term of service, but left the master free to stop his work and his wages whenever he chose to do so, was held to be inequitable and wholly void, as being prejudicial to the infant servant. But that void here means no more than void as against the infant, or voidable at his option, is plain from the criticisms directed against the case, and especially from what was held by the Queen's Bench Division in *Leslie v. Fitzpatrick*,¹ also a case of contract of service by an infant. It is true that this case has been questioned in a later decision,² but it seems to contain an accurate exposition of the law. It has been laid down that an infant can do no act to bind himself unless it be manifestly for his benefit;³ but the other opinion, and one followed in more recent decisions, is that the court must be satisfied that the contract is not for his advantage before it can hold it to be void.⁴

Valid contracts between infants and adults bind the latter, but the former have the privilege of avoiding or confirming them at majority; for "those who enter into contracts with them shall be bound, if it be prejudicial to the infant to rescind the contract."⁵ This is a valuable privilege; and to declare their contracts void which may have a superficial aspect of prejudice to them would be to deprive them of this privilege, and be more to the adult's advantage than theirs. The object of the law, which is the protection of the infant, is amply secured by not allowing the contract to be enforced against him during his infancy, and leaving it in his option to affirm or repudiate it at his full age. An infant may enforce his contracts by suit against the adult contracting party, though he himself has incurred no corresponding obligation. Thus, an infant may sue for wages on a contract for hiring and service;⁶ for a breach of contract to marry,⁷ and generally for breach of any contract entered into with him.⁸ But there is an exception to his power of enforcing his voidable contracts against the other contracting party during infancy, for specific performance will not be granted at the suit of an infant, because the remedy is not mutual.⁹ The infant, on the contrary, is not liable for goods supplied him,¹⁰ or for work and labour done at his request,¹¹ or for rent in an action for use and occupation of

Power of
infant to
enforce
contracts;
adult bound,

but not by
specific
performance.

¹ 3 Q. B. D. 229.

² *Meakin v. Morris*, 12 Q. B. D. 354. See *post*, Contracts of Service, pp. 784 *et seq.*

³ Per Abbott, C.J., in *Rex v. Wigston*, 3 B. & C. 484.

⁴ Per Martin, B., in *Cooper v. Simmons*, 31 L. J. M. C. 138. See *Meakin v. Morris* (*ubi sup.*).

⁵ Per Lord Redesdale in *Shannon v. Bradstreet*, 1 Sch. & Lef. 58.

⁶ Per Bayley, J., in *Rex v. Chillesford*, 4 B. & C. 101.

⁷ *Holt v. Ward*, 2 Stra. 937. But see *post*, p. 776 *n* 1.

⁸ *Warwick v. Bruce*, 6 Taunt. 118.

⁹ *Flight v. Bolland*, 4 Russ. 298. See *Lumley v. Ravenscroft*, [1895] 1 Q. B. 683.

¹⁰ *Stone v. Withypol*, Cro. Eliz. 127; 37 & 38 Vict. c. 62, s. 1. His liability or non-liability for goods sold to him is determined at the time the property in the goods passed to him; thus where goods are bought by an infant, and delivered to his carrier (the property in them thereby passing) but not delivered by the carrier till after he has attained twenty-one, he is not liable. *Griffin v. Langfield*, 3 Camp. 254.

¹¹ *Dilk v. Keighley*, 2 Esp. 480.

premises occupied by him,¹ or for breach of contract to marry,² or on a warranty.³ Nor would he be prejudiced by leaving his goods in the order and disposition of one who becomes bankrupt.⁴

An infant, however, is not entitled to commit fraud with impunity; consequently, if he represent himself to be of full age, he is bound by payments made and acts done at his request and on the faith of such representations and is liable to restore any advantage he has obtained by such representations to the person from whom he has obtained it.⁵ But in the absence of any false assertion by the infant, relief in equity will not be granted against him upon the ground that the other contracting party believed him to be of full age;⁶ and the mere fact of his entering into a transaction, which must necessarily be invalid, unless entered into by an adult, is not such a fraud as entitles the other party to relief;⁷ and knowledge of his infancy by the other party is a complete bar to relief.⁸ The fraud, it would appear, must be active in its character, and the mere negation of the true state of facts would be insufficient to bind him.⁹

When infant bound: fraud.

Whether a debt due from an infant would constitute sufficient interest to enable a creditor to insure his life would seem to be doubtful. If it were not an effective debt as for necessities it would be probably held insufficient.

Insurable interest in infant's life in creditor.

Void Contracts.—Certain contracts and agreements of infants were void. Thus, a bare agreement to deliver goods was void;¹⁰ such as were clearly to the prejudice of the infant were likewise void, as a release of debts by an infant executor.¹¹ If he bind himself by a bond with a penalty to pay for things supplied him, whether necessities or not, he is not bound.¹² Again, there are some contracts which under one set of circumstances may be valid, and under another absolutely void; thus, a contract by an infant to take shares in a company which is wound up before he attains twenty-one is a mere nullity,¹³ the intervention of the winding-up order rendering it unmistakably to his disadvantage,¹⁴ though it would be otherwise if the company were not wound up during his infancy, and he did not avoid his contract within a reasonable time after reaching majority. Formerly the presence or absence of prejudice (by which the validity or invalidity of the

Void contracts.

Contracts clearly to the prejudice of infant.

¹ *Lowe v. Griffith*, 1 Scott, 458.

² *Coshead v. Mullis*, 3 C. P. D. 439; *Northcote v. Doughty*, 4 C. P. D. 385; *Ditcham v. Worrall*, 5 C. P. D. 410.

³ *Howlett v. Haswell*, 4 Camp. 118.

⁴ *Viner v. Cadell*, 3 Esp. 88.

⁵ See *Bartlett v. Wells*, 31 L. J. Q. B. 57; *Clarke v. Copley*, 2 Cox, 173.

⁶ *Stikeman v. Dawson*, 1 De G. & S. 90.

⁷ *Ibid.*

⁸ See *Simp. Inf.* 102.

⁹ *Nelson v. Stocker*, 32 L. T. (O.S.) 368.

¹⁰ *Perk. s.* 12.

¹¹ *Russell's Case*, 5 Rep. 27.

¹² *Co. Litt.* 172 a.

¹³ *Mann's Case*, L. R. 3 Ch. App. 459; *Capper's Case*, *ibid.* 458. See remarks of Selwyn, L.J., in *Lumsden's Case*, L. R. 4 Ch. App. 34.

¹⁴ *Reid's Case*, 24 Beav. 318; *Litchfield's Case*, 3 De G. & S. 141.

contract was determined) was wont to be decided by the tribunal before which the case came for decision; but by a recent Act a large number of contracts entered into by infants are declared to be absolutely void, and it is immaterial whether or not they would be prejudicial to the infant. But though a contract may be declared void and set aside, yet if an infant has paid any money for things which he has used or consumed he cannot recover their price.¹

Infants' Relief Act, 1874.

This Act is the Infants' Relief Act, 1874;² its short but important provisions are as follows:—

Contracts by infants, except for necessities, to be void.

Sect. 1. "All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied (other than contracts for necessities), and all accounts stated with infants, shall be absolutely void; provided always that this enactment shall not invalidate any contract into which an infant may by any existing or future statute, or by the rules of common law or equity enter, except such as now by law are voidable.

No action to be brought on ratification of infant's contract.

Sect 2. "No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age, of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age."

For the operation of this section see chap. iii.

Effect of Act.

What is the full effect of this enactment it is impossible to say, for there have been as yet but few judicial decisions on it. If the first clause and the proviso of section 1 are taken together, it seems quite possible to hold that *every* contract entered into by an infant, except contracts for necessities, or contracts binding upon him by any existing or future statute, or by the rules of common law or equity, is *absolutely void*. The effect of this would be to do away with the class of voidable contracts by infants, and to render section 2 superfluous.³ But it can hardly have been the intention of the Legislature to make such a sweeping change; and arguing from the analogy supplied by Lord Tenterden's Act,⁴ it may be said that those contracts incident to interests in property of a permanent nature, with obligations attached to it (such as partnership, and the holding of shares), are valid and subsisting until set aside by the infant on reaching twenty-one, or within a reasonable time after. Again, section 5 of Lord Tenterden's Act required that the confirmation of

Whether applicable to contracts incident to interests in property of a permanent nature with obligations attached, *quære*.

¹ *Valentini v. Canali*, 24 Q. B. D. 166.

² 37 & 38 Vict. c. 62.

³ These two sections do not hang neatly together, and one or other of them seems to be unnecessary; for if all contracts (except particular kinds) are *absolutely void*, there cannot be a ratification of them; or if ratification of *any* promise or contract made during infancy shall be ineffectual to render such promise or contract actionable, there was no need to set out what contracts were void; unless, as has been suggested (but which is doubtful), the ratification was intended to be efficacious for all purposes other than founding an action.

⁴ 9 Geo. IV. c. 14.

promises of infants reaching majority should be in writing. Notwithstanding this provision, contracts of partnership and the like entered into by infants were held valid and binding upon them if they did not disaffirm them, though they did not ratify them in writing according to the statute.

All contracts, whether by specialty or by simple contract, for the repayment of money lent, or to be lent, are void;¹ all contracts for goods supplied or to be supplied (other than for necessities);² trading contracts;³ all accounts stated with infants,⁴ even for necessities;⁵ and they cannot be used as evidence against him that the goods supplied were necessities.⁶ A promise on attaining majority to fulfil a void contract made by him during infancy, and any negotiable instrument given by him to carry out the new promise is void against all persons.⁷ A promise to marry is within the Act.⁸

Void contracts under the Act.

The next point to be considered is the liability of an infant to be adjudicated a bankrupt. It has been seen that an infant cannot contract legal debts by way of trade or otherwise, except for necessities; and if persons enter into business relations with him, they do so at their own risk, and can only rely on his honour and integrity to repay them for what they have furnished to him. He therefore cannot be adjudicated a bankrupt in respect of such debts, on the simple ground that he does not owe them, or has any creditors who can prove for them.⁹ But since he can contract validly for necessities, it is probable that he can be adjudicated a bankrupt in respect of debts so incurred, though, as a rule, it would not be worth while to procure his adjudication. An infant who trades does not hold himself out by such trading as an adult, so as to make himself able to contract valid debts, and liable to be made a bankrupt on his own petition,¹⁰ or on that of a creditor.¹¹ Formerly, if a person on attaining his majority confirmed a debt contracted during infancy, he might have been adjudged a bankrupt in respect of it;¹² and a debt contracted by him under a representation that he was of age might have been proved under a bankruptcy against him after he had attained his majority;¹³ and a

Infant cannot be adjudicated bankrupt;

except possibly for necessities

¹ 37 & 38 Vict. c. 62, s. 1.

² *Ibid.*; *Ex parte Kibble, Re Onslow*, L. R. 10 Ch. App. 373.

³ *Ex parte Jones, Re Jones*, 18 Ch. D. 109, overruling *Re Lynch*, 2 Ch. D. 227; *Reg v. Wilson*, 5 Q. B. D. 28.

⁴ Sect. 1. This overrules *Williams v. Moor* (12 L. J. Ex. 253), on the point that an account stated with an infant was voidable only.

⁵ *Bartlett v. Emery*, 1 T. R. 42 n.

⁶ *Ingledeu v. Douglas*, 2 Stark. 36.

⁷ 55 & 56 Vict. c. 4, s. 5 (Betting and Loans (Infants) Act, 1892).

⁸ *Cozhead v. Mullis*, 3 C. P. D. 439; *Northcote v. Doughty*, 3 C. P. D. 385; *Ditcham v. Worrall*, 5 C. P. D. 410.

⁹ *Ex parte Jones, Re Jones* (*ubi sup.*), overruling *Re Lynch* (*ubi sup.*); *Reg. v. Wilson* (*ubi sup.*).

¹⁰ *Ex parte Jones* (*ubi sup.*).

¹¹ *Ex parte Kibble, Re Onslow* (*ubi sup.*).

¹² *Belton v. Hodges*, 9 Bing. 369.

¹³ *Ex parte The Unity Joint-Stock Mutual Banking Association, Re King*, 27 L. J. Bk. 33.

Infant not
liable under
the Debtors
Act, 1869.

bankruptcy made upon a debt so contracted was refused to be annulled.¹ For the like reason that he cannot validly contract, he is not liable to the criminal provisions of the Debtors Act, 1869.² Though if he fraudulently convert goods which have been delivered to him under an agreement for their hire, he can be convicted of larceny as a bailee of them.³

Cannot present
petition to
a liquidate
debtor a
bankrupt.

As all contracts for the supply of goods and the like (except for necessities) made by infants are void, he has not the capacity to present a petition to adjudicate his debtor a bankrupt, or take valid proceedings in his debtor's liquidation by arrangement or composition. But there does not appear to be any insuperable obstacle to his issuing a debtor's summons, and if the debtor is adjudicated a bankrupt in consequence, the adjudication will not be set aside.⁴ The proper person to prove for the infant's legal debts is his guardian.⁵

Valid con-
tracts.

Valid Contracts.—The valid contracts of infants will be divided into two classes—(1) those which are voidable, and so may be set aside by them; (2) those which are binding upon them and cannot be set aside. This classification, it is submitted, is still a possible one, notwithstanding the passing of the Infants' Relief Act, 1874.⁶ It would be difficult to maintain with success that the contracts here described as voidable are not within the letter of the first section of that Act, or, if they are contracts which infants can practically affirm on reaching twenty-one, by not repudiating within a reasonable time, and by claiming benefits under them, to deny that such qualified ratification is a practical limitation of the effect of section 2 of the same statute.⁷ It will be noticed that the contracts here treated of as voidable are such as are connected not with isolated goods and chattels, but with incidents in property of a permanent and continuing nature, as realty, or partnership, or the holding of shares, to which obligations are attached. If these engagements are to be considered, as has been suggested, as being other than pure contracts, then the reason for upholding them would be that the infant is a purchaser of an interest in property of a permanent nature with obligations attached to it, and he cannot renounce the liability unless he has renounced his interest. Again, it is not illegal for an infant to enter into contracts, and some of his engagements are clearly binding on him; others, though not absolutely binding on him, ought from their nature and incidents to be deemed valid until set aside by him.

Voidable con-
tracts, i.e.,
those con-
nected with
property of a
permanent and
continuing
nature.

¹ *Ex parte Watson*, 16 Ves. 265.

² 32 & 33 Vict. c. 62, s. 11.

³ *Reg. v. Macdonald* 15 Q. B. D. 323.

⁴ *Ex parte Brocklebank, Re Brocklebank*, 6 Ch. D. 358.

⁵ *Ex parte Belton*, 1 Atk. 251.

⁶ 37 & 38 Vict. c. 62.

⁷ See *post*, chap. iii., Ratification and Avoidance of Acts and Contracts.

Voidable Contracts, or those Valid until set aside by the Infant.—Voidable contracts. Realty. Leases.
 A lease executed by an infant with a reservation of rent is voidable,¹ and it is not necessary that the best rent possible should be reserved.² An agreement for a lease cannot be enforced against him either by way of specific performance or injunction.³ The lessee cannot avoid the lease on account of the infancy of the lessor;⁴ nor can the lessor well avoid during his infancy, as by granting another lease of the same property to another person,⁵ but he must wait till he be of age;⁶ but his heir may avoid it if he die under age.⁷ The avoidance should be some act of notoriety, as ejectment, entry, or demand of possession;⁸ the ratification may be shown by some such act as acceptance of rent,⁹ or by a mortgage of the land to the lessee by a deed reciting the lease.¹⁰ But where a lease is binding upon an infant, e.g., as a reversioner of an estate leased from year to year, he cannot determine the tenancy without giving due notice to quit;¹¹ so, too, where he has recognized the lease by receiving rent.¹² A parol lease is voidable only, and the infant may recover for use and occupation.¹³ A lease without a rent reserved is not void, if it be to the infant's advantage.

There is a dictum of Lord Mansfield that if an infant take an estate and is to pay rent for it, he shall not hold the estate, and defend himself against payment of the rent by pretence of infancy;¹⁴ but Sir G. Jessel, in *Lemprière v. Lange*,¹⁵ stated that such was not the law, and certainly since the Infants' Relief Act, 1874, it would not be held to be an accurate statement of it. But if he had to pay rent *ratione tenuræ*, or perform some condition, in all probability his superior landlord would be entitled to distrain for arrears of such rent;¹⁶ or he might forfeit his interest in the land through non-performance of the condition. While a lease to an infant is voidable by him, if he continue to occupy after attaining twenty-one, he will be liable for all arrears of rent.¹⁷ Leases to infants.

¹ Per Lord St. Leonards in *Allen v. Allen*, 2 Dr. & W. 307, 339. If the first section of 37 & 38 Vict. c. 62, applies, and renders such a lease or an agreement for a lease absolutely void, no ratification of it is possible, and a new lease ought therefore to be executed by the infant on attaining majority; if not, his lessee would stand to him as a tenant at will, or a tenant from year to year, with the covenants of the void lease to be observed. If the infant were the lessee, he would be on the like footing of a tenant at will, or tenant from year to year, as the case might be.

² *Slator v. Brady*, 14 Ir. C. L. R. 61.

³ *Lumley v. Ravenscroft*, [1895] 1 Q. B. 683.

⁴ *Zouch v. Parsons*, 3 Burr. 1794.

⁵ *Slator v. Trimble*, 14 Ir. C. L. R. 342.

⁶ *Ibid.*

⁷ 4 Cruise, 74, s. 67.

⁸ *Slator v. Trimble* (*ubi sup.*)

⁹ *Ibid.*

¹⁰ *Story v. Johnson*, 2 Y. & C. Ex. 586.

¹¹ *Maddon v. White*, 2 T. R. 159.

¹² See *Rees dem. Lloyd v. Evans*, cited Simp. Inf. 26.

¹³ *Smith v. Bowen*, 1 Mod. 25.

¹⁴ In *Earl of Buckinghamshire v. Drury*, 2 Ed. 60, 72.

¹⁵ 12 Ch. D. 675.

¹⁶ See Simp. Inf. 26. *Evelyn v. Chichester*, 3 Burr. 1717; *Rex v. Sutton*, 4 L. J. K. B. 215.

¹⁷ *Ketley's Case*, Cro. Jac. 320; *S. C. Ketley's Case*, 1 Brownl. 120; *S. C. Kettle v. Elliott*, 1 Roll. Abr. 731; and *Kirton v. Elliott*, 2 Bulst. 69.

The interests of the infant are regarded; therefore, where a lease is renewed to an adult alone in which the adult and infant are jointly interested, if beneficial, the adult will be held as trustee for the infant; if not, the renewal will be to the adult alone.¹ An infant has been held liable for rent which became due while he was in occupation, though he repudiated the tenancy before attaining twenty-one.² This liability does not rest on contract; and an action for use and occupation cannot be maintained against him, except in so far as the occupation may be considered *necessary*, and for his benefit,³ even where he has been guilty of fraudulent misrepresentation as to his age; but the court may declare the lease under such circumstances to be null and void.⁴

Infant must
avoid lease
within a
reasonable
time.

The election to avoid a lease must be made by the infant within a reasonable time after he attains majority;⁵ and an acquiescence of four months after majority has been held to preclude an infant from afterwards disaffirming a lease; and an acquiescence for so long a period would be evidence from which a jury might infer an affirmance of the lease.⁶ An infant's voidable conveyance of land cannot be avoided or confirmed during minority, not only because of the solemnity of the instrument, but "that his election might not be found by the judgment," that is, in any action brought during infancy to avoid his act.⁷ The powers of guardians to make leases are treated of elsewhere.⁸

Surrender.
Mortgages.

The surrender of a lease by an infant is voidable by him.⁹

An infant cannot execute a valid mortgage of his personal chattels, as by a bill of sale, nor under ordinary circumstances of his realty,¹⁰ and though in the latter case his conveyance taking effect by delivery would be within the rule laid down by Perkins, and so good, yet the deed would be void as being clearly prejudicial to him, for it cannot be to his advantage to charge his property. Neither a guardian nor the Court of Chancery has any inherent power to mortgage the infant's property, except that the latter may direct a mortgage of the infant's realty for payment of his ancestor's debts.¹¹ But where the infant charges his realty in order to secure advances made to pay for necessities, his mortgage is not void but voidable; it cannot be enforced during infancy, and is not binding on him till he affirm after reaching majority.¹² If the infant has been guilty of fraud in making the mortgage, and

¹ *Ex parte Grace*, 1 B. & P. 376. But see *Re Biss*, *Biss v. Biss*, [1903] 2 Ch. 40.

² *Blake v. Concanon*, 1 Ir. C. L. 323; but see *Lemprière v. Lange*, 12 Ch. D. 675.

³ *Simp. Inf.* 26. See *Holmes v. Blogg*, 8 Taunt. 35.

⁴ *Lemprière v. Lange* (*ubi sup.*).

⁵ See *North-Western Railway Co. v. M'Michael*, 20 L. J. Ex. 97.

⁶ *Slator v. Trimble*, 14 Ir. C. L. R. 342.

⁷ *Zouch v. Parsons*, 3 Burr. 1794.

⁸ Part III. chap. vi. pp. 700 *et seq.*

⁹ See *Zouch v. Parsons* (*ubi sup.*).

¹⁰ *Coote, Mort.* 219.

¹¹ 11 Geo. IV. & 1 Wm. IV. c. 47, and 2 & 3 Vict. c. 60.

¹² *Martin v. Gale*, 4 Ch. D. 428.

the parties cannot be restored to their original positions, the infant will be held bound by the deed.¹

An infant's acts may by virtue of express custom bind him; thus, by the custom of gavelkind an infant of either sex and in actual possession of the land may validly aliene it at the age of fifteen by feoffment;² but this liberty is only allowed under such limitations and restrictions that he is not thereby wronged or imposed upon;³ in other words, there must be full valuable consideration for the sale and feoffment.⁴

An infant is liable for a customary fine of copyhold if he occupy.⁵ He may by special custom surrender copyhold by way of alienation or otherwise, and be bound by the surrender, but if there be no such special custom, his surrender is voidable.⁶

If an infant enters into a contract of a permanent or continuing nature which is not of itself prejudicial to him, he must repudiate it within a reasonable time of reaching majority, or he will be bound by its terms.⁷

Partnership.—At common law an infant may be a partner. In the important case of *Goode v. Harrison*,⁸ Bayley, J., said: "It is clear that an infant may be in partnership. It is true that he is not liable for contracts entered into during his infancy, but he still may be a partner. If he is in point of fact a partner during his infancy, he may, when he comes of age, elect if he will continue the partnership or not."⁹ Lord Lindley¹⁰ is of opinion that notwithstanding the second section of the Infants' Relief Act, 1874, a person who on attaining majority retains a share in a partnership or company cannot retain it without its incidental obligations on the doctrine of holding out.¹¹ But the effect of the section is to render him in no way liable for the prior debts contracted during his infancy, and if on attaining twenty-one he elect to avoid the contract of partnership, he may recover back any money paid in part performance of the contract, if he has reaped no advantage, and there is a total failure of consideration, and he can restore the other party to the same position as before the contract,¹² but if he has enjoyed any part

¹ See *Watts v. Haiswell*, cited in *Earl of Buckinghamshire v. Drury*, 2 Ed. 73; *S. C. Earl of Clare v. Bedford*, 13 Vin. Abr. 536; also *Watts v. Cresswell*, 9 Vin. Abr. 415.

² *Robinson, Gavelk.* 248-250. This mode of conveyance is rarely resorted to nowadays, and as much land in Kent, where the custom chiefly prevails, is held in socage tenure, and much has been disgavelled, circumspection should be used in accepting titles under a feoffment by an infant.

³ *4 Bac. Abr.* (7th edit.) p. 49.

⁴ *Re Maskell and Goldfinch's Contract*, [1895] 2 Ch. 525.

⁵ *Etelyn v. Chichester*, 3 Burr. 1717.

⁶ *Maoph. Inf.* 473; *Naylor v. Strode*, 2 Ch. Rep. 392; *Zouch v. Parsons*, 3 Burr. 1794.

⁷ *North-Western Railway Co. v. M'Michael*, 20 L. J. Ex. 97; *Goode v. Harrison*, 5 B. & Ald. 147; *Whittingham v. Murdy*, 60 L. T. 956.

⁸ *Ubi sup.*

⁹ See per Herschell, L.C., in *Lovell v. Beauchamp*, [1894] App. Cas. 611.

¹⁰ *Part.* 84. ¹¹ See *Cork and Brandon Railway Co. v. Cazenove*, 10 Q. B. 935.

¹² *Corpe v. Overton*, 10 Bing. 252; *Everitt v. Wilkins*, 29 L. T. 846.

of the consideration he cannot recover,¹ or enjoyed some advantage sufficient to constitute valuable consideration for the contract to become a partner, and the mere allotment of shares and the placing of his name on the register are not such an advantage.² But "notwithstanding the general irresponsibility of an infant, he cannot, as against his co-partners, insist that in taking the partnership accounts he shall be credited with profits and not be debited with losses. He must either repudiate or abide by the agreement under which alone he is entitled to any share of the profits."³ As an infant is not responsible for the torts of his agent, an infant partner cannot be made liable for the misconduct of his co-partners. The irresponsibility of an infant as a partner seems therefore to be complete except in cases of fraud.⁴ Where an infant is a member of a firm, a judgment against the firm simply for its debts or liabilities cannot be recovered; but a judgment against "the defendants other than" the infant partner may be recovered;⁵ and if an act of bankruptcy has been committed by the firm a receiving order cannot be made against the firm simply, but should be made against the firm "other than" the infant partner.⁶ The infant's fraud will be visited with like results in partnership as in other contracts, and his fraudulent representations will bind him.⁷

Infant shareholder.

Shareholding.—An infant may be a shareholder. Infant shareholders are not mere contractors, for then they would have been exempt, but in truth they are purchasers who have acquired an interest, not in a mere chattel, but in a subject of a permanent nature, either by contract with the company, or purchase or devolution from those who have contracted, and with certain obligations attached to it, which they were bound to discharge, and have been thereby placed in a situation analogous to an infant purchaser of real estate who has taken possession, and thereby becomes liable to all the obligations attached to the estate, for instance, to pay rent in the case of a lease rendering rent, and to pay a fine due on the admission, in the case of a copyhold to which an infant has been admitted, unless they have elected to waive or disagree to the purchase altogether, either during infancy or after full age, at either of which times it is competent for an infant to do so.⁸ The infant's engagement is voidable, and he may have his name removed from the register of the company, unless, perhaps, he has been guilty of fraud.⁹ Thus, his signing the memorandum of association does not absolutely fix him with liability, though he remains a member

¹ *Holmes v. Blogg*, 8 Taunt. 508.

² *Hamilton v. Vaughan-Sherrin Electrical Engineering Co.*, [1894] 3 Ch. 589.

³ *Lind. Part. 83.*

⁴ *Ibid.* 83.

⁵ *Lovell v. Beauchamp*, [1894] A. C. 611.

⁶ *Ibid.*

⁷ *Lind. Part. 83.*

⁸ *Per Parke, B.*, in *North-Western Railway Co. v. M'Michael*, 20 L. J. Ex. 97.

⁹ See *post*, p. 794.

until he repudiates his shares;¹ his application for shares,² and the payment of calls and receiving of dividends have the like effect.³

The company has the corresponding privilege of rejecting the infant as shareholder on ascertaining the fact of his infancy, and can put his transferrer in his place;⁴ but if his transferee has been accepted by the company as a shareholder, the transfer by the infant cannot be treated as a nullity.⁵ The transfer, then, to an infant is voidable not only by the infant whilst of age, or within a reasonable time after coming of age, but also by the company, unless it has accepted him, knowing him to be an infant, or has allowed him to transfer and has accepted his transferee.⁶ Unless the infant repudiate his shares within a reasonable time after attaining majority, he will be bound and placed on the list of contributories.⁷ His liability will now be considered under two different sets of circumstances; (1) when the company is a going concern at the time of his coming of age; (2) when the company is being wound up during his infancy.

Transfer to
infant
voidable.

(1) The infant may repudiate his shares during minority or within a reasonable time after coming of age.⁸ If he does not repudiate his shares he must pay calls like any other shareholder; but on repudiation he will not be liable for calls unless he has received any profits out of the concern;⁹ but he cannot hold the shares and decline to pay the calls in respect of them.¹⁰ His repudiation must be clear and explicit,¹¹ otherwise he will be held to have ratified the contract by acquiescence.¹²

Company a
going concern.

(2) When the company is ordered to be wound up before the infant reaches his majority the transfer of shares to him becomes inoperative, on the ground of prejudice to the infant.¹³ It has been held that a transfer under such circumstances is not a mere nullity *ab initio*; ¹⁴ and Lord Lindley ¹⁵ writes that he "is not aware of any case in which an infant has been put on the list of contributors. Upon principle, however, there does not appear to be any reason why he should not, if it be for his

Company
wound up
during
infancy.

¹ See *Re Nassau Phosphate Co.*, 2 Ch. D. 610.

² *Ebbel's Case*, L. R. 5 Ch. App. 302.

³ *Lumsden's Case*, L. R. 4 Ch. App. 31.

⁴ *Custello's Case*, L. R. 8 Eq. 504; *Symon's Case*, L. R. 5 Ch. App. 298.

⁵ *Gooch's Case*, L. R. 8 Ch. App. 266, overruling *S. C. L. R.* 14 Eq. 454.

⁶ Lind. Comp. 828, and the cases there cited.

⁷ *Shrapnell's Case*, cited Lind. Comp. 810.

⁸ *Newry and Enniskillen Railway Co. v. Coombe*, 18 L. J. Ex. 325; *Dublin and Wicklow Railway Co. v. Black*, 22 L. J. Ex. 94.

⁹ *Newry and Enniskillen Railway Co. v. Coombe (ubi sup.)*.

¹⁰ *Ibid.*

¹¹ *North-Western Railway Co. v. McMichael (ubi sup.)*; *Birkenhead and Cheshire Junction Railway Co. v. Pileher*, 20 L. J. Ex. 97.

¹² *Cork and Bandon Railway Co. v. Cazenove*, 10 Q. B. 935. See *post* chap. iii., Ratification and Avoidance of Contracts.

¹³ *Litchfield's Case*, 3 De G. & S. 141; *Reid's Case*, 24 Beav. 318; *Capper's Case*, L. R. 3 Ch. App. 458; *Mann's Case*, *ibid.*; *Lumsden's Case (ubi sup.)*.

¹⁴ Per Selwyn, L.J., in *Lumsden's Case (ubi sup.)*.

¹⁵ Comp. 809.

benefit; and this, if there are surplus assets, may be the case." So, too, Page Wood, L.J., in *Capper's Case*¹ admits that difficulties might arise as to the effect of a transfer to an infant, "for it would seem that the infant ought to have an option whether he will repudiate or ratify the transfer." But there are two cases² which approach closely to a decision that such transfer is a nullity; they decided that a person who was an infant when the winding-up commenced could not on his attaining twenty-one elect to hold shares transferred to him, and thereby defeat the right of the company to reject him, and to have his transferrer put on the list in his place; but where it is clearly not for his benefit, he will not be liable. This right to treat the transfer as inoperative is not peculiar to the infant, but the company, or, if the company is in liquidation, the liquidator may remove the infant's name from the register, and put on that of his transferrer.³ But the company may lose this right if it be guilty of laches prior to the winding-up.⁴ The infant does not lose his right of repudiation on his part by mere delay.⁵ The person who takes shares direct from a company in the name of an infant, in the event of the company being wound up, will usually be held liable for contributions in respect of them and not the infant;⁶ also where the infant's name is used as an alias by the purchaser.⁷

Member of
friendly
society.

Infants above one year of age may be members of a "friendly society" unless provision to the contrary be made in the rules of the society, and, subject to such rules, may enjoy all the rights of members.⁸ So he may be a member of a building society, unless its rules prohibit his admission;⁹ and he can consent to the society being dissolved.¹⁰ If the infant member is over sixteen he may by himself, and if under that age by his parent or guardian, execute all instruments and give all acquittances necessary to be executed or given under the rules;¹¹ but he shall not be a member of the committee, or a trustee, or manager or treasurer of the society or of a branch.¹² He may be a member of an industrial society if over sixteen years of age, unless its rules provide to the contrary, and may enjoy (subject to the rules) all the rights of a member, except he shall not be

Industrial
society; and
trade-union.

¹ 3 Ch. App. 461.

² *Castello's Case*, L. R. 8 Eq. 504; *Symon's Case*, L. R. 5 Ch. App. 298. The ratio decidendi of these cases is that the winding-up fixes the status of the contributory.

³ Lind. Comp. 811; *Symon's Case* (ubi sup.).

⁴ *Parson's Case*, L. R. 8 Eq. 656.

⁵ *Shrapnell's Case*, cited Lind. Comp. 810.

⁶ *Weston's Case*, L. R. 5 Ch. App. 614.

⁷ *Richardson's Case*, L. R. 19 Eq. 588.

⁸ 59 & 60 Vict. c. 25, s. 36, sub-s. 1 (The Friendly Societies Act, 1896). Under the Friendly Societies Act, 1855 (18 & 19 Vict. c. 63), infants six years old could be admitted.

⁹ 37 & 38 Vict. c. 42, s. 38.

¹⁰ *Dennison v. Jeffs*, [1896] 1 Ch. 611.

¹¹ This removes a doubt expressed in *Rudd v. James*, [1896] 2 Ch. 554.

¹² 59 & 60 Vict. c. 25, s. 36 (2).

a member of the committee, trustee, manager, or treasurer, and may execute all instruments and give all acquittances necessary to be executed or given under the rules.¹ The like provisions apply to his membership of a trade-union.² Though an infant may become a member of such society and give all necessary acquittances, yet he cannot execute a valid mortgage of his real estate to secure advances made to him by the society. Such mortgage is absolutely void under the Infants' Relief Act, 1874. But on the other hand the society becomes entitled to a lien upon the property and title-deeds for the purchase-money which they may have paid for the infant to the vendor.³

Infant Traders.—There is nothing in law to prevent an infant Trading. from being engaged in trade, and he might maintain an action for slander which might injure him in his trade,⁴ but since the Infants' Relief Act, 1874, all his contracts in respect of it are void and unenforceable against him;⁵ and the mere fact that he carries on a trade is no representation that he is of age.⁶ His liability or non-liability to be made a bankrupt in respect of his debts and engagements has been before discussed.⁷

Binding Contracts.—There are certain contracts which it is to the advantage of the infant should bind him. To hold them void, or even voidable, would be more to his detriment than profit; others, again, the interests of society demand should hold him bound.

Nature has made the sexes *habiles matrimonii* at a period much earlier than the legal age of majority; and it would be detrimental to the morals of the contracting parties and the well-being of society if a contract of marriage between marriageable minors could be rescinded at the option of either. Accordingly, it is settled law that a male infant may contract a valid marriage at fourteen, and a female infant at twelve. If they go through the form of marriage while *infra nobiles annos*, but above seven, and agree to marry after arriving at the above ages, there need be no new marriage; but they cannot disagree before the said ages.⁸ If the contract of marriage itself is valid, whether made by an adult or infant, so the promise to marry by an infant is one that should be held to be not void but voidable only at the discretion of the infant on arriving at majority. The courts have held otherwise, and that the promise to marry is void within section 1 of the Infants' Relief Act, 1874,⁹ but not without some doubting

Marriage contract.

¹ 56 & 57 Vict. c. 39, s. 32.

² 39 & 40 Vict. c. 22, s. 9.

³ *Thurstan v. Nottingham Permanent Building Society*, [1903] A. C. 6.

⁴ *Wilde v. Tomkinson*, 5 L. J. K. B. 265.

⁵ *Ex parte Jones, Re Jones*, 18 Ch. D. 109, 121. ⁶ *Ibid.* ⁷ *Ante*, p. 767.

⁸ Co. Litt. 79 a. See *ante*, Part I., Husband and Wife, chap. vi., Impediments to Marriage, pp. 71 *et seq.*

⁹ *Coxhead v. Mullis*, 3 C. P. D. 439; *Northcote v. Doughty*, 4 C. P. D. 385; *Ditcham v. Worrall*, 5 C. P. D. 410.

on the part of the judges.¹ That Act was passed to protect infants from contracts for the purchase of goods and loans of money and the like, and was not, it is submitted, intended to apply to contracts unconnected with such matters. It is a question of fact for the jury whether there has been a fresh promise of marriage by the defendant or a mere ratification of the old promise; if the former, the promisor is bound; if the latter, he is not bound.² The evidence of a new promise ought to be clear and not consistent with a mere ratification of the old promise.³

Guardian's
suit to annul
infant's void
marriage.

Where the marriage of a minor is alleged to be void, a guardian may institute a suit for its nullity;⁴ but the guardian must be duly elected and appointed for that purpose, and all necessary parties must be cited.⁵

Marriage
settlement
under Infants'
Settlement
Act, 1855.

A settlement, or an agreement for a settlement, made in contemplation of marriage with the sanction of the Court of Chancery under the Infants' Settlement Act, 1855,⁶ is binding upon the parties, though both or one may be under age.⁷

Contracts for
necessaries.

The general rule of law is clearly established, and is that an infant is generally incapable of binding himself by a contract. To this rule there is an exception introduced for the benefit of the infant himself. This exception is that he may make a contract for necessaries. And, as is accurately stated by Parke, B., in *Peters v. Fleming*:⁸ "From the earliest time down to the present the word necessaries is not confined in its strict sense to such articles as were necessary to the support of life, but extended to articles fit to maintain the particular person in the state, station, and degree in life in which he is; and, therefore, we must not take the word necessaries in its unqualified sense, but with the qualification above pointed out."⁹ The reason for making such contracts binding is altogether the benefit of the infant. Now it is not an accurate statement of the law to say that every contract for the benefit of the infant is binding on him.¹⁰ Buller, J., in *Maddon v. White*,¹¹ is reported to have said that "all the modern cases have expressly held that an infant cannot avoid a lease

¹ Per Denman, J., in *Ditcham v. Worrall* (see 5 C. P. D. 416). If this contract is rightly within the Act, it must be considered to be absolutely void on the two following grounds: (a) By the effect of the proviso in section 1, all the voidable contracts of infants are invalidated; (b) because it has been held to be a promise incapable of ratification, and as such must be void. The result, then, will be that an infant will not be able to sue the adult contracting party for breach of a promise to marry, and such cases as *Holt v. Ward*, 2 Stra. 937, are no longer law: *sed de hoc quære*.

² *Holmes v. Brierley*, 59 L. T. 70.

³ *Ibid*.

⁴ See *Bowyer v. Ricketts*, 1 Hag. Con. Rep. 213.

⁵ *Cottam v. Wells* (f. c. *Wells*), 33 L. J. P. & M. 41.

⁶ 18 & 19 Vict. c. 43.

⁷ See *post*, chap. iv., Marriage Settlements of Infants.

⁸ 6 M. & W. at p. 46.

⁹ Per Willes, J., in *Ryder v. Wombwell*, L. R. 4 Ex. 32, 38.

¹⁰ Or, conversely, that his contract is binding unless manifestly to his prejudice. *Cooper v. Simmons*, 7 H. & N. 707, 721; but see 31 L. J. M. C. 138, 144.

¹¹ 2 T. R. 159, 161.

which is for his own benefit"; and Lord Mansfield, in *Drury v. Drury*,¹ laid it down as a general principle that if an agreement be for the benefit of an infant at the time it shall bind him. Lord Hardwicke afterwards adopted this rule. In the argument of *Martin v. Gale*,² Jessel, M.R., said³ of this proposition: "There must be some mistake in the report of what Buller, J., is stated to have said. No case can be found in which Lord Mansfield or Lord Hardwicke had laid down any such general principle"; and his lordship decided that case in accordance with the better opinion that infants' acts and contracts are in general voidable at their option. A contract clearly unfair, unreasonable, or on the whole to the detriment of an infant is not binding on him.⁴ But if it is established that a contract in the nature of a "necessary," such as a contract of service or apprenticeship, is on the whole to the advantage of the infant it is not voidable and to be repudiated by him.⁵

The question here to be discussed deals with things necessary for the support of life, and becoming to the infant in his social station.⁶ If an infant could not obtain such things he would be in a poor plight; if he could not obtain credit in their purchase, not only might he starve from hunger, cold, or neglect, but be excluded from his rightful place in society, though in the immediate future he might have ample means to purchase them. To obtain credit his direct or implied promise to pay for them must be enforced; and his "single" bond (that is, one without a penalty) for necessities, including teaching or instruction, may be enforced against him.⁷ The principle upon which an infant is made liable for necessities is an implied obligation on his part as a person who, by reason of disability, cannot contract to pay for such necessities out of his own property.⁸ This implied obligation extends to the case of an infant pauper supported at the expense of the rates; and Poor Law guardians are entitled to recover six years' arrears of maintenance of such pauper infant.⁹

Contracts for necessities of life.

The question of necessities is one of mixed law and fact. The respective provinces of the judge and the jury have not been

Mixed law and fact.

¹ Dom. Proc. 26th May 1762.

² 4 Ch. D. 428.

³ At p. 431.

⁴ *Corn v. Matthews*, [1893] 1 Q. B. 310; *Flower v. London and North-Western Railway Co.*, [1894] 2 Q. B. 65.

⁵ *Clements v. London and North-Western Railway Co.*, [1894] 2 Q. B. 482.

⁶ It is well established by the decisions that under the denomination *necessaries* fall not only the food, clothes, and lodging necessary to the actual support of life, but likewise means of education suitable to the infant's degree, and all those accommodations, conveniences, and matters of taste, which the usages of society for the time being render proper and conformable to a person in the rank in which the infant moves. *Sm. Cont.* 292.

⁷ *Co. Litt.* 172 *a*; *Pickering v. Jacobs*, March, 145; *Russel v. Lee*, 1 Lev. 86. See *Walter v. Everard*, [1891] 2 Q. B. 369.

⁸ See *Re Rhodes*, *Rhodes v. Rhodes*, 44 Ch. D. J. 94.

⁹ *Re Clabbon (Infant)*. [1904] 2 Ch. 465.

Province of
the judge.

Province of
the jury.

settled without some debate and controversy. The matter has been settled by the Court of Exchequer Chamber in *Ryder v. Wombwell*.¹ It may now be taken to be settled that it is the province of the judge to hold whether the things supplied are *prima facie* necessities, or, that if not *prima facie* necessities, the plaintiff has the *onus* cast upon him of proving that the articles supplied are, owing to the special circumstances of the case, within the category of necessities, and then whether there is any evidence to satisfy that *onus*. If the judge is of opinion that under no circumstances could the things supplied be held to be necessities (that is, no reasonable and proper evidence could be offered to satisfy the jury that they were necessities),² it is his duty to non-suit the plaintiff.³ The province of the jury is to say whether the things supplied were necessities for the infant. They are not at liberty to find any and everything to be a necessary, as they please. The circumstances of the infant, his rank, degree, and fortune are first to be inquired into, and then the nature of the things supplied him. Willes, J., on this point said: ⁴ "We quite agree that the judges are not to determine facts, and therefore where evidence is given as to any fact, the jury must determine whether they believe it or not. But the judges do know, as much as juries, what is the usual and normal state of things, and consequently whether any particular article is of such a description as that it may be a necessary under such usual state of things."⁵ When the judge has left the question to the jury, it is for them to determine on the evidence whether the things supplied were or were not under the circumstances of the case necessities so as to bind the infant purchaser. But their verdict in this as in other matters is not conclusive, but subject to review: and if held to be given against the weight of evidence, a new trial may be ordered.⁶ Indeed, there must be some limit imposed upon the power of juries to find what things are or are not necessities. Jurymen are principally drawn from the trading classes, and have a not unnatural bias in favour of the plaintiff, which is increased by a sense that it is shabby on the part of a grown-up infant who is of an extravagant bent to plead infancy in order to shirk his responsibilities, though he has willingly availed himself of his

¹ L. R. 4 Ex. 32, overruling S. C. L. R. 3 Ex. 90.

² As, for instance, "earrings for a male, spectacles for a blind person, a wild animal, daily dinners of turtle and venison for a month, or a coach and four for a clerk on £1 a week." Per Bramwell, B., in *Ryder v. Wombwell* (*ubi sup.*).

³ *Bryant v. Richardson*, L. R. 3 Ex. 93 *n.* In *Mackarell v. Bachelor*, Cro. Eliz. 583, the court appears to have decided this question upon demurrer.

⁴ L. R. 4 Ex. p. 40. It is not unlikely that his Majesty's judges would be as cognizant of the usages and requirements of society as a common jury.

⁵ Cockburn, C.J., in *Jenner v. Walker*, 19 L. T. 398, followed this ruling, but thought that it had altered the law.

⁶ *Ryder v. Wombwell* (*ubi sup.*); *Harrison v. Fane*, 1 M. & G. 550.

opportunities to gratify his tastes. They, too, from a want of intimate knowledge of what is required in the higher strata of society, are too prone to regard as necessities what is mere wasteful luxury, quite useless and unnecessary to the defendant in his proper station. If a check were not put upon juries the protection devised by the law on behalf of infants would disappear.

It would be quite superfluous, not to say impossible, to attempt to give an exhaustive list of what things have been held necessities and non-necessaries. The varied and various circumstances that must be taken into consideration in the different cases, the quantity and quality of the articles supplied, the rank, fortune, station, and prospects of the infant, render it impracticable to lay down any hard-and-fast rules, or to cite instances as conclusive guides *in omnibus*. The following cases are mere examples of what under their particular circumstances have been held to be necessities, and what not necessities.

An infant may bind himself to pay for his necessary meat, Necessaries. drink, apparel, necessary physic,¹ and such other necessities, and likewise for his good teaching or instruction, whereby he may profit himself afterwards,² that is, instruction which would fit for a profession, or trade, or business.³ This has been extended⁴ to articles fit to maintain the particular person in the state, station, and degree of life in which he is. In short, the term "necessary" is relative.⁵ "Necessaries" are defined by the Sale of Goods Act, 1893,⁶ to mean goods suitable to the condition in life of an infant and to his actual requirements at the time of the sale and delivery. Things necessary to a person in one station of life may be quite unnecessary, and even wanton extravagance, in a person in another station of life. So, too, things which would be unnecessary for the same individual under one set of circumstances may under another be necessary. Thus, expensive articles of diet, which would be unnecessary for a man in health, may become necessary when ordered to be taken by

¹ This would be held to include medical attendance, and not merely the supply of medicine. See *Huggins v. Wiseman*, Carth. 110.

² Co. Litt. 172 a. The "good teaching or instruction" has been held to comprehend that general education which is required by his station in life (*Manby v. Scott*, 1 Sid. 112); but special instruction, with a view to the exercise of a particular calling, has in one case been excluded; thus, where a brother advanced £40, as a premium for taking his sister as an apprentice to learn millinery, Lord Kenyon was of opinion that it could not be considered as a necessary, and therefore that the payment could not be enforced in a court of law (*Smith v. Gibson*, Peake, Add. Cas. 52). But see *Walter v. Everard*, [1891] 2 Q. B. 369. In an American case it was held to be a *prima facie* rule that a college education could not be ranked among those necessities for which an infant could render himself absolutely liable. *Middlebury College v. Chandler*, 16 Vt. 683. See *Pickering v. Gunning*, Sir Wm. Jones, 182.

³ *Walter v. Everard* (*ubi sup.*); *Cooper v. Simmons*, 31 L. J. M. C. 138 (apprentice-ship).

⁴ Per Parke, B., in *Peters v. Fleming*, 6 M. & W. 42, 46.

⁵ "It is a flexible, and not an absolute term." Per Thomas, J., in *Breed v. Judd* 1 Gray, 458 (Amer.)

⁶ 56 & 57 Vict. c. 71, s. 2.

Utility a
partial test.

him under medical advice.¹ The utility of an article does not seem to be an unfair test as to whether it is necessary or not. Articles of mere ornament or luxury cannot well be necessities; but an article if useful ought not to be held unnecessary simply because it is ornamental and luxurious, if it is of such a description as might well comport with the rank and fortune of the infant.² In all cases there must be personal advantage from the contract derived to the infant himself.³ Whether such article is or is not a necessary, is properly to be left to the jury.⁴ In addition to the ordinary necessities of life, such as meat, drink, clothing, and lodging,⁵ the following have been held necessities: ⁶ livery for the servant of a captain in the army; ⁷ a volunteer's uniform; ⁸ a light cart for an officer in the army, such as was used by nearly all officers; ⁹ a gold watch-chain, rings, and two gold pins, for an undergraduate, eldest son of a man of fortune; ¹⁰ payment of money to release an infant from arrest,¹¹ or to save him from ejectment for non-payment of rent.¹² Necessaries for an infant's wife are necessities for him.¹³ Presents of jewelry for an intended bride may, it seems, be held necessary for a person in a good pecuniary position;¹⁴ and costs of a marriage settlement.¹⁵ An article not *prima facie* a necessary may become so under special circumstances, as a horse, or carriage exercise ordered by a doctor;¹⁶ a racing bicycle has been held to be such, though the infant was living with his parents.¹⁷ Whether legal expenses disbursed on behalf of the infant were or were not necessities would probably depend upon whether the legal proceedings were properly and reasonably undertaken. If they were necessary, or incurred clearly for his benefit, they would in all likelihood be recovered against him, but the *onus probandi* would be on his legal adviser.¹⁸ If the infant contracts for necessities he impliedly promises to pay for them, but if another undertakes to pay for the goods supplied, this express agreement would seem to take away the implied contract on the part of the infant;¹⁹ but an infant is not liable

Article not
prima facie a
necessary may
become so
under special
circumstances.

¹ See *Wharton v. Mackenzie*, 13 L. J. Q. B. 130.

² *Peters v. Fleming*, 6 M. & W. 42.

³ *Chapple v. Cooper*, 13 M. & W. 252, 258.

⁴ *Maddox v. Miller*, 1 M. & S. 738.

⁵ *Louce v. Griffith*, 1 Scott, 458. An infant may contract for the use and occupation of necessary lodgings, and he will be liable on assumption for a reasonable rent, but not on his covenant to pay a fixed rent. Macph. Inf. 501.

⁶ Collected in *Simp. Inf.* 91, 92.

⁷ *Hands v. Slaney*, 8 T. R. 578.

⁸ *Coates v. Wilson*, 5 Esp. 152. This was "in perilous times, when young men enrolled themselves in different corps for the defence of the country."

⁹ *Bernard v. —*, cited 7 C. & P. 52.

¹⁰ *Peters v. Fleming* (*ubi sup.*).

¹¹ *Male v. Roberts*, 3 Esp. 163; *Clark v. Leslie*, 5 Esp. 28.

¹² *Ex parte M'Key*, 1 Ba. & B. 405.

¹³ *Turner v. Frisby*, 1 Stra. 168.

¹⁴ *Jenner v. Walker*, 19 L. T. 398.

¹⁵ *Helps v. Clayton*, 10 Jur. (N.S.) 1184.

¹⁶ *Hart v. Prater*, 1 Jur. 623.

¹⁷ *Clyde Cycle Co. v. Hargraves*, 78 L. T. 296.

¹⁸ On analogy to the liability of the husband of a married woman for her legal expenses when held to be necessities. Her solicitor must show that they were reasonably incurred in her behalf. See Part I. chap. xiv. p. 324.

¹⁹ *Duncombe v. Turkridge*, 9 Vin. Abr. Enf. 2, 392.

on a bill of exchange accepted by him, though for the price of necessaries.¹ Where necessaries are sold to an infant he must pay a reasonable price for them.²

The following have been held not to be necessaries: Cockades Non-necessaries. for some of the soldiers of a company commanded by the infant;³ a chronometer costing £68 for a lieutenant in the navy not in commission;⁴ expensive dinners and desserts supplied to an undergraduate in his private rooms;⁵ cigars and tobacco;⁶ a pair of jewelled solitaire studs worth £25, and a silver goblet worth fifteen guineas, though the infant was a baronet's son and moved in the upper ranks of society;⁷ highly ornamented betting books costing £15, and ornamented jewelry and stationery of very expensive nature;⁸ and an expensive hunter.⁹ As the trading contracts of infants are void,¹⁰ wares furnished to him to be sold again, or work done for him in the way of his trade, cannot be recovered for as necessaries, though he may gain his living by the business.¹¹

The next question to be considered is whether, if an infant be already supplied with necessary articles, a tradesman, not knowing of his being so supplied, furnishes him with other articles of like description, the latter are necessaries so as to entitle the tradesman to recover, and whether the tradesman is bound to make inquiries concerning the infant's income and general circumstances. The current of authority ran very strongly in the direction of holding that a tradesman supplied an infant on credit at his own risk, and that if the latter was already properly supplied with like articles, the former could not recover.¹² The tradesman was not bound to make inquiries, and a non-suit or adverse verdict did not necessarily follow on his neglect to do so, but he supplied the infant at his peril.¹³ Evidence used to be admitted to show that the defendant was so supplied,¹⁴ but in *Ryder v. Wombwell*,¹⁵ Kelly, C.B., at the trial, and the court *in banc* (Kelly, C.B., Channell, and Pigott, B.B., Bramwell, B., dissenting) upheld the Lord Chief Baron, and refused to admit such evidence, and the Court of Exchequer Chamber forbore on appeal to decide the point as being unnecessary, saying it was a question of some nicety, and the authorities by no means uniform, adding: "If ever the point again arises, the court before which it comes must determine it on the balance of

Infant already supplied with necessary articles.

Tradesman supplies goods at his peril.

¹ *Re Soltzkoff, Ex parte Murgrett*, 60 L. J. Q. B. 339.

² 56 & 57 Vict. c. 71. s. 2.

³ *Hands v. Slaney* (*ubi sup.*).

⁴ *Berolles v. Ramsay*, Holt. N. P. 77.

⁵ *Brooker v. Scott*, 11 M. & W. 67; *Wharton v. Mackenzie, Cripps v. Hill*, 13 L. J. Q. B. 130.

⁶ *Bryant v. Richardson*, L. R. 3 Ex. 93 n.

⁷ *Ryder v. Wombwell*, L. R. 4 Ex. 32, overruling S. C. L. R. 3 Ex. 90.

⁸ *Jenner v. Walker*, 19 L. T. 398.

⁹ *Skrine v. Gordon*, Ir. Rep. 9 C. L. 479.

¹⁰ *Ex parte Jones, Re Jones*, 18 Ch. D. 109.

¹¹ *Dilk v. Keighley*, 2 Esp. 480; *Lowe v. Griffith*, 1 Scott, 458.

¹² *Bainbridge v. Pickering*, 2 W. Bl. 1325; *Ford v. Fothergill*, 1 Esp. 211; *Foster v. Redgrave*, L. R. 4 Ex. 35 n.

¹³ *Brayshaw v. Eaton*, 5 Bing. N. C. 231.

¹⁴ *Burghart v. Angerstein*, 6 C. & P. 690.

¹⁵ *Ubi sup.*

authority and on principle, without being fettered by a decision of this court.”¹ In a later case, however, the court following the earlier decisions, and not that of *Ryder v. Wombwell* on this point, held that evidence that the defendant was already sufficiently supplied with articles of the same kind ought to be admitted and left to the jury, though the plaintiff was ignorant of his being so supplied, and that the jury are to judge of the effect of that supply on the question of necessities.² This decision was followed in a later case by members of the Court of Appeal sitting as a Queen’s Bench Divisional Court.³

The mere fact of an infant having an income out of which he could pay ready money for goods supplied is not equivalent to his being actually supplied, nor prevents him from contracting for necessities on credit.⁴ Again, the apparent means and an ostentatious display on the part of the infant do not render it any the less necessary for the tradesman to inquire into his circumstances. The case of *Dalton v. Gib*⁵ appears to be an authority for the proposition that the apparent means of the buyer are a material element in deciding whether the tradesman ought or ought not to have made inquiries; but the decision may be referred to other grounds, that the purchase of the goods were sanctioned by the mother, and that the infant herself had told the plaintiff that she had expectations.

Where an infant resides with his parents or guardians who provide such things as appear to them to be proper, so that he is not destitute of real necessities, he cannot be bound for what under other circumstances might be necessities, on the ground that what is sufficient and proper must be left to the discretion of those who have the custody and control of the infant: thus, if a father provide his infant child with proper clothing, clothes furnished to the infant are not necessities.⁶ If a tradesman supplies an infant under such circumstances with goods, he does so eminently at his own risk, and has the *onus* of proof of necessities cast upon him, for it is presumed that when an infant resides at home he is properly maintained.⁷ It would be otherwise if the infant were emancipated from such control.

These three last considerations may be thus summed up.

¹ Per Willes, J., who delivered the judgment of the court, L. R. 4 Ex. 42.

² *Baines (or Barnes) v. Toye*, 13 Q. B. D. 410.

³ *Johnstone v. Marks*, 19 Q. B. D. 509. For legislative sanction of these decisions, see 56 & 57 Vict. c. 71, s. 2; *ante*, p. 779.

⁴ *Burghart v. Hall*, 4 M. & W. 727, in which *Mortara v. Hall*, 6 Sim. 465, decided to the contrary, was doubted, and it may be considered to be no longer law.

⁵ 7 Scott, 117. The facts of this case were: The mother of the infant daughter, the defendant, sat in her carriage while her daughter purchased expensive goods at the plaintiff’s shop; some of the goods were taken away in the carriage; others delivered at the hotel where the mother and daughter were residing.

⁶ *Cook v. Deaton*, 3 C. & P. 114.

⁷ *Bainbridge v. Pickering*, 2 W. Bl. 1325; see also *Brayshaw v. Eaton*, 5 Bing. N.C. 231.

Ostentatious display on part of defendant does not enable tradesman to recover.

Infant living with parent or guardian.

Summary.

The tradesman is not bound to inquire into the income or circumstances of the infant, or whether he is already supplied with like articles. His non-inquiry would not prejudice his right to recover, if the goods supplied were necessities, any more than his inquiry (in which he was deceived) would entitle him to recover if the goods supplied were not necessities. In short, he trusts the infant at his peril. The apparent means or ostentatious display of the infant do not render it less risky for the tradesman to trust him; and where the infant resides with his parents or guardians, the *onus* of proof of necessities is cast upon the plaintiff.

Money lent to an infant to be laid out in the purchase of necessities, and which has been so laid out, cannot at law be recovered by the lender, for by lending the money to the infant he has put it in his power to misapply it;¹ but if the money be laid out in necessities under the eye of the lender, the latter may recover it.² In equity, however, an infant who borrowed money, and applied it towards payment of his debts for necessities, was liable to refund it, though not at law.³ As the principles of equity now prevail in cases where they clash with those of law, a lender's claim will be upheld at law where it could have been upheld in equity.⁴ Advances made on account of a debt due to an infant to procure him necessities have been held good and valid.⁵

Money lent for necessities not recoverable;

An infant's bond with a penalty,⁶ or an account stated,⁷ or bill of exchange⁸ given for necessities supplied,⁹ or a promissory note for price of furniture,¹⁰ does not bind him; and his deed binding his reversionary interest in realty in respect of advances for their purchase is voidable.¹¹ He may bind himself by a bond without a penalty;¹² and possibly by a note or instrument not negotiable.¹³ An acknowledgement by an infant of a debt for necessities is enough to take it out of the Statute of Limitations.¹⁴

nor on bonds or accounts stated.

The American law on this subject is stated to be as follows: American law.
"An infant is not bound by any express contract for necessities to the extent of such contract; but is bound only on an implied contract to pay the amount of their value to him; that when the instrument given by him as security for payment is such that, by the rules of law, the consideration cannot be inquired into,

¹ *Darby v. Boucher*, Salk. 279.

² *Ellis v. Ellis*, 5 Mod. 368.

³ *Marlow v. Pitfield*, 1 P. Wms. 558.

⁴ See the analogous case of husband liable in equity for money advanced to wife for necessities; *Deare v. Southen*, L. R. 9 Eq. 151.

⁵ *Hedgley v. Holt*, 4 C. & P. 104.

⁶ *Rearsby v. Cuffer*, Godb. 219; Co. Litt. 162 a.

⁷ *Williams v. Moor*, 11 M. & W. 256; 37 & 38 Vict. c. 62, s. 1.

⁸ *Williamson v. Watts*, 1 Camp. 552.

⁹ *Re Sollykoff, Ex parte Margrett*, [1891] 1 Q. B. 413.

¹⁰ *Valentini v. Canali*, 24 Q. B. D. 166.

¹¹ *Martin v. Gale*, 4 Ch. D. 428.

¹² *Russel v. Lee*, 1 Lev. 86.

¹³ See Campbell's note to *Williamson v. Watts* (*ubi sup.*); Co. Litt. 172 a.

¹⁴ *Williams v. Smith*, 4 El. & Bl. 180.

it is void and not merely voidable ; that whenever the instrument is such that the consideration may be inquired into, he is liable thereon for the true value of the articles for which it was given.¹

Contracts of service.

Grounds for making beneficial contracts of service binding on infant.

Contracts of Service.—Contracts of service entered into by infants, whether by deed of apprenticeship or in the way of ordinary hiring, domestic or otherwise, are valid and binding upon them unless manifestly to their prejudice. If to their prejudice, they are not binding upon them, but may be avoided at their option. The principle on which those contracts are held binding on an infant is that they are not merely beneficial to him, but partake of the nature of “necessaries” for him, as providing for his maintenance or education and fitting out in some trade or profession.² A reasonable condition or restriction, such as that the infant should not after twenty-one set up a like trade within immediate neighbourhood of the master, will, if acquiesced in by the infant on attaining majority, be enforced.³ It has been seen that an ordinary contract (*e.g.*, a trading contract and the like), though beneficial to the infant, is not binding upon him. These binding contracts of service are an extension of the principle that contracts of infants for necessaries (and so clearly for their benefit) are valid. Now a contract of service is not a “necessary” in the sense that unless the infant entered into it, either he must perforce starve, or his position in life be necessarily seriously affected, but it partakes of the nature of a “necessary.” In truth here, as in the case of marriage, nature dictates to the law what rules to lay down. Youth is the best time to learn ; the mind and intellect readily expand ; and the body, long before the age of majority is reached, is capable of sustaining much physical labour and fatigue. Again, the actual interests of the infants are served ; they acquire a knowledge of handicrafts and trades which will stand them in good stead in after life. They, too, have the means of earning a livelihood and acquiring a sense of independence which will render them better able to take care of themselves in future life than if they were obliged to wait till they had reached twenty-one before they could learn a trade or earn a wage. The interests of society require that these contracts of service between masters and infant apprentices, and employers and the infant employed, should be as binding and valid as between adults, provided that they are not prejudicial to the infants ; for if the latter could at any moment declare the contract no longer binding, trade and commerce would be endangered ; employers never could be sure that their orders would be executed, and might have their works

¹ Sch. Dom. Rel. s. 414, citing Reeve, Dom. Rel. ss. 229, 230.

² See *Walter v. Everard*, [1891] 2 Q. B. 369.

³ *Cornwall v. Hawkins*, 41 L. J. Ch. 435 ; *Evans v. Ware*, [1892] 3 Ch. 502.

suspended from want of labour. To avoid this danger and harmful results, a contract of service to which one of the parties is under age ought to be and has been made binding on the latter unless manifestly to his prejudice. But in this as in other matters the inexperience and weakness of youth are to be protected and not taken advantage of; consequently when the infant has been imposed upon, and has entered into a contract manifestly to his disadvantage, it is only fair and equitable that he should not be bound by it, but should have the power to "resile from it" (to use a Scottish phrase) at his option. But to hold even an inequitable contract as void *ab initio* is a doubtful advantage to the infant, because a void contract is one that is not binding upon either party to it; and so the master equally with the infant servant could put an end to it at any time, and elect not to be bound by the covenants which told most against him; that is, he might refuse to pay wages for services rendered up to the time of setting aside the contract. The better opinion is that these inequitable or prejudicial contracts of service are not void, but only voidable at the option of the infant.

Infant not bound by inequitable contract.

A contract of service by an infant is considered *prima facie* to be for his benefit; and he may bind himself by a deed of apprenticeship,¹ or contract of ordinary service, as a domestic servant, farm labourer, operative and the like,² unless it is manifestly disadvantageous to him, as where the master might stop the work whenever he chose, and retain the wages during the stoppage,³ or where the master should not be liable to pay wages to the apprentice so long as his business should be interrupted or impeded by or in consequence of any turn-out, but that the apprentice during such turn-out might employ himself in any other manner or with any other person for his own benefit;⁴ or where a penalty or forfeiture is attached to the hiring.⁵ The inequitable and prejudicial terms must appear on the face of the contract, and not depend upon considerations outside of it; and the mere fact that more advantageous terms might have been secured for the infant does not render the contract not binding, if the actual terms were not exacting, hard, and disadvantageous to him, more especially if there were a justification for their presence in the necessities of trade and the labour market;⁶ and where a master merely provides against

Contract of service *prima facie* beneficial.

Test whether deed of apprenticeship binding or not.

¹ *Rex v. Arundel*, 5 M. & S. 257.

² *Keane v. Boycott*, 2 H. Bl. 511; *Rex v. Chillesford*, 4 B. & C. 94; *Wood v. Fenwick*, 10 M. & W. 195.

³ *Reg. v. Lord*, 17 L. J. M. C. 181.

⁴ *Meakin v. Morris*, 12 Q. B. D. 352.

⁵ *Co. Litt.* 172 a; *Reg. v. Lord* (*ubi sup.*). See *ante*, p. 764.

⁶ *Leslie v. Fitzpatrick*, 3 Q. B. D. 229. The accuracy of the test of the validity of the contract laid down in this case has been doubted by the Queen's Bench Division in *Meakin v. Morris* (*ubi sup.*), where clearly the contract was not generally for the infant's benefit; but it would seem that, notwithstanding a contract might be in part disadvantageous to an infant, yet, if on the whole it was clearly beneficial, to hold it

liability to pay wages or find work for the apprentice while his business is at a standstill through an accident beyond his control (including strikes but not lock-outs), such provision does not render the deed inequitable and unenforceable against the apprentice.¹ Though an infant apprentice cannot be sued on his covenants of service,² or restrained by injunction from a breach of them,³ but must in certain cases be proceeded against in a court of summary jurisdiction,⁴ yet if an infant enter into an ordinary contract of service which is beneficial to him by which he engages not to do certain acts detrimental to his employer on attaining majority, he will be restrained by injunction from committing a breach of that engagement after he reaches majority.⁵ But it is now settled law that where a master in an apprenticeship deed secures for himself the right of not paying wages or discontinuing the instruction of the apprentice, whether at his own free will, or by reason of strikes or lock-outs in the trade or profession, such stipulation as against the infant and his sureties makes the contract unenforceable either in law or equity,⁶ and the contract is bad for all purposes; thus, an action on it would not lie against a third person for enticing the apprentice away.⁷ But where some provisions are disadvantageous yet on the whole the contract is beneficial for the infant it will be held binding on him.⁸

To whom
infant may be
bound ap-
prentice.

An infant may be bound apprentice to another infant⁹ (in which case the contract is voidable); to his own father,¹⁰ or mother;¹¹ to his master and his executor or administrator; and if the latter carry on the trade and afford as good instruction as that of the master, the apprentice cannot refuse to serve, and may be punished for deserting his service till the period of his articles is up, or he has disaffirmed on reaching majority.¹²

A father has no common law right to bind his child as an apprentice,¹³ but the latter must execute the indenture as a proof of consent to be bound, either in person,¹⁴ or by agent.¹⁵

unenforceable against him would not be a violation of the principle of law that an infant must be protected against rash and injurious engagements. See *Esher, M.R.*, in *Corn v. Matthews*, [1894] 1 Q. B. 314; *Clements v. London and North-Western Railway Co.*, [1895] 2 B. Q. 482.

¹ *Green v. Thompson*, [1899] 2 Q. B. 1.

² *Gylbert v. Fletcher*, Cro. Car. 179.

³ *De Francesco v. Barnum*, 43 Ch. D. 165 (Chitty, J.), and 45 Ch. D. 430 (Fry, L. J.).

⁴ Under 38 & 39 Vict. c. 86, s. 5.

⁵ *Cornwall v. Hawkins*, 41 L. J. Ch. 435; *Fellows v. Wood*, 59 L. T. 513; *Erans v. Ware*, [1892] 3 Ch. 502; and see *Brown v. Harper*, 68 L. T. 488.

⁶ *Reg. v. Lord* (*ubi sup.*); *Meakin v. Morris* (*ubi sup.*); *De Francesco v. Barnum* (*ubi sup.*); *Corn v. Matthews* (*ubi sup.*). In the case of *De Francesco v. Barnum*, it is difficult to appreciate the prejudice suffered by the infants under their contract of apprenticeship.

⁷ *De Francesco v. Barnum*, 45 Ch. D. 430.

⁸ *Clements v. London and North-Western Railway Co.* (*ubi sup.*).

⁹ *Rex v. St. Petroz*, 4 T. R. 196.

¹⁰ *Rex v. Chillesford*, 4 B. & C. 94.

¹¹ *Gilbert v. Schwenck*, 14 M. & W. 488.

¹² *Cooper v. Simmons*, 31 L. J. M. C. 138.

¹³ *Rex v. Aresby*, 3 B. & Ald. 584.

¹⁴ *Ibid*; *St. Nicholas v. St. Botolph*, 31 L. J. M. C. 258.

¹⁵ *Rex v. Longnor*, 4 B. & Ad. 647.

There is a statutory exception to this rule, for under the Poor Law Act the guardians of unions or parishes have the power to bind as apprentices pauper children under twenty-one within their jurisdiction.¹ But if any undue advantage were taken of the infant, the covenants would not be enforced against him.

As an infant cannot be sued on his covenants,² it is usual for the father or other guardian of the infant to be a party to the indenture and covenant that the infant shall serve; and the covenantor is liable for the infant's default on this covenant,³ though the latter avoid the covenant at twenty-one.⁴ The only exception to this rule is under the custom of the City of London, where the master can sue his infant apprentice on his covenant.⁵

A youthful offender or child detained in a reformatory or industrial school may with his own consent be apprenticed by the managers or disposed of by emigration, though the period of detention has not expired, and such apprenticing or disposition is as valid as if done by his parents.⁶ If the child is detained for less than twelve months he cannot be emigrated without the consent of the Secretary of State.⁷

Contracts of apprenticeship were held voidable at the option of the infants on their attaining twenty-one.⁸ From this it follows that unless they avoided within a reasonable time after coming of age they were deemed to have ratified them. This would seem to be still the law, notwithstanding the Infants' Relief Act, 1874.⁹ These contracts are not within the first section of that Act, for they were binding by the rules of the common law upon infant parties (until, at any rate, they attained majority).¹⁰ If not within the first section, they cannot be also within the effect of the second, so that ratification of them by the infant parties on attaining majority would be ineffectual. In a case decided after the passing of this Act,¹¹ it was held that these contracts were voidable at majority, and that the Master and Servant Act, 1867,¹² did not bring about any alteration in the rule. Further details on this subject will be found in Part V., dealing with the Relations of Master and Servant.¹³

Apprenticeship of youthful offenders.

Infants on majority may ratify or disaffirm contracts of apprenticeship.

¹ See 42 Geo. III. c. 46; 56 Geo. III. c. 139; 3 & 4 Wm. IV. c. 63; 7 & 8 Vict. c. 101, ss. 12, 13; 14 & 15 Vict. c. 11. See *post*, Part V. chap. v.

² *Gylbert v. Fletcher*, Cro. Car. 179.

³ *Branch v. Ewington*, 2 Doug. 518.

⁴ *Cuning v. Hill*, 3 B. & Ad. 59.

⁵ *Horn v. Chandler*, 1 Mod. 271. This custom, it is said, was introduced for the purpose of promoting trade in the City.

⁷ *Ibid.*

⁶ 54 & 55 Vict. c. 23, s. 1.

⁹ 37 & 38 Vict. c. 62.

¹⁰ See *Leslie v. Fitzpatrick*, 3 Q. B. D. 229, which was a case decided after the passing of the Act of 1874.

¹¹ *Moore v. Smith*, 39 J. P. 772.

¹² 30 & 31 Vict. c. 141, repealed by 38 & 39 Vict. c. 86. This point is not without difficulty, for if the infant cannot disaffirm this contract during minority, it is one of the few which it is not open to him to disaffirm during that period. The rule may be supported by the theory that this contract is a *quasi-necessary* for him.

¹³ Chap. v.

Enlistment of
infants.

For social and political reasons, infants are at liberty to contract binding engagements to serve the State, both in the army and navy,¹ and when bound are liable to the provisions of the discipline Acts and regulations of their respective services. Infant apprentices, bound for four years and upwards, must be discharged from the army if claimed by their masters within a month from the date of their enlistment.²

Liability of
infant for his
torts.

An infant is liable for torts committed by him; thus, he is liable for trespass,³ for slander,⁴ for false representation in carrying on a trade,⁵ for wrongly detaining goods,⁶ and for embezzling money;⁷ and if he give a charge on his property on coming of age to avoid being sued in tort for a wrong committed by him during infancy, the charge will be enforced.⁸ But he will not be liable where it is sought to convert an action really grounded on contract into one grounded upon tort, as on a warranty of goods sold,⁹ or for overriding a horse which he hired.¹⁰ But where he commits a separate and independent wrong apart from the contract, though arising out of the original contract, he is liable, and the plea of infancy affords no defence to the claim of the plaintiff for damages in respect of the wrong.¹¹ He may be visited with the costs of the suit in which he is the defeated party.¹²

¹ *Rex v. Rotherfield Greys*, 1 B. & C. 345; *Rex v. Walpole St. Peters*, Burr. S. C. 638; *Rex v. Hardwick*, 5 B. & Ald. 176.

² 42 & 43 Vict. c. 33, s. 92.

³ Bac. Abr. Inf. H.

⁴ *Defries v. Davis*, 1 Bing. N. C. 692.

⁵ *Chubb v. Griffiths*, 35 Beav. 127; *Woolf v. Woolf*, [1899] 1 Ch. 343.

⁶ *Mills v. Graham*, 1 B. & P. N. R. 140.

⁷ *Bristow v. Eastman*, 1 Esp. 172

⁸ *Re Seager*, *Seeley v. Briggs*, 60 L. T. 665.

⁹ *Howlett v. Haswell*, 4 Camp. 118.

¹⁰ *Jennings v. Rundall*, 8 T. R. 335.

¹¹ *Walley v. Holt*, 35 L. T. 631; *Burnard v. Haggis*, 14 C. B. (N.S.) 45.

¹² *Chubb v. Griffiths* (*ubi sup.*); *Woolf v. Woolf* (*ubi sup.*).

CHAPTER III.

RATIFICATION AND AVOIDANCE OF ACTS AND CONTRACTS.

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RATIFICATION of the acts and contracts of infants was formerly of more importance than it is at present. Many matters which could have been adopted and confirmed by an infant on reaching majority are now incapable of being ratified by him. The majority of the contracts entered into by infants were not invalid, and only a few which were deemed clearly to his detriment were void *ab initio*. Though their contracts were not invalid, yet in order to ensure the protection of their youth and inexperience, they were not bound by them if during infancy, or within a reasonable time after attaining majority, they disaffirmed them; and they were bound where they promised afresh to abide by them, or expressly ratified them, or in certain kinds of contracts continued to derive advantages under them, which in fairness they could not be allowed to retain without being fully bound by the engagements from which they were derived, though liabilities were incidental thereto. Of void contracts there cannot,

Ratification of
less import-
ance now than
formerly.

of course, be any ratification, and such need not be expressly avoided, for no act on the part of either of the parties can give validity to that which never was valid or binding. A recent Act has made a large number of the contracts of infants void,¹ and, even when their contracts are not void but voidable, has rendered any new promise or ratification in respect of them ineffectual. This provision renders any lengthened discussion on the subject of ratification unnecessary. An infant cannot affirm or ratify during minority;² thus acquiescence in a breach of trust does not bind him.³

Ratification :
What it is.

Ratification has been defined to be "any act or declaration which recognizes the existence of the promise as binding; as in the case of an agency, anything which recognizes as binding an act done by an agent, or a party who has acted as agent, is an adoption of it. Any written instrument signed by the party which in the case of adults would have amounted to the adoption of the act of party acting as agent, will in the case of an infant who has attained his majority amount to a ratification."⁴ "Ratification," says Parke, B.,⁵ "is an admission that the party is *liable and bound* to pay the debt arising from a contract which he made when an infant." It has also been laid down that "a ratification necessarily has reference to the past, and, as applied to promises made by the person ratifying, a ratification is simply an intentional recognition of some previous promise made by him, and an adoption and confirmation of such promise with the intention of rendering it binding. In other words, a ratification of a voidable promise is a recognition of it and an election not to avoid it, but to be bound by it."⁶ The ratification by an adult of his acts done during infancy is similar to the ratification by a principal of the acts of his agent—the acts of the agent are not binding till formally endorsed and approved by the principal; accordingly, none of the voidable acts and contracts made by an infant were binding on him until he had adopted and confirmed them on reaching his majority; though in many cases the ratification need not have been of a precise and formal nature.

Ratification by
adult of acts,
&c., done
during mino-
rity is on the
principle of
ratification by
principal of
acts of agent.

Distinction
between new
promise and
ratification.

In the decisions and the statutes dealing with this subject, a distinction has been drawn between a promise made by an infant on his attaining majority to abide by his engagement entered into during infancy, and his ratification of it. The promise includes ratification, but ratification does not include a new promise; "ratification and confirmation mean something more

¹ 37 & 38 Vict. c. 62.

² *Slator v. Trimble*, 14 Ir. C. L. 342.

³ *Wilkinson v. Parry*, 4 Russ. 272.

⁴ *Harris v. Wall*, 1 Exch. 122. This definition was approved by the Court of Queen's Bench in *Rowe v. Hopwood*, L. R. 4 Q. B. 1. But see the judgment of Martin, B., in *Mawson v. Blane*, 10 Exch. 206, 210.

⁵ In *Mawson v. Blane* (*ubi sup.*), p. 210.

⁶ Per Lindley, J., in *Litcham v. Worrall*, 5 C. P. D. 410.

than merely repeating the promise.”¹ Again, a new and independent promise made after majority, though practically the same as the one made during infancy, is different from ratification; the former requires a fresh consideration to support it, whereas ratification does not necessarily require such new consideration.² There cannot be any doubt that owing to the effect of section 2 of the Infants’ Relief Act, 1874, the tendency of the courts will be to find new and independent promises supported by fresh considerations, rather than mere promises relating to the past transaction or ratification, which will be quite inoperative.³ Because of this Act there is no need to give instances of what has been held sufficient or insufficient to constitute a ratification of or a new promise to abide by, acts done in infancy, which are within that statute, and so void, for to do so would be of no practical importance, but unnecessary. Instances of practical ratification of other kinds of contracts will be given in their proper places.

In the preceding chapter⁴ it has been laid down that at common law the majority of the acts and contracts of infants were voidable only and not void, and might be ratified or avoided by them on reaching majority. This confirmation of them need not have been in any particular or set method, but the infant might on attaining majority, by his general conduct, or express promise (if the ratification or confirmation was made before action brought),⁵ ratify and confirm his contracts made during infancy; and his contracts concerning property of a permanent nature to which obligations attach, or which involve continuous rights and duties, and he has taken benefits under them, unless disaffirmed by him within a reasonable time of reaching his majority, were binding on him.⁶ The ratification must have been after full knowledge and complete information respecting the transaction,⁷ and he must have known that he was discharged by his nonage.⁸

To affect an alteration of the law the Act known as Lord Tenderden’s Act⁹ was passed, which in its fifth section provided that “no action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age

Ratification need not be of a formal nature.

Lord Tenderden’s Act. Ratification must be in writing.

¹ Per Ellenborough, C.J., in *Cohen v. Armstrong*, 1 M. & S. 724. His lordship thought it more correct to say that infants made new promises after they came of age, rather than ratified their former promises.

² *Ditcham v. Worrall*, 5 C. P. D. 410.

³ See *Ditcham v. Worrall* (*ubi sup.*), and the conclusion arrived at by the majority of the court, with which Coleridge, C.J., did not agree.

⁴ Chap. ii., Acts and Contracts of Infants.

⁵ *Thornton v. Illingworth*, 2 B. & C. 824.

⁶ *Goode v. Harrison*, 4 B. & Ald. 147.

⁷ *Harmer v. Killing*, 5 Esp. 102.

⁷ *Kay v. Smith*, 21 Beav. 522.

⁹ 9 Geo. IV. c. 14. Sect. 5 was specifically repealed by 38 & 39 Vict. c. 66 (Statute Law Revision Act, 1875).

of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith."¹ Ratification after attaining majority, under this Act, of a debt contracted during infancy, to give the creditor a right of action, must have amounted to a recognition of the debt as an existing liability;² and a mere promise to pay it "as a debt of honour" was insufficient.³ This provision affected the ordinary contracts of infants, and required the ratification and new promise to be in writing; but it was never held to apply to infants' contracts affecting property of a permanent nature, or which were of a continuing character; nor is there any decision in the books showing that it was to be applied to the promises of marriage made by infants.

The Infants' Relief Act, 1874,⁴ is the statute which now governs the contracts of infants, and by section 2 it provides that

"no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age."

The words of the first section of this Act⁵ are perfectly general, and apply to all contracts of infants except those which are expressly excepted.⁶ So, too, in section 2, there are words of universal application. This section is divided into two parts; the first provides that an infant's promise made after age to pay *any debt* contracted during infancy, shall not be actionable, that is, shall not in any case form a valid consideration upon which an action can be brought; the second, that his ratification made after full age of *any promise or contract* made during infancy shall likewise be not actionable. Any new consideration given for such new promise or ratification shall be inoperative.⁷ In an Irish case,⁸ however, an action was held maintainable by an indorsee for value, against the acceptor of a bill of exchange, accepted by the latter after attaining twenty-one years of age, for a debt contracted during infancy, and after the passing of this Act, though not in respect of necessities. This decision, which seems questionable, was based upon the necessity of preserving intact the title of negotiable securities in the hands of third parties for value. The court, too, inclined to the opinion that as

¹ See *Rawley v. Rawley*, 1 Q. B. D. 460.

² *Roue v. Hopwood*, L. R. 4 Q. B. 1.

³ *Maccord v. Osborne*, 1 C. P. D. 568.

⁴ 37 & 38 Vict. c. 62.

⁵ See *ante*, p. 766.

⁶ Per Jessel, M.R., in *Ex parte Jones, Re Jones*, 18 Ch. D. 109.

⁷ This provision must have been inserted to prevent collusion, and evasion of the Act, or in order that the courts should not be bound to inquire into the adequacy of the new consideration.

⁸ *Belfast Banking Co. v. Doherty*, L. R. 4 Ir. C. L. 124.

Infants' Relief Act, 1874.

No action to be brought on ratification of infant's contract.

Effect of section sweeping in its nature.

between the immediate parties to the bill the action would not lie. That this section is considered by the judges to be wide in its operation, and intended to be strictly carried out, is evinced by the case in which it was held to apply to a ratification after the passing of the Act of a contract made during infancy before it came into operation, and the ratification deemed inoperative.¹ Under Lord Tenterden's Act, a verbal ratification of an infant's contract was held inoperative to enable a defendant sued by him to set off validly a debt contracted during infancy by the plaintiff with the defendant.² Under that Act ratification was possible and effectual if carried out in writing; but under the present Act no ratification, whether verbal or in writing, is to be of any efficacy, therefore *à fortiori* an infant's debt or contract cannot now be made the subject of a set-off or counter-claim. A marriage settlement by an infant is only voidable, and is confirmed or ratified by acquiescence in its provisions after majority is attained; so that a marriage settlement is a class of contract not affected by this section.³ A debt to be set off must be actionable, and as ratification is expressly declared incapable of founding an action, an infant's debt or contract, though in a sense ratified, cannot be rendered a valid set-off, or found a valid counter-claim.

Debt owed
by infant can-
not be set off.

There must be now an actual new promise; and the evidence to support such new promise must be clear and not merely consistent with that which would show a mere ratification of the promise made during infancy.⁴ Thus, where a defendant during infancy became jointly with two others indebted to a firm who brought an action against them after the defendant attained his majority to recover the amount of the debt, and he compromised the action on terms which included (*inter alia*) that he should give certain acceptances, and one of the bills given by the defendant to the plaintiff firm was indorsed by the latter to the plaintiff who was their solicitor in the original action and who took the bill with notice of the circumstances in which it was given, it was held that the transaction or compromise merely amounted either to a promise after age to pay the debt contracted during his infancy, or was a mere ratification after full age of the contract or promise made during his infancy.⁵ But a covenant to repay and an assurance of real property by way of mortgage to secure money lent to an infant may amount to more than a mere satisfaction of the debt incurred in infancy.⁶ Under the

New promise
now necessary.

¹ *Ex parte Kibble, Re Onslow*, L. R. 10 Ch. App. 373.

² *Rawley v. Rawley*, 1 Q. B. D. 460.

³ See *Carter v. Silber*, [1892] 2 Ch. 278; *Duncan v. Dixon*, 44 Ch. D. 211. See *post*, p. 810.

⁴ See *Lindley, L.J.*, in *Ditcham v. Worrall*, 5 C. P. D. 410; *Holmes v. Brierley*, 59 L. T. 70.

⁵ *Smith v. King*, [1892] 2 Q. B. 543.

⁶ *Re Foulkes, Foulkes v. Hughes*, 69 L. T. 183.

Betting and Loans (Infants) Act, 1892,¹ if an infant has contracted a loan which is void in law and has agreed on attaining majority to pay money in respect of such loan, which is not a new advance, such agreement or negotiable security representing such agreement shall be void against all persons.

Infant cannot enforce contract by specific performance.

Another result of an infant's contract being void, and ratification on attaining majority ineffectual to found an action, an adult will not now be able to enforce specific performance of a contract entered into by him during infancy.² As a promise to marry has been held to be within this Act, it will be a material fact whether the infant promisor on attaining majority merely ratifies the old promise or enters into a specific new promise; in the latter case the promisor will be bound, but will not be bound in the former.³

Exception, when fraudulent representation as to age has been made.

Since, then, the passing of this Act, any form of ratification of a debt contracted in infancy is powerless to revive it as a good cause of action.⁴ An equitable exception to this has been made in cases where the infant is in appearance and person an adult, and has made express representations that he is of age with intent to deceive the person who trusts him; this is a fraud against which equity will grant relief. The undertaking of an infant does not become a debt, but a liability to pay a sum of money; and as under the Bankruptcy Act, 1883,⁵ liabilities are provable, the defrauded creditor can, on the majority of the infant, take proceedings in bankruptcy, and prove for the money or amount advanced.⁶ It seems, however, that the personal appearance of the infant is a material element in such a case, for if his looks are clearly those of one not arrived at maturity, the creditor must be held to have dealt with him at his risk, and cannot establish the material fact of deception; and it has been expressly decided that it is not enough that he has by trading held himself out as an adult.⁷

Summary.

The practical result of this Act is that there cannot be any such complete ratification by a person on attaining majority of his contracts made during infancy so as to render them enforceable by action. However, under Lord Tenterden's Act, which required ratification to be in writing, certain contracts which the infant did not repudiate or disaffirm on reaching twenty-one were by his conduct after that period (whether of a formal or informal nature, though not in writing), though not enforceable by action, held to be ratified and good for all other purposes. So, by analogy, it is submitted (though yet to be judicially decided) that infants' acts and contracts of a like nature will under the

¹ 55 & 56 Vict. c. 4, s. 5.

³ *Holmes v. Brierley*, 59 L.T. 70.

⁵ 46 & 47 Vict. c. 52, s. 37.

⁷ *Ibid.* See on this point, *Maclean v. Dummett*, 22 L. T. 710.

² See *Flight v. Bolland*, 4 Russ. 298.

⁴ *Ex parte Kibble*, L. R. 10 Ch. App. 373.

⁶ *Ex parte Jones, Re Jones*, 18 Ch. D. 109.

Infants' Relief Act, 1874, though not the subject-matter of an action, be equally good and valid for other purposes.

The acts and contracts to which infants ought to be held bound are such as affect interests in property of a permanent nature with certain obligations attached, to which, as they have derived benefits under their engagements, they ought in fairness to conform, unless they have repudiated their liability within a reasonable and proper time after attaining majority. The persons who enter into them are rather purchasers of a more or less permanent interest than mere contractors. Their position has been thus defined: "They have been treated therefore as persons in a different situation from mere contractors, for then they would have been exempt: but, in truth, they are purchasers who have acquired an interest, not in a mere chattel, but in a subject of a permanent nature, either by contract . . . or purchase, or devolution from those who have contracted, and with certain obligations attached to it which they were bound to discharge."¹ In other words, their liability does not arise on a contract, but on a legal obligation arising out of the circumstances of the transaction. Thus, where an infant defendant in a suit brought to raise portions for the purpose of preventing a sale of certain lands offered to charge the portions on other lands, he was held bound by his offer after attaining his majority, as he had not retracted on attaining twenty-one, and the sale had been delayed.² These acts and contracts to which obligations are attached may be divided into two classes: (1) Those connected with realty; (2) those not connected with realty, but which are of a continuing nature.

What acts and contracts are capable of being ratified.

Where infants are not so much contractors as purchasers of a thing of a permanent nature.

(1) *Purchase of Land*.—Where an infant has purchased an estate, unless he disaffirm the purchase within a reasonable time after attaining twenty-one, he will be taken to have ratified it; a re-sale at majority of property bought during infancy is a confirmation of the purchase.³

Acts and contracts connected with realty. Purchase of land.

If he sell and convey his estate, he must do some act at majority to disaffirm the conveyance, or ratification will be presumed.⁴

Sale and conveyance.

Where an infant makes a lease or takes a lease which is clearly not detrimental to him, he must avoid it within a reasonable and proper time. As a lease is only voidable by him, he may ratify it by continuing to occupy after attaining majority, in which case he will be liable not only for rent due since his majority, but also for arrears accrued before majority.⁵ A surrender of a lease being

Leases.

¹ Per Parke, B., in *North-Western Railway Co. v. M^cMichael*, 20 L. J. Ex. 97.

² *Cecil v. Salisbury*, 2 Vern. 224.

³ *Gooch's Case*, L. R. 8 Ch. App. 266. See *Whittingham v. Murdy*, 60 L. T. 956.

⁴ *Slator v. Brady*, 14 Ir. C. L. 61.

⁵ *Ketsey's Case*, Cro. Jac. 320; *S. C. Kettle v. Elliott*, 1 Roll. Abr. 731; *S. C. Kirton v. Elliott*, 2 Buls. 69; *Evelyn v. Chichester*, 3 Burr. 1717.

voidable, will be taken to be ratified unless disaffirmed within a reasonable time of reaching majority. Where he has made a lease, he must likewise avoid it within a reasonable time, or he will be held to have ratified it. A year's acquiescence is sufficient to confirm it,¹ or any act which recognizes it as binding, *e.g.*, making a mortgage subject to the lease,² or acceptance of rent.³ In an old case an infant's saying to the lessee, "God give you joy of it," was held a confirmation;⁴ and it seems any act of recognition, as receiving rent during infancy, is so far a confirmation that the lessor cannot determine the lease without notice.

Continuing contracts.

(2) *Continuing Contracts*.—Where the contract entered into by the infant is of a continuing nature, unless he repudiate or disaffirm either before or within a reasonable time after arriving at majority, he will be deemed to have ratified it.⁵ Of such contracts are partnership, the holding of shares, and those of hiring and service.

Partnership.
Ratification possible notwithstanding
Infants' Relief Act, 1874.

An infant, it has been seen, may be a partner,⁶ but his contract or agreement in that respect is voidable, but until he has repudiated it it is valid and binding on him, and unless he disaffirm either within age or within a reasonable time after attaining his majority, he will be held to have ratified his contract. Lord Lindley, in the last edition of his work on Partnership,⁷ on the possibility of an adult ratifying his infantile contract of partnership since the Act of 1874, writes: "If, when an infant partner comes of age, he is desirous of retiring from the firm, he should express his determination speedily and unequivocally." It is true that by the Infants' Relief Act, 1874,⁸ promises made by a person who has attained twenty-one to pay debts contracted before that age cannot be enforced, but a person who retains a share in a partnership or company cannot retain it without its incidental obligations, and the doctrine of "holding out" is itself sufficient to impose liability upon an adult, although he may not long have attained his majority. This is well exemplified in *Goode v. Harrison*.⁹ There an infant was a member of a firm, and he was known to be a member. After he had attained twenty-one he did not expressly either affirm or disaffirm the partnership. He was held liable for debts incurred by his co-partners subsequently to that time. In this case of *Goode v. Harrison*, Best, J., said: ¹⁰ "The infant by holding himself out as a partner contracted a continual obligation, and

Intention of infant partner on majority to retire should be speedy and unequivocal.

¹ *Doe (dem. Bromfield) v. Smith*, 2 T. R. 436.

² *Story v. Johnson*, 2 Y. & C. Ex. 586.

³ *Smith v. Low*, 1 Atk. 489.

⁴ *Anon.*, 4 Leon. 4, c. 15.

⁵ See *North-Western Railway Co. v. M'Michael (ubi sup.)*; *Goode v. Harrison* 5 B. & Ald. 147; *Whittingham v. Murdy (ubi sup.)*.

⁶ See *ante*, p. 771.

⁷ P. 84.

⁸ 37 & 38 Vict. c. 62, s. 2.

⁹ 5 B. & Ald. 147.

¹⁰ P. 159.

that obligation remains till he thinks proper to put an end to it. He continued that obligation when he became of age . . . and if he wished to be understood as no longer continuing as a partner, he ought to have notified it to the world." Such notification is obligatory upon him.

The like principles hold good in cases where an infant is the holder of shares in any company. He may be a shareholder, but as his contract is voidable, he may disaffirm it within age, and unless he disaffirm it within a reasonable time after attaining twenty-one, he will be deemed to have ratified it; thus, if he receive a dividend or pay a call after reaching his majority, such acts will be held to amount to a ratification of his contract. The repudiation shall be in a clear and unequivocal manner, and non-repudiation will be held equivalent to ratification.¹

Holding of shares.

If an infant enter into a contract of hiring, as, for instance, employ a solicitor or servant, and continue the employment after reaching twenty-one, he will be liable for remuneration due from that time.² In the preceding cases the ground of the infant's liability is that in fairness he ought to confirm the transactions.

Contracts of service.

The term voidable contract means a contract which can be avoided or put an end to by the party who has a right to do so. An avoidance is some later act inconsistent with the earlier act and done with the intention direct or indirect to avoid and repudiate it.³ This is a right which the law has ever insisted shall be preserved to infants in their dealings with others. It is now settled law that an infant may avoid his voidable contracts with practically few or no exceptions, such as for necessities and the like, either before or within a reasonable time after coming of age; and what is a reasonable time depends in each case on its circumstances.⁴ Laches is not to be imputed to an infant, for it is a presumption of law that he does not understand his rights, and is not capable of taking advantage of the rules of law, so as to apply them to his advantage. But laches after attaining majority, in not making himself acquainted with the terms of the contract which he seeks to avoid is generally fatal to the efficiency of his repudiation.⁵ The rule is that matters *in fait*, that is, not of record, he shall avoid either within age or at full age, but matters of record only within age.⁶ Thus, the old processes known as fines and recoveries were valid and binding on infants unless set aside by them during infancy.

Avoidance : what it is.

Laches not imputed to infant.

Matters of record.

¹ See *ante*, chap. ii. pp. 772 *et seq.*, for a more full discussion of this question.

² *Waldo v. Waldo*, 1 F. & F. 173; *Guy v. Burgess*, 1 Smith, 117.

³ See *Inman v. Inman*, L. R. 15 Eq. 260.

⁴ *Edwards v. Carter*, [1893] App. Cas. 300. See *Viditz v. O'Hagan*, [1899] 2 Ch.

So a judgment in law is binding on him unless he gets it set aside on the ground of infancy,¹ but the court is not bound to set it aside if it thinks the infant disentitled to the indulgence.² A judgment of the court for past maintenance of an infant has been decreed to bind his inheritance, on the principle that a judgment for necessities could be obtained against his real estate;³ but this is a principle which is not unquestioned.⁴

Matters in fait.
Avoidance must be within reasonable time after attaining majority.

Matters in fait may be avoided either within age or within a reasonable time after attaining twenty-one. An infant's final and conclusive election cannot be made till he reaches majority;⁵ for if he avoid within age, his avoidance may not be conclusive, for on reaching majority he may disaffirm his avoidance;⁶ but where it would be more to his prejudice to affirm than to avoid, it would be necessary to produce clear and unmistakable evidence of his having revived the contract.⁷ On the other hand, where the act done by the infant is complete and past, like the conveyance of an estate executed by him,⁸ or where his contract is of a continuing nature, such as a partnership or the holding of shares, he must as clearly and unequivocally demonstrate his repudiation of liability.⁹ Thus, if an infant shareholder does not repudiate his shares either whilst he is an infant or within a reasonable time after he attains twenty-one, and in an unmistakable manner, he will be liable to pay calls, or to be put upon the list of contributories,¹⁰ unless the company was in process of being wound up at the time he became possessed of or interested in the shares.¹¹ But there is an important difference between the acquiescence of a shareholder and that of a contributory; "if a man allows his name to remain on the register of shareholders for a length of time, that may raise an equity against him to have it kept there, but I cannot see that his leaving it on the list of contributories raises any similar equity against him. His allowing it to remain there is, indeed, capable of being used as evidence against him that it was rightly placed there."¹² So, as a partner, unless he disaffirm within a reasonable time after attaining twenty-one, he will be liable for the partnership debts incurred after he has reached majority.¹³ Again, in a contract of service, the infant must avoid his contract in a proper manner,

Difference between the acquiescence of a shareholder and that of a contributory.

¹ *Henry v. Archibald*, I. R. 5 Eq. 559. See *ante*, p. 760.

² *Wright v. Hunter*, 1 L. J. K. B. (O.S.) 248.

³ *Re Howarth*, L. R. 8 Ch. App. 415.

⁴ See *Cadman v. Cadman*, 33 Ch. D. 397.

⁵ *North-Western Railway Co. v. M'Michael*, 20 L. J. Ex. 97.

⁶ *Zouch v. Parsons*, 3 Burr. 1794; *Slator v. Trimble*, 14 Ir. C. L. 342.

⁷ *Baker's Case*, L. R. 7 Ch. App. 115.

⁸ *Slator v. Brady*, 14 Ir. C. L. 61.

⁹ *Goode v. Harrison*, 5 B. & Ald. 147; *Cork and Brandon Railway Co. v. Cuzenore*,

10 Q. B. 935; *Dublin and Wicklow Railway Co. v. Black*, 8 Ex. 181; *Baker's Case*

(*ubi sup.*); *Whittingham v. Murdy*, 60 L. T. 956.

¹⁰ *Lind. Comp.* 810, and the cases there cited.

¹¹ *Shrapnell's Case*, cited in *Lind. Comp.* 810.

¹² *Per Turner, L.J.*, in *Shewell's Case*, L. R. 2 Ch. App. 387.

¹³ *Goode v. Harrison* (*ubi sup.*).

and not merely by implication; and the running away of an apprentice after attaining twenty-one is not a proper avoidance of the contract of service.¹ If an infant enters into a contract of service which is beneficial for him in which he binds himself not to do a particular act on the termination of the service, though on reaching majority he may avoid his contract, yet he will be restrained from committing a breach of that part of the contract which binds him not to do the particular act;² and if he continues in the service some time after attaining majority an entirely new contract as an adult will be inferred.³

The privilege of avoiding his contracts is one which is personal to the infant and his representatives;⁴ therefore, though the contract be voidable, yet it shall bind the person of full age.⁵ His representatives must be privies in blood and descendant to him, and not merely privies in estate. Thus, if an infant tenant in fee or in tail convey his estate, his heir may enter and avoid the conveyance.⁶ Mere privies in estate cannot set aside his acts; "therefore if donee in tail within age makes a feoffment in fee and dies without issue, the donor shall not enter, because there was privity between them only in estate, and no right accrued to the donor by the death of the donee. So if two joint-tenants in fee be within age, and one makes a feoffment in fee of his moiety and dies, the survivor cannot enter by reason of the infancy of his companion, for by his feoffment the jointure was severed so long as the feoffment remains in force."⁷ Privies in law cannot set them aside, as a lord by escheat.⁸

Privilege of avoiding personal only to infant and his representatives in blood and descent.

If an infant avoids a contract, and has derived no benefit from it, he is entitled to recover back any money paid by him in part performance of it, or if there has been a total failure of consideration, and there can be a *restitutio in integrum* on his part;⁹ and there may be a failure of consideration as to the principal agreement, though the infant may have received a benefit under some collateral stipulation;¹⁰ but he cannot do so unless he restore the party contracting with him to the same position as if there had been no contract: accordingly, if an infant take a lease and occupy, he cannot on avoiding the lease recover the premium paid for it;¹¹ or if he uses and consumes things for which he has

Effect of avoidance: when infant entitled to recover back money paid.

¹ See *Rex v. Ewered*, 16 East, 27; *Gray v. Cookson*, 16 East, 13.

² *Fellows v. Wood*, 59 L. T. 513. See *Cornwall v. Hawkins*, 41 L. J. Ch. 435, and *Evans v. Ware*, [1892] 3 Ch. 502.

³ *Brown v. Harper*, 68 L. T. 488.

⁴ *Keane v. Boycott*, 2 H. Bl. 511. "In short, the disabilities of an infant are intended by law for his own protection, and not for the protection of the rights of third persons; and his acts may therefore, in many cases, be binding upon him, although the persons under whose guardianship, natural or positive, he then is, do not assent to them." Per Story, C.J., in *United States v. Bainbridge*, 1 Mason, 83.

⁵ Bac. Abr. Inf.

⁶ *Whittingham's Case*, 8 Rep. 43.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Corpe v. Overton*, 10 Bing. 253; *Hamilton v. Vaughan-Sherrin Electrical Engineering Co.*, [1894] 3 Ch. 589.

¹⁰ *Eccrett v. Wilkins*, 29 L. T. 846

¹¹ *Holmes v. Blogg*, 8 Taunt. 508.

paid he cannot under the Infants' Relief Act, 1874, recover back the money he has paid for them, though the contract in respect of which the money was paid be declared void and set aside;¹ or if he becomes and acts as a partner, he cannot recover the money paid for the partnership;² again, if he insure his life, he cannot recover the premiums.³ If he buy land or goods and pay cash for them, and he avoids the contract after attaining majority his avoidance would revest the land or goods in the vendor.⁴ This proposition assumes that he has done nothing to the land so as to affect its value, or in the case of a lease if he has not occupied the premises for any length of time.⁵ Of course, as in the case of adults, where there is a total failure of consideration, and the other party to the contract can be restored to his original position, the infant may recover whatever he may have paid.⁶ So if he sell land and is not paid the purchase-money he can recover it; or if he sells goods on credit he can avoid the contract and recover the goods.⁷

¹ *Valentini v. Canali*, 24 Q. B. D. 166.

² *Ex parte Taylor*, 26 L. T. (O.S.) 266.

³ *Buny. Life Ass.* 346.

⁴ See *North-Western Railway Co. v. M^cMichael*, 20 L. J. Ex. 97.

⁵ See *Holmes v. Blogg*, 8 Taunt. 508.

⁶ *Corpe v. Overton*, 10 Bing. 253.

⁷ *Austen v. Jervas*, Hobbes, 77.

CHAPTER IV.

MARRIAGE SETTLEMENTS OF INFANTS.

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THE marriage settlements of infants constitute a subject which might have been discussed in the second chapter of this present part, but in order to obtain a comprehensive view of the matters arising in connection with them it has been thought advisable to treat them as a whole.

There are two classes of settlements by infants: (1) Those not under the Infants' Settlements Act, 1855;¹ (2) Those made in pursuance of the provisions of that Act.

(1) The general incapacity of an infant to contract is the foundation of the rule that an infant, male or female, cannot irrevocably under all circumstances bind his or her property of whatsoever description by a marriage settlement; and the marriage agreement, even if beneficial, may be set aside on repudiation within a reasonable time after attaining majority, when he or she may sell and dispose of the property intended to be affected by the agreement.² It was, however, in earlier times thought that because the infants could contract validly to marry, therefore contracts by them dealing with their property to be affected by marriage would also be valid. Where a settlement is for the benefit of the infant it is not void but voidable, and if sought to be repudiated, repudiation must take place within a reasonable time after attaining majority, and what is a reasonable time depends upon the facts of each case.³ The

Settlements of infants not under Infants' Settlements Act, 1855. General incapacity of infants to contract.

¹ 18 & 19 Vict. c. 43.

² See *Edwards v. Carter*, [1893] App. Cas. 360.

³ *Ibid.*; *Viditz v. O'Hagan*, [1899] 2 Ch. 569.

Court of Chancery never has had inherent jurisdiction to compel an infant, whether a ward of court or not, to make a settlement of his or her property on marriage.¹ An infant cannot make a binding settlement of his or her property on consideration of a third person making a competent settlement on him or her;² and the consent of parents or guardians to the marriage, and their approbation of the settlement confers no binding force on it.³ The majority of the authorities are connected with the cases of female minors, so they will be treated first.

Female infant,
male adult.

Female Infant, Male Adult.—The power of making a valid settlement depended upon the nature of the property to be settled; and the canon by which the validity of the settlement could be tested was the interest of the husband in the property of the wife. Where the husband had an absolute interest by operation of law in the property intended to be settled, the settlement of such was binding on both, for the settlement was in effect his settlement and not hers;⁴ where, on the contrary, he had no interest in the property of his wife, the latter, on attaining her majority, could set the arrangement aside. A female infant could not make a binding settlement of her real estate, because her husband by law took only a limited interest in her real estate.⁵ If she survive her husband her power over her realty is the same as if no settlement had ever been made. If her husband survive her, and she on her majority has made no disposition *inter vivos*, or testamentary as she now can,⁶ and he has had a child by her capable of inheriting, he will become tenant by the curtesy.⁷ It is quite clear law that she cannot, apart from any statutory authority, make a binding settlement of her property. Under the Conveyancing and Law of Property Act, 1881,⁸ the estate of an infant held in fee or on lease is settled estate, and if a female infant marry, her trustees are to stand possessed of the accumulated fund arising from the income of the land and from investments of the income in trust for her separate use.⁹

Realty.

But there has not been a consensus of opinion on this point. Lords Macclesfield¹⁰ and Hardwicke¹¹ held that she could make a binding settlement of her realty. Lord Nottingham was of opinion that she could not contract to bind her real estate;¹² this was followed by Lord Thurlow, who expressly decided that an infant could not enter into a binding marriage settlement, and if he did

¹ *Field v. Moore*, 24 L. J. Ch. 161; *Re Leigh, Leigh v. Leigh*, 40 Ch. D. 290; *Seaton v. Seaton*, 13 App. Cas. 61.

² *Durnford v. Lane*, 1 Bro. C. C. 106.

³ *Clough v. Clough*, 5 Ves. 717.

⁴ Per Leach, M.R., in *Simson v. Jones*, 2 Russ. & Myl. 365, 376. See *Stevens v. Trevor-Garrick*, [1893] 2 Ch. 307; and *Buckland v. Buckland*, [1900] 2 Ch. 534.

⁵ *Durnford v. Lane* (*ubi sup.*); *Milner v. Lord Harewood*, 18 Ves. 259; *Stamper v. Barker*, 5 Madd. 164; *Pimm v. Insall*, 7 Ha. 193; *Field v. Moore* (*ubi sup.*). See Peach. Sett. 26-28.

⁶ 45 & 46 Vict. c. 75, s. 1.

⁷ See *ante*, Husband and Wife, chap. xl. pp. 219 *et seq.*

⁸ 44 & 45 Vict. c. 41.

⁹ Sect. 42.

¹⁰ In *Cunneil v. Buckle*, 2 P. Wms. 242.

¹¹ In *Harvey v. Ashley*, 3 Atk. 607

¹² *Salsbury v. Bagott*, 2 Swanst. 603.

nothing on attaining majority to affirm his contract, he could set it aside.¹ This reasoning was adopted by Lord Eldon, who held that the principle of infantile incapacity applied equally to males and females.² It has been held that an agreement by the wife disposing of her chattels real was binding, because the husband had complete control over his wife's leaseholds.³ The wife was, however, practically bound during her coverture, because her husband's concurrence was necessary to the conveyance of her realty, and he was not permitted to do or concur in any act calculated to defeat the uses of the settlement.⁴ But the wife will be bound if she has been guilty of concealment and fraud.⁵ She will also be bound by a representation which is inaccurate, though made in good faith, to which the sanction of the court was made under the Infants' Settlement Act, 1855.⁶ She could be bound by a jointure or a suitable and competent provision in lieu of dower.⁷

When infant bound.

The general personal estate of a female infant was bound by the settlement, because her husband took an absolute interest in such property, and the settlement was deemed practically to be his.⁸ Her choses in action reduced into possession during the coverture were also bound;⁹ but such as were not reduced,¹⁰ or her reversionary interests not becoming interests in possession during coverture, were not so bound.¹¹ A settlement by her operates as a severance of the joint-tenancy of any property settled by her which she held jointly with others.¹² Property settled to the wife's separate use was not bound, for the reason that the husband took no interest in it.¹³ It was at first thought that the effect of the Married Women's Property Act, 1882, was to render a settlement of personalty as well as realty not authorized by the Court of Chancery, not binding upon a female infant; but the courts have held that where the husband agreed to the infant wife's settlement of her non-separate property, or covenanted to settle such property, section 19 of the Act preserved the old state of the law, and that the infant wife was bound.¹⁴

Separate property not bound.

¹ *Williams v. Williams*, 1 Bro. C. C. 152.

² *Caruthers v. Caruthers*, 4 Bro. C. C. 500. See *Milner v. Lord Harewood*, 18 Ves.

259. ³ *Trollope v. Linton*, 1 Sim. & St. 477.

⁴ *Durnford v. Lane*, 1 Bro. C. C. 106; *Pimm v. Insall*, 7 Ha. 193.

⁵ *Sharpe v. Foy*, L. R. 4 Ch. App. 35.

⁶ *Mills v. Fox*, 37 Ch. D. 153.

⁷ Under 27 Hen. VIII. c. 10. *Drury v. Drury*, 2 Ed. 60; *Caruthers v. Caruthers* (*ubi sup.*). This is a point of little importance since the passing of the Dower Act,

³ & ⁴ Wm. IV. c. 105. See *ante*, Part I., Husband and Wife, chap. xi. pp. 227 *et seq.*

⁸ *Simson v. Jones*, 2 R. & M. 365.

⁹ *Rawlins v. Birkett*, 25 L. J. Ch. 837.

¹⁰ *Borton v. Borton*, 16 Sim. 552.

¹¹ *Cunningham v. Antrobus*, 16 Sim. 436; *Field v. Moore*, 24 L. J. Ch. 161.

¹² *Burnaby v. Equitable Reversionary Interest Society*, 28 Ch. D. 416.

¹³ *Simson v. Jones* (*ubi sup.*).

¹⁴ *Hancock v. Hancock*, 38 Ch. D. 78; *Stevens v. Trevor-Garriek*, [1893] 2 Ch. 307; *Buckland v. Buckland*, [1900] 2 Ch. 534. See pp. 135 and 802. There is, however, a Bill now before the House of Lords which corrects this injustice, and provides that any such settlement or agreement for a settlement on the part of the husband shall not bind the wife unless she die an infant.

Wife bound by
acquiescence.

The wife might be bound by her acquiescence in the settlement,¹ or by her subsequent confirmation of it on attaining majority.² A mere appointment of a new trustee by a married woman on attaining her majority is not necessarily an expression of her intention to confirm the settlement,³ but it is not necessary that she should do any particular act to confirm it.⁴ If the confirmation ought to be by deed acknowledged, then there ought to be such deed;⁵ and the property she professes to bind by her confirmation must be such as she is capable of disposing of.⁶ Dissent from the provisions of a settlement must be expressed within a reasonable time after the infant attains majority.⁷ But where an infant with an English domicile enters into covenants with and marries a foreigner by the law of whose domicile she never could ratify the settlement or deprive herself of the right to repudiate it, the English doctrine that the voidable contract of an infant is binding unless repudiated within a reasonable time after majority is attained has no application, and so she would not be bound by her contract.⁸

Wife's cove-
nant for settle-
ment voidable.

Where the wife is a minor, and her covenant for the settlement of her property is for her benefit, it is voidable only and not void, and is binding upon all property coming to her during coverture which can be affected by her covenant until she avoids or disaffirms the covenant as to such property; and she may, after attaining twenty-one, and during the coverture, elect whether the covenant shall be binding on her separate estate or not, such right of election being a necessary consequence of a married woman's power to dispose without her husband's consent of property settled to her separate use.⁹ If the settled property consists of a fund in court it will not be transferred to her trustees without her consent on attaining majority.¹⁰ A married woman on majority may confirm the settlement as to a particular fund without confirming it as a whole;¹¹ though in the absence of evidence to the contrary, confirmation of part would be deemed confirmation of the whole.¹² Where she attains majority, and evinces her intention of confirming the settlement, it will be recognized as binding on her; and if she became of unsound mind (though not so found by inquisition) before electing, the court will elect on her behalf when it appears to be for her

Election on
attaining
majority.

¹ *Ashton v. M'Dougal*, 5 Beav. 56.

² *Merryweather v. Jones*, 4 Giff. 509; *Barrow v. Barrow*, 4 K. & J. 409; *Davies v. Davies*, L. R. 9 Eq. 468; *Willoughby v. Middleton*, 2 J. & H. 344; *White v. Cor*, 2 Ch. D. 387; *Smith v. Lucas*, 18 Ch. D. 531.

³ *Haywood v. Tidy*, 63 L. T. 679.

⁴ See *Burnaby v. Equitable Reversionary Interest Society*, 28 Ch. D. 416.

⁵ *Field v. Moore* (*ubi sup.*).

⁶ *Smith v. Lucas* (*ubi sup.*).

⁷ *Edwards v. Carter*, [1893] App. Cas. 360.

⁸ *Viditz v. O'Hagan*, [1900] 2 Ch. 87.

⁹ *Willoughby v. Middleton* (*ubi sup.*); *Smith v. Lucas* (*ubi sup.*). See Part I. chap. viii. pp. 133 *et seq.*

¹⁰ *Day v. Day*, 11 Beav. 35.

¹¹ See *Seaton v. Seaton*, 13 App. Cas. 61.

¹² *Davies v. Davies*, L. R. 9 Eq. 468; *Simp. Inf.* 35.

benefit.¹ Where a person takes a benefit under an instrument, he or she can accept the benefit under it, but not without at the same time conforming to all its provisions and renouncing every right inconsistent with them ; in other words, such person cannot approbate and reprobate the instrument at the same time. Where, then, any person chooses to defeat a settlement he or she must make compensation to those who are disappointed by her choice. Compensation. This rule of law has been held applicable to a woman who, marrying as an infant with property settled on her, on attaining majority has elected to disaffirm the settlement. Thus, it has been held that a wife could not insist upon the benefit of a settlement made during her infancy so far as regards property effectually bound by the contract of her husband, and at the same time repudiate the settlement as to property not capable of being so bound, but had to elect whether she would take under or against the settlement.²

Again, a married woman has been put to her election to take under or against the settlement under the following circumstances: She married as an infant, and joined in a post-nuptial settlement, executed after her coming of age, in which her husband's property, property settled by her father on her, and reversionary property of her own (which she could not have properly bound) were all settled on the trusts of the marriage ; she became discovert before the reversion fell into possession, and claimed the reversionary property independently of the settlement.³ This rule will continue to be applied in all cases not affected by the Act of 1882 ; but where that Act will apply, the question of election would not seem to arise, for the husband's covenant cannot bind any property of his wife, for he has no interest in it ; so that on attaining majority she will be able to repudiate the covenant made by her ; but the courts have decided that her covenant to settle property not settled to her separate use does bind her on attaining majority, where the husband agrees or covenants to give up his marital right.⁴ It is a condition precedent that the infant should on attaining full age be competent to give up by way of compensation the provision intended for him or her under the settlement.⁵ When put to election.
Rule affected by M.W.P. Act, 1882.

This doctrine of election is founded on a presumption of a general intention that every part of an instrument shall take effect ; but the presumption of such general intention may be rebutted by an inconsistent particular intention appearing in the

¹ *Wilder v. Pigott*, 22 Ch. D. 263. See also *Jones v. Lloyd*, L. R. 18 Eq. 265.

² *Willoughby v. Middleton*, 2 J. & H. 344.

³ *Codrington v. Codrington*, L. R. 7 H. L. 854. See *ante*, p. 401.

⁴ *Buckland v. Buckland*, [1900] 2 Ch. 534 ; *Stevens v. Trevor-Garrick*, [1893] 2 Ch. 307. These two decisions seem contrary to the spirit of the Act, See pp. 135, 803.

⁵ 6 Byth. & Jarm. (4th edit.) 148.

instrument; and so far as married women infants are concerned restraint against anticipation is such inconsistent intention;¹ and this intention is not affected by the fact that the married woman has subsequently become discovert.² Thus, where a married woman, as an infant, was possessed of a fund which she was restrained from anticipating by the instrument of settlement, and by the same instrument entered into a covenant to settle after-acquired property, which covenant she disaffirmed after reaching majority, she was held not bound to elect whether she should take under or against the instrument of settlement, but entitled to keep both the settled sum and any other sums which might otherwise have been affected by her covenant.³ This question has given rise to a considerable conflict of opinion, and a married woman has been held bound to her election under such circumstances as above mentioned.⁴ But the opinion given in the text is now settled law.⁵ Where a married woman elects to repudiate the settlement she must do so within a reasonable time after attaining majority.⁶ The election cannot be made by an infant while under disability.⁷

Difference
between
election and
confirmation.

Election is different from confirmation, for though an election to abide by a settlement is of course a confirmation of it, yet a confirmation need not raise any question of election, so that part of a settlement only may be confirmed; but an election to abide by part is an election to abide by the whole.⁸

Summary.

To sum up. A covenant by a female infant on her marriage with a male adult did not bind her realty, because her husband took but a limited interest in the property; but her interest by survivorship in her chattels real was bound. The general personal estate of a female infant was bound by a settlement made on her marriage, because it became the absolute property of the husband, and the settlement was in effect his settlement. This included choses in action reduced into possession during coverture, but not those not reduced into possession. Her separate property was not bound, because her husband took no interest in it. On attaining her majority a married woman might be bound by a settlement made by her during infancy, where she acquiesced in it, or confirmed it, or elected to take under it. The effect of the Married Women's Property Act, 1882, is to render every settlement of realty or personalty not made with the sanction of the

¹ *Re Vardon's Trusts*, 31 Ch. D. 275; *Hamilton v. Hamilton*, [1892] 1 Ch. 396; *Haynes v. Foster*, [1901] 1 Ch. 361.

² *Haynes v. Foster* (*ubi sup.*).

³ *Re Vardon's Trusts* (*ubi sup.*).

⁴ See *Willoughby v. Middleton*, 2 J. & H. 344; *Codrington v. Codrington*, L. R. 7 H. L. 854; *Re Queade's Trusts*, 54 L. J. Ch. 786.

⁵ *Re Wheatley, Smith v. Spence*, 27 Ch. D. 606; *Re Vardon's Trusts* (*ubi sup.*), overruling *Re Queade's Trusts* (*ubi sup.*); and see judgment of Jessel, M.R., in *Smith v. Lucas*, 18 Ch. D. 531.

⁶ *Edwards v. Carter*, [1893] App. Cas. 360.

⁷ *Milner v. Lord Harewood*, 18 Ves. 259.

⁸ *Milner v. Lord Harewood* (*ubi sup.*); *Simp. Inf.* 36.

Court of Chancery by a female infant voidable at her election on attaining the age of twenty-one.¹

Male Infant, Female Adult.—There is no distinction to be made between male and female infants as regards their powers of making binding settlements of their property. An ante-nuptial agreement by a husband to settle his wife's unsettled property was held void as being prejudicial to his interests.² A male infant cannot more effectually covenant to settle his real or personal property than a female;³ though it seems that if he has been guilty of fraud and misrepresentation by which his wife has been misled, he will be held bound by his settlement of his personal property.⁴

Where the infant wishes to repudiate a settlement made on his marriage, he must disaffirm the contract within a reasonable time after attaining majority;⁵ though it has been held that *forty years* after reaching majority was not an unreasonable time for repudiation;⁶ but this decision can hardly be deemed accurate. Where he elects to defeat the settlement he must make compensation out of the interest derived through or out of the settlement.

Where both husband and wife are infants their respective covenants to settle their property, real or personal, are absolutely ineffectual to bind them. Where the infant is a ward of court, the sanction of the court must be obtained to the marriage, which will not be granted unless it appears that the marriage is suitable, and the proposed settlement proper.

(2) It was once thought that the concurrence of the parents or guardians rendered the covenants of infants binding,⁷ and that the Court of Chancery might so contract on behalf of its infant wards as to bind them.⁸ But it is now settled that the former proposition is no longer law,⁹ and that the Court of Chancery has no authority to give an infant a power of alienation even for his own benefit;¹⁰ and that apart from its statutory powers the court cannot intervene to give to the act of an infant any further operation upon property, or other legal result than it would have

¹ If she derives a benefit under the settlement from her husband, she ought not to be permitted to repudiate her own covenant and claim at the same time the benefit she takes from him, but will be put to her election to take under or against the deed.

² *Kingsman v. Kingsman*, 6 Q. B. D. 122.

³ See *Blood v. Branfill*, cited by Turner, L.J., in *Field v. Moore*, 7 De G. M. & G. 711; *Honywood v. Honywood*, 20 Beav. 451; *Derbishire v. Home*, 5 De G. & Sm. 702. In *Slocombe v. Glubb* (2 Bro. C. C. 551), the infant husband was held bound by his wife's covenant, because as husband he had to answer for her ante-nuptial contracts; but in view of recent legislation, that ground cannot be said any longer to exist.

⁴ See *Nelson v. Stocker*, 33 L. T. (O.S.) 277.
⁵ *Edwards v. Carter*, [1893] App. Cas. 360, reversing *Hamilton v. Hamilton*, [1892] 1 Ch. 396 on this point. See *Viditz v. O'Hagan*, [1899] 2 Ch. 569.

⁶ *Re Jones, Farrington v. Forrester*, [1893] 2 Ch. 461, per North, J.

⁷ See *Harvey v. Ashley*, 3 Atk. 607; *Ainslie v. Medlycott*, 9 Ves. 19.

⁸ See *Drury v. Drury*, 2 Ed. 60.

⁹ *Simson v. Jones*, 2 Russ. & Myl. 365.

¹⁰ *Hastings v. Orde*, 11 Sim. 205.

independently of such intervention.¹ In order to obviate the inconveniences and disadvantages arising from the incapacity of persons marrying during their infancy to make binding settlements of their property, in 1855 the following Act was passed, entitled, "An Act to enable Infants, with the Approbation of the Court of Chancery, to make Binding Settlements of their Real and Personal Estate on Marriage."²

Infants may, with approbation of Court of Chancery, make valid settlements or contracts for settlement of their estate upon marriage.

"Sect. 1. From and after the passing of this Act it shall be lawful for every infant upon³ or in contemplation of his or her marriage, with the sanction of the Court of Chancery, to make a valid and binding settlement or contract for a settlement of all or any part of his or her property, or property over which he or she has any power of appointment, whether real or personal, and whether in possession, reversion, remainder, or expectancy; and every conveyance, appointment, and assignment of such real or personal estate, or contract to make a conveyance, appointment, or assignment thereof, executed by such infant, with the approbation of the said court, for the purpose of giving effect to such settlement, shall be as valid and effectual as if the person executing the same were of the full age of twenty-one years: Provided always, that this enactment shall not extend to powers of which it is expressly declared that they shall not be exercised by an infant.

In case infant die under age, appointment, &c., to be void.

"Sect. 2. Provided always, that in case any appointment, or any disentailing assurance, shall have been executed by any infant tenant in tail under the provisions of this Act, and such infant shall afterwards die under age, such appointment or disentailing assurance shall thereupon become absolutely void.

The sanction of the Court of Chancery to be given upon petition.

"Sect. 3. The sanction of the Court of Chancery to any such settlement or contract for a settlement may be given upon petition presented by the infant or his or her guardian in a summary way, without the institution of a suit; and if there be no guardian, the court may require a guardian to be appointed or not, as it shall think fit; and the court also may, if it shall think fit, require that any persons interested or appearing to be interested in the property should be served with notice of such petition.

Not to apply to males under 20, or females under 17 years of age.

"Sect. 4. Provided always, that nothing in this act contained shall apply to any male infant under the age of twenty years, or to any female infant under the age of seventeen years."

Application under the Act does not constitute the infant a ward of court.

An application under this Act does not constitute the infant a ward of court, nor does the court inquire into the propriety of the marriage, but only the propriety of the settlement, though, of course, "what in each case may be a proper settlement must

¹ Per Turner, L.J., in *Field v. Moore*, 7 De G. M. & G. 711; *Re Leigh, Leigh v. Leigh*, 40 Ch. D. 290; *Seaton v. Seaton*, 13 App. Cas. 61.

² 18 & 19 Vict. c. 43, extended to Ireland by 23 & 24 Vict. c. 83.

³ In *Re Sampson v. Wall*, 25 Ch. D. 492, Lord Selborne held that "upon" was equivalent to "upon occasion of," and would therefore give the court jurisdiction over settlements to be made after the marriage of the infant settlor; but after the more recent cases of *Re Leigh, Leigh v. Leigh* (*ubi sup.*) and *Seaton v. Seaton* (*ubi sup.*) in the House of Lords this construction cannot easily be maintained.

sometimes lead to an inquiry as to all the circumstances connected with the marriage."¹

The practice in petitions under the Act is regulated by Rule 20 of the Regulations as to Business in Chambers, August 1857,² which is as follows: Upon applications to obtain the sanction of the court to infants making settlements on marriage, under the Act of 18 & 19 Vict. c. 43, evidence is to be produced to show:—

Practice in petitions under the Act.

1. The age of the infant.
2. Whether the infant has any parents or guardians.
3. With whom, or under whose care, the infant is living, and if the infant has no parents or guardians, what near relations the infant has.
4. The rank and position in life of the infant and parents.
5. What the infant's property and fortune consist of.
6. The age, rank, and position in life of the person to whom the infant is about to be married.
7. What property, fortune, and income such person has.
8. The fitness of the proposed trustees, and their consent to act.

The proposals for the settlement of the property of the infant, and of the person to whom such infant is to be proposed to be married, are to be submitted to the judge.

The active interference of the court is usually confined to keeping them within the limits of what it considers expedient and suitable to the circumstances, and of deciding in case of a difference of opinion.³ The settlement is that of the infant and not that of the court.⁴ A settlement will be rectified on the ground of mistake on the part of the infant.⁵ This statute got rid of the disability of infancy, but did not in the case of a female infant remove that of coverture;⁶ but this disability has been removed by the Married Women's Property Act, 1882. This Act enables an infant in exercising a general power of appointment for the purpose of making a settlement of his property on marriage to make an absolute appointment, so that on the failure of the limitations of the settlement the appointed property will become his own.⁷

Settlement that of infant and not of court.

It has been decided that this statute renders valid a post-nuptial settlement of an infant's estate made with the approbation

Court has claimed power to sanction post-nuptial settlement,

¹ *Re Dalton*, 4 W. R. 761. See also *Re Strong*, 26 L. J. Ch. 64.

² These have not, however, the force of General Orders.

³ 3 Dav. Prec. Part I. p. 195. In an Irish case it was held that the Act was intended to enable infants to make binding settlements, and not to defeat a settlement by appointing away part of the settled property, *Re Armit's Trusts*, Ir. Rep. 5 Eq. 352.

⁴ *Seaton v. Seaton*, 13 App. Cas. 61.

⁵ *Mills v. Fox*, 37 Ch. D. 153.

⁶ *Seaton v. Seaton* (*ubi sup.*).

⁷ *Re Scott*, *Scott v. Hanbury*, [1891] 1 Ch. 298; and see *Re D'Angibau*, *Andrews v. Andrews*, 15 Ch. D. 228.

whether infant
ward of court
or not; *sed*
quære.

Seaton v.
Seaton in Dom.
Proc.

Settlement not
within Inf.
Rel. Act, 1874.

of the Court of Chancery, where the infant is a ward of court;¹ and the sanction of the court may be given where no petition under the Act has been filed.² It was also subsequently decided by the Court of Appeal that the court has power to sanction a binding settlement of the property of an infant; not being a ward of court, even after his marriage.³ This decision was followed by Chitty, J., in the case of a young girl who married before she was seventeen; and after attaining seventeen applied to the court to make a binding settlement of her property.⁴ This power, if it exists at all, enables the court to make a settlement binding upon infants which otherwise would have been voidable at their election. But the House of Lords has laid it down that the court has no power to compel one of its wards to make a settlement of his property *in invitum*, even though he has been in contempt for marrying without leave.⁵ After the expression of opinion of the House of Lords in *Seaton v. Seaton*, a considerable doubt of the accuracy of the judgment of the Court of Appeal in *Sampson v. Wall* must result.

An infant's marriage settlement is voidable and not void, and is not within the Infants' Relief Act, 1874.⁶

¹ *Powell v. Oakley*, 34 Beav. 575; *Re Sampson and Wall*, 25 Ch. D. 482.

² See *Re Sampson and Wall* (*ubi sup.*).

³ *Ibid.*

⁴ *Re Phillips (an Infant)*, 32 Ch. D. 467.

⁵ *Seaton v. Seaton*, 13 App. Cas. 61; and see *Re Leigh, Leigh v. Leigh*, 40 Ch. D. 290. See *ante*, p. 808.

⁶ 37 & 38 Vict. c. 62. *Duncan v. Dixon*, 44 Ch. D. 211; *Carter v. Silber*, [1892] 2 Ch. 278.

CHAPTER V.

WARDS OF COURT.

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THE important question of wardship of court will now be considered. It is treated of in the present place—and not under the heading of Guardian and Ward—because the exercise of the power of the court is founded less on the right of wardship than a delegated right to interfere on behalf of infants who are in need of its assistance. The power and jurisdiction of the Court of Chancery to superintend and protect the interests of infants are clear and undisputed.

The interests of infants within the jurisdiction of the Court of Chancery. Origin of the jurisdiction.

This superintendence and protective power over those who cannot help themselves must in every civilized country be deemed to exist somewhere, and unless found to exist elsewhere, is held most properly to exist in the supreme authority. The idea that the king was the especial protector of orphans and those unable to defend themselves is of long standing; and clear traces of it are found in the legislation of Charlemagne. It is true that in the case of infants possessed of land, the feudal relation of lord and vassal subsequently took the place in Europe of that between the king and his subjects; yet in every country there must have been a large number of infant orphans who had no feudal superior, and who, if there had not been a common protector of their rights and interests, would have been altogether

The king *parens patriæ*.

defenceless and at the mercy of strangers. In England that protective power was not found to exist in any particular court, or body of persons, by inherent jurisdiction, and therefore must be presumed to have been in the Crown. It was this protecting power and jurisdiction on behalf of infants that the kings delegated to their representatives when they themselves could no longer personally superintend its enforcement. In England it was delegated by the Sovereign to the Court of Chancery, a court presided over by the Chancellor, who, in the ecclesiastical language of the day, was the keeper of the king's conscience. The court exercises the delegated functions of the Crown as *parens patriæ*, which now form part of its general jurisdiction.¹ It is enough to say that the jurisdiction is fully recognized. By the Judicature Act, 1873,² wardship of infants is exclusively assigned to the Chancery Division of the High Court. The power of the court is exercisable over not only children resident in England, but over the children of British subjects, though born and residing abroad;³ but in cases where the guardian is residing out of the jurisdiction, the court will appoint a guardian within the jurisdiction.⁴ The Court of County Palatine has concurrent jurisdiction with the High Court to appoint guardians, but with a general right of interference by the Chancery Division.⁵

Delegation of royal authority to the Court of Chancery.

Judicature Act, 1873, assigns wardship of infants to Court of Chancery.

How ward of court constituted.

By action, commenced in the interest of the infant.

Where a suit is instituted for the direction of the court in relation to the estate or person of an infant and for his benefit, or for the administration of property in which he is interested, the infant, whether he be plaintiff or defendant, becomes a ward of court the instant that the bill is filed. In this character he is considered to be under the particular care of the court; and he is equally entitled to its protection, whether he is under the immediate tutelage of a parent, a statutory or common law guardian, or of a guardian appointed by the court; for the court does not assume to itself the actual guardianship of infants.⁶ Leave to apply for directions for the appointment of a guardian and for maintenance, and for directions as to education, &c., are

¹ This is the opinion of Mr. Fonblanque (2 F. Tr. Eq. 5th edit. 228 n), which coincides with that of Lord Hardwicke in *Butler v. Freeman* (Amb. 301), where his lordship says that the "court does not act on the footing of guardianship or wardship," but "has a general right delegated by the Crown as *pater patriæ* to interfere in particular cases for the benefit of such who are incapable to protect themselves." It is also approved by Lord Thurlow in *Powell v. Cleaver* (2 Bro. C. C. 499), and by Lord Eldon in *De Mannerille v. De Mannerille* (10 Ves. 52). Mr. Hargrave, in his edition of Coke upon Littleton (Co. Litt. 88 b), is certainly opposed to this view put forward by Mr. Fonblanque, and goes so far as to say that the jurisdiction of the Court of Chancery is a usurpation, though a necessary one. However, authority is in favour of Mr. Fonblanque's statement of the law.

² 36 & 37 Vict. c. 66, s. 34, sub-s. 3.

³ *Hope v. Hope*, 26 L. J. Ch. 417.

⁴ *Johnstone v. Beattie*, 10 Cl. & F. 42. See Part III., Guardian and Ward, chap. ii. p. 629. The court can still enforce its orders by its officer, the "Sergeant-at-arms attending the court." *G. v. L.*, [1891] 3 Ch. 126.

⁵ *Re Alison's Trusts*, 8 Ch. D. 1.

⁶ Macph. Inf. 103.

no longer inserted in the decree; for application for such matters can be made at chambers without leave. If the infant is a party to the suit, the application is made by an ordinary summons; if he is not a party, the first application is made by a summons in the form used for proceedings originating at chambers, which is instituted in the matter of the infant by his next friend, and in the suit, but subsequent applications in the same matter and suit are made by an ordinary summons.¹ In order thoroughly to protect the interests of infants, any person may commence proceedings on their behalf; though if the proceedings have been improperly commenced, the originator will run the risk of having the suit dismissed, and being censured and visited with the costs.²

Application by summons if infant party to the suit.

Any person may originate proceedings.

An infant is also constituted a ward of court by an order in Chancery appointing a guardian;³ by payment of money in which the infant is interested into court, under the Trustee Relief Act;⁴ by an order made upon a petition under that Act for payment of part of such fund for maintenance;⁵ by payment into court of moneys to the separate account of an infant in an administration suit to which the infant was not a party;⁶ but it has been more recently held that this does not apply where the infant was altogether an alien with a foreign domicile; or at any rate that the court has a discretion whether the foreign infant shall be so constituted one of its wards;⁷ or by an order at chambers for the maintenance of an infant without suit.⁸ An opinion has also been expressed that an actual order of the court appointing a guardian is not necessary to constitute an infant a ward of court; but that if a summons for the appointment of a guardian is taken out, and no order is made upon it, but an arrangement as to access to the infant is made, such proceedings are sufficient to constitute the infant a ward of court.⁹

But payment into court under section 32 of the Legacy Duty Act, 1796 (38 Geo. III. c. 52) of a legacy left to an infant does not constitute him a ward of court;¹⁰ nor payment into court of money under the Lands Clauses Act, 1845 (8 & 9 Vict. c. 18);¹¹ and the mere bringing an action in Chancery against an infant, except for the above purposes, does not make him a ward of court.¹² And it seems that the carrying of a fund to the separate account of an infant in an action to which he is not a party is insufficient to constitute him a ward of court, and it certainly

What does not constitute a ward of court.

¹ 2 Dan. Ch. Pr. 1116.

² *Ibid.* 1112. See *post*, chap. vii.

³ *Stuart v. Marquis of Bute*, 9 H. L. Cas. 440.

⁴ 10 & 11 Vict. c. 96.

⁵ *Re Hodge's Trusts*, 3 Jur. (N.S.) 860; *Re Benard*, 16 W. R. 538; *Re Lloyd's Trusts*, 1 R. 2 Eq. 507.

⁶ *De Pereda v. De Mancha*, 19 Ch. D. 451.

⁷ *Brown v. Collins*, 25 Ch. D. 56. The court will in such a case be slow to hold the infant to be a ward of court.

⁸ *Re Graham*, L. R. 10 Eq. 530.

⁹ *Per Hall, V.C.*, in *De Pereda v. De Mancha* (*ubi sup.*).

¹⁰ *Re Hillary*, 2 Dr. & Sm. 461.

¹¹ *Ex parte Brewer, Re Wilts and Somerset Railway*, 2 Dr. & Em. 552.

¹² *Macph. Inf.* 104.

will not where the infants are aliens and resident out of the jurisdiction.¹

Effect of infant
being made
ward of court.

The effect of an infant being made a ward of court upon those who have the care and control of him has been thus described: "If there be a parent living within the jurisdiction of the court, or if there be a testamentary guardian within the jurisdiction of the court, the court in that case does not interfere for the purpose of appointing a person to discharge the duty which is imposed upon the court itself of taking care of the person of the infant, but the parent or testamentary guardian is subject to the orders and control of the court, precisely in the same way as an officer appointed by the authority of the court, for the purpose of discharging the duties to which I have referred. I apprehend that is clearly the law of the Court of Chancery, and it has always been so, as far as I have been able to understand and comprehend."²

Infant British
subject abroad
may be made
ward of court.

An infant British subject may be made a ward of court even where it is out of the jurisdiction, if there is property in this country in which it is interested, and which can be administered by the court and even where there is no property in this country,³ though this would not be the case where the infant was an alien but possessed property in this country, and guardians abroad had been appointed to him.⁴ The effect of this is that if an order of the court is made requiring the infant to be brought back within the jurisdiction, and is served upon the person who has the custody, and he disobeys it by keeping the infant abroad, or by marrying it without the consent of the court, he can be attached for contempt on coming within the jurisdiction.

When the
court will act.
Court of Chan-
cery will not
usually act as
guardian un-
less the infant
has some
property to be
administered.

The court exercises its supervising jurisdiction as possessing the delegated power of the Sovereign as *pater patriæ* to superintend and protect the interests of those who are unable to take care of themselves; but there are, apparently, grounds for holding that the court has practically placed a limit on its own jurisdiction; that is, it will not ordinarily act unless there is something before it upon which it can exercise its jurisdiction; in other words, where there is no property of the infant to administer, there the court does not interfere. Thus, Lord Eldon has said: "This court has not the means of acting, except where it has property to act upon. It is not, however, from any want of jurisdiction that it does not act, but from a want of means to exercise its jurisdiction, by applying property for the use and maintenance of the infants."⁵ A very small amount of property,

Small amount
of property
sufficient.

¹ *Brown v. Collins*, 25 Ch. D. 56.

² Per Lord Lyndhurst in *Johnstone v. Beattie*, 10 Cl. & Fin. 85.

³ *Re Willoughby (an Infant)*, 30 Ch. D. 324.

⁴ See *Brown v. Collins (ubi sup.)*; *Re Bourgeoise*, 41 Ch. D. 310. See Part III. chap. ii. p. 629.

⁵ *Wellesley v. Duke of Beaufort*, 2 Russ. 1, 21.

money, or otherwise (£100 is sufficient), need be settled upon the infant to make him a ward of court;¹ a mere contingent right to property is enough to found the jurisdiction of the court.² Where the court is exercising its statutory jurisdiction, such as appointing a guardian under the Marriage Act³ for the purpose of giving consent to the marriage of an infant, the latter need not possess any property,⁴ but the petition for such purpose must be presented pursuant to the statute, or it will be dismissed.⁵

The purely protective jurisdiction of the court exercising the delegated power of the Crown can be put in force without the infant possessing any property, and the court may make an order for the delivery of an infant to the party who ought to have the custody of it, on petition, as well as under the general jurisdiction upon *habeas corpus*, which it shares with the common law courts.⁶ So far as the practice has been, it seems that an infant will not be made a ward of court unless there is some property, the trusts of which the court can administer in the interests of the ward, consequently only a small amount of property, real or personal, need be settled on the infant; but where the court is merely asked to exercise its powers for the protection and assistance of the infant, there no question of property arises, and none is required for the purpose. But if ever occasion requires that the court should put in force the wider jurisdiction which it exercises in the case of its wards, for the benefit of an infant who has no property, it will dispense with the necessity of settling any sum, however trifling, upon the infant.⁷ In this sense all British subjects who are infants are wards of court, because they are subject to that sort of parental jurisdiction which is entrusted to the court.⁸ But it is a limited jurisdiction, and where the infant has no property under the control of the court, the court cannot provide any scheme for its maintenance or education. The court has power to appoint or remove guardians in the interests of the infant.⁹ No next friend of a penniless infant, no relation, no kind or charitable person, no co-religionist of the infant, no priest or minister of religion, has any right except of informing the court of what is wrong, and asking the court's assistance on behalf of the infant.¹⁰

Protective jurisdiction may be exercised without infant possessing property.

¹ *Re Lyons*, 22 L. T. 770.

² *Russell v. Nicholls*, 16 L. J. Ch. 477.

³ 4 Geo. IV. c. 76, s. 17.

⁴ *Re Woollcombe*, 1 Madd. 213.

⁵ *Ex parte Becher*, 1 Bro. C. C. 556.

⁶ *Re Spence*, 2 Ph. 247; *Re Fynn*, 2 De G. & Sm. 457.

⁷ See Story, Eq. Jur. 1351, and the remarks of Cotton, L.J., in *Agar-Ellis v. Agar-Ellis*, *Re Lascelles*, 24 Ch. D. 317, 332.

⁸ See *Brown v. Collins*, 25 Ch. D. 56; *Re Spence* (*ubi sup.*); *Re Fynn* (*ubi sup.*); *Barnardo v. McHugh*, [1891] App. Cas. 395; *Re Scanlan (Infants)*, 40 Ch. D. 200; *Re Nerin (an Infant)*, [1891] 2 Ch. 299.

⁹ *Re M'Grath (Infants)*, [1893] 1 Ch. 143; *Re Scanlan (Infants)* (*ubi sup.*).

¹⁰ *Re M'Grath (Infants)* (*ubi sup.*).

Jurisdiction of the Court over its Wards.

Jurisdiction of
the court
over wards.
Generally.

(a) *Generally.*—The court exercises its large powers (inherent and acquired by statute) for the care and protection of those who have sought refuge under its protecting ægis. It insists upon its orders being carried out, and punishes those who neglect or attempt to evade them. It does not wait for an injury to be done to the wards, but on the slightest suspicion of harm to them, interferes with preventive rather than remedial efficacy, and removes them from the source of danger. No act can be done affecting the person, the property, or the state of the minor, unless under the express or implied direction of the court itself. “Every act done without such direction is treated as a violation of the authority of the court, and the offending party will be arrested upon the proper process for the contempt, and compelled to submit to such orders and such punishment by imprisonment as are applied to other cases of contempt. Thus, for example, it is a contempt of the court to conceal or withdraw the person of the infant from the proper custody, to disobey the orders of the court in relation to the maintenance or education of the infant, or to marry the infant without the proper consent or approbation of the court. . . . Indeed, when once the Court of Chancery has thus directly or indirectly assumed authority over the person or property of the infant, as its ward, it acts throughout with all the anxious care and vigilance of a parent, and it allows neither the guardian nor any other person to do any act injurious to the rights and interests of the infant.”¹

Father,
mother, or
testamentary,
or other guardian
may be
superseded by
the court,

Though the father or the mother be alive, the court will remove or supersede them in the guardianship of the infant, and appoint another to be guardian, if at any time the interests of the ward should demand their removal. But that which would be a ground for removing or superseding a mere legal guardian from the control of the infant, would not be sufficient in the case of its parents. So where there is a testamentary guardian, the court can supersede or remove him,² and put another in his place, if it should be necessary to do so; and can remove guardians appointed by the infant himself, or a guardian in socage, or a guardian appointed by itself. The father, or other guardian, may have orders made upon him regulating his conduct, and if he fail to comply with the directions of the court, he will be removed from his trust; and in this respect no difference will be made between a parent and a guardian who is a stranger in blood to the ward. The court exercises the care of a vigilant parent in watching over the best interests of its wards. It may,

and must obey
its orders.

¹ St. Eq. Jur. 1353.

² 49 & 50 Vict. c. 27, ss. 2, 6, 13.

if it thinks fit, control their education; thus, while the court may order its ward to be educated in the religious faith of its dead father,¹ yet if the latter has altogether forfeited or abandoned his right to educate his children in his own faith, the court, on their becoming its wards, can pronounce in what religious faith they shall be brought up.²

(b) *As to the Marriages of Wards of Court.*—The marriage of its wards is an “important and delicate duty of the Court of Chancery, which it exercises with great caution.”³ The reasons which actuate the court are the same as those which dictate to the dutiful parent the necessity of encouraging suitable and fitting marriages among his children. Before the wards are allowed to marry, it is necessary to apply to the court for leave to marry, and this leave will not be granted unless the marriage appear suitable, and the settlement proposed is proper.⁴ Parties desirous of marrying wards of courts must petition the court for leave to do so.

A marriage is said to be fitting or suitable when the ages of the parties agree, and there is a fair equality of rank and fortune between them, and a proper settlement has been agreed upon between them. When the court is satisfied of the fitness of the match, it makes an order giving leave to the parties to intermarry.⁵ The jurisdiction of the court is not ousted because the parents of the ward are alive, or there is a testamentary guardian, and their consent to the ward’s marriage does not render the leave of the court unnecessary.⁶ The court will interfere with parents and guardians who are endeavouring to bring about a marriage without acquainting the court of the fact, and commit the ward to the custody of another.⁷

When the court appoints trustees of the settlement on the marriage of its ward, it will not choose persons who are distasteful to the ward to serve in that capacity.⁸

The court will assist parents or guardians to prevent the improper marriage of their wards; but on the other hand they will be ordered not to permit the marriage without the court’s consent.⁹

To marry a ward of court without the leave of the court is treated as a serious contempt, and visited at times with severe punishment, and this is so even where the party marrying the ward is an infant.¹⁰ The contempt is just as great where the

Marriages of wards of court.

What is a suitable marriage.

Marriage without leave contempt of court.

¹ *Hawksworth v. Hawksworth*, L. R. 6 Ch. App. 539.

² *Andrews v. Salt*, L. R. 8 Ch. App. 622; *Re Newton (Infants)*, [1896] 1 Ch. 740. For further details of this subject, see Part II., Parent and Child, chap. ii. p. 544 *et seq.*

³ St. Eq. Jur. s. 1358.

⁴ *Smith v. Smith*, 3 Atk. 304; *Earl of Plymouth v. Lewis*, 2 Dick. 801.

⁵ Set. Judg. & Ord. 891 *et seq.* ⁶ *Wellesley v. Duke of Beaufort*, 2 Russ. 1, 28.

⁷ *Vernon v. Vernon*, 10 Geo. I., cited *Eyre v. Countess of Shaftesbury*, 2 P. Wms. 103, 113; *Pearce v. Crutchfield*, 14 Ves. 206; *Lord Shipbrook v. Lord Hinchinbrook*, 2 Dick. 547; *Tombes v. Elers*, 1 Dick. 88; and see *Smith v. Smith (ubi sup.)*.

⁸ *Re Sampson and Wall*, 25 Ch. D. 482.

⁹ *Lord Raymond's Case*, Cas. t. Talb. 58.

¹⁰ *Edes v. Brereton*, West, Cas. t. Hardw. 348.

father or the guardian consents to the marriage. It is not a more heinous offence for a man to marry a female ward than for a woman to marry a male ward, if the sanction of the court be not obtained. It sometimes happens that the person who actually marries the ward is not more guilty than those who have aided and abetted in bringing about the marriage; thus, all the parties concerned will be brought before the court and censured or punished as they may deserve.¹

Attempt to marry a contempt.

To contrive or attempt to bring about a marriage without the leave of the court is a contempt just as much as the actual marriage itself; and if the parties persist in running counter to the directions of the court they will be punished. Since the court prefers to prevent mischief rather than punish breaches of the law, when it is informed of an intended clandestine marriage of one of its wards, it will by injunction not only interdict the marriage, but restrain the parties from communicating with one another,² whether in person or by letter;³ and where it suspects the parent⁴ or guardian of any connivance, it will remove the infant from his care and custody, and intrust him to that of a committee.⁵ In order to obtain evidence of an attempt to bring about a clandestine marriage, the court will order letters containing promises of marriage from the intended husband to the wife to be delivered up,⁶ though not mere letters of civility.⁷ It will give effect to hearsay evidence not contradicted by the other side. In a case of *Beard v. Travers*,⁸ Lord Hardwicke said: "In cases relating to clandestine marriages, hearsay evidence and declarations are no defective proof, but has weight with the court, especially when uncontradicted by anything on the other side." In such a case, although the mere fact of marrying a ward of court without the leave of the court is always a contempt, a general order will be made that an infant shall not be married without leave of the court, and that persons shall have no access to him or her by letter or otherwise.⁹

Any person may inform the court of an intended marriage of a ward.

Any person may bring to the notice of the court that one of its wards has been married, or is about to be married, without its leave. The court will thereupon direct a reference to inquire whether a valid marriage has taken place, and if it has what settlement ought to be ordered under the circumstances.¹⁰

¹ *Eyre v. Countess of Shaftesbury*, 2 P. Wms. 103; *Hughes v. Science*, Amb. 302 n; Macph. Inf. Appdx. I.; 2 Foub. Eq. Bk. II. Part II. chap. ii. s. 1; St. Eq. Jur. 1358; Set. Dec. 900, 901.

² *Pearce v. Crutchfield*, 14 Ves. 206. In Seton (pp. 894-896) are set out orders restraining marriage or intercourse with the ward, and subsequent orders; also references to various orders in one case, which give a history of the transaction, beginning with an order restraining the principal and conniving parties from all intercourse with the ward, and ending with an order dismissing petition for leave to marry the ward.

³ *Dawson v. Thompson*, 12 L. T. 178.

⁴ *Lord Shipbrook v. Lord Hinchinbrook*, 2 Dick. 347; *Roach v. Garcan*, 1 Ves. Sen. 157. ⁵ *Tombes v. Elers*, 1 Dick. 88. ⁶ *Smith v. Smith*, 3 Atk. 304. ⁷ *Ibid.*

⁸ 1 Ves. Sen. 313.

⁹ See *Smith v. Smith* (*ubi sup.*).

¹⁰ Macph. Inf. 191.

The jurisdiction of the court is not ousted by the lapse of a considerable period before the complaint is brought; for whether the communication of the fact that a contempt has been committed comes early or late, the court has jurisdiction, and may feel a duty to punish that contempt; yet it would not be a very wholesome exercise of discretion to visit that offence strongly, if upon attention to circumstances that have occurred in the course of six, seven, or eight years, not very strongly called upon to vindicate the jurisdiction; and in these cases where it is exercised really for the benefit of the party, the court ought to look with great attention to all the circumstances of each case.¹

The fact of contempt of court is not affected by the marriage of the ward being valid or invalid;² but where the marriage is of doubtful validity, the court will order an inquiry to be made whether it is or is not valid; and in the meantime direct all intercourse between the parties to be terminated. Where the marriage is found to be invalid, and the ward is a female, and the parties have cohabited, a valid remarriage will be ordered.³ Where the ward is a male, and has been led into a derogatory connection, the court will order steps to be taken to have the invalid marriage set aside;⁴ but the court can, if it sees fit, direct that the parties should be validly remarried;⁵ but in such a case, it is submitted, the consent of the ward to the valid marriage must be secured.

Incongruity of age between the parties is an aggravation of the contempt; thus, where an infant, an undergraduate of Oxford, was entrapped into a marriage with a common servant maid older than himself, the circumstances of the case were deemed an aggravation of the contempt;⁶ so, too, where a female ward of sixteen was married to an old man of sixty;⁷ or one of twelve years and a half was married to her guardian.⁸ Several cases of like nature are to be found collected in Mr. Simpson's work on Infants.⁹

Inequality of rank and fortune is also an aggravation of the contempt. Thus, in all cases where the ward has been a person of fortune or good rank, and has contracted a marriage with a person of no fortune or low birth, the court has deemed that fact to be an aggravation of the contempt.¹⁰ It is not necessary that the person marrying the ward should be beneath him both in rank and fortune; it is sufficient if the inequality be as regards

Where marriage of doubtful validity.

Remarriage in case of female.

Aggravation of contempt. Incongruity of age.

Inequality of rank and fortune.

¹ Per Lord Eldon in *Ball v. Coutts*, 1 V. & B. 292, 302.

² *Warter v. Yorke*, 19 Ves. 451.

³ *Bathurst v. Murray*, 8 Ves. 74. See *Simp. Inf.* 336.

⁴ *Warter v. Yorke* (*ubi sup.*).

⁵ See *Re Murray*, 3 Dr. & W. 83, 86.

⁶ *Herbert's Case*, 3 P. Wms. 116.

⁷ *Hughes v. Science*, cited *Amb.* 302; *Macph. Inf. Appdx. I.*

⁸ *Harford v. Morris*, 2 Hag. Con. Rep. 423.

⁹ P. 334.

¹⁰ See *Herbert's Case* (*ubi sup.*); *Priestley v. Lamb*, 6 Ves. 421; *Bu ler v. Freeman*, *Amb.* 302.

fortune only; a son of a peer who had no fortune or allowance except what he obtained from his father or other relatives, was restrained from marrying an infant heiress and ward of court.¹ The contempt is aggravated where there has been criminality or fraud in bringing about the marriage, or where confidential relationships between the ward and the person marrying the ward are abused.²

Mitigation of contempt.

Some instances of contempt of court are not so flagrant or heinous as others, and a contempt may be committed which does not call for any severe punishment from the court, or any strong vindication of its jurisdiction. Thus, where the party in contempt has been imposed upon, and kept in ignorance of the true state of the facts, the court will deal leniently with such a case. But ignorance of the fact that the party married is a ward of court is no defence;³ and in one instance where a female was made a ward of court on the same day that she was married in Scotland, the marriage with her was deemed a contempt;⁴ but if the marriage is in other respects proper, it is a mitigation of the offence.⁵ The contempt, if venial and slight, will be overlooked, and not be visited with any punishment, but, however, creates a jurisdiction over the party in contempt which can be enforced against him at any time in respect of the settlement of the property of the ward.⁶ If the contempt is not aggravated in its nature, or if the committal of the husband would work great injury, an undertaking to execute a settlement might be deemed sufficient.⁷

Ignorance of infant being a ward of court no defence.

Punishment of contempt.

If the offence is brought home to the parties they will be punished with considerable severity until they are purged of the contempt. The usual punishment is committal to prison. In former days when the person in contempt was a peer, sequestration and not imprisonment was resorted to;⁸ but in modern times privilege of Parliament would not prevent the contemnor being sent to prison.⁹ It does not, however, always follow that it will be to the ward's interest that the person in contempt should be punished by commitment; the practice is accordingly to bring the matter of the contempt before the court by summons in chambers and not in open court, in order that the judge may inquire whether it would be for the infant's benefit that the contemnor should be committed. If the facts disclosed warrant a committal, the court on a motion to that effect will make an

¹ *Smith v. Smith*, 3 Atk. 304; *Gordon v. Irwin*, 4 B. P. C. 355.

² *Priestley v. Lamb*, 6 Ves. 121. See *Hodgens v. Hodgson*, 4 Cl. & Fin. 323.

³ *Barrington v. Grogan*, Beatt. 199.

⁴ *Salles v. Savignon*, 6 Ves. 572.

⁵ *Richardson v. Merrifield*, 4 De G. & S. 161.

⁶ See *Martin v. Foster*, 25 L. T. (O.S.) 5.

⁷ *Simp. Inf.* 338. See *Winch v. James*, 4 Ves. 386.

⁸ *Eyre v. Countess of Shaftesbury*, 2 P. Wms. 103.

⁹ *Long Wellesley's Case*, 2 R. & M. 639.

order for the committal of the contemnor.¹ Commitment to prison is not the only method pursued by the court to punish contemnors of its jurisdiction; but in very gross cases, where it does not consider commitment sufficient, it will order criminal proceedings to be taken against them for perjury or conspiracy.² Where in a gross case the contemnors can be punished not only by imprisonment but by other ways, the court will not hesitate to visit them with a severe punishment; thus a justice of the peace will be removed from the commission, a barrister disbarred, and a solicitor struck off the rolls.³ The orders of the court must be obeyed; thus, where a ward was induced to marry a prostitute, and the court ordered him to be sent abroad, and restrained the wife from having any intercourse or communication with him, it was held that he did not conduce to her subsequent adultery within the meaning of section 31 of the Matrimonial Causes Act, 1857.⁴

When the contemnors have been committed to prison, they will not be kept there for an indefinite time,⁵ but after a certain period will be liberated on their petition expressing contrition and declaring their willingness to submit to any such order as the court may think fit to make.⁶ But the court will not always listen to the submission of the contemnors, and liberate him from confinement, if it does not think he has been sufficiently punished.⁷ The punishment for contempt is used not infrequently as a means of compelling the party marrying the ward either to make or agree to a settlement approved by the court.⁸ The court will not order the discharge from prison of a person committed for contempt by marrying an infant ward, until a certificate has been produced of the due solemnization of the marriage, and a proper settlement of the ward's property has been prepared and approved.⁹

The court generally punishes the wrong-doer, if the husband, in flagrant cases by depriving him of any interest in his wife's property,¹⁰ or by giving him a very slight share in it, unless the husband brings in an equivalent provision, or the contrary would be for the ward's benefit.¹¹ Where the female ward is the wrong-doer, the court will punish her by settling the bulk of her property on the issue of the marriage; but where as an infant she has erred in ignorance of her position, it will settle her property

Contemnors
not kept in
prison in-
definitely.

Punishment
used to compel
contemnors to
execute
settlement.

How the court
directs the
terms of the
settlement.
Husband
guilty party.
Wife guilty
party.

¹ *Brown v. Burrow*, 48 L. T. 357.

² See *Pearce v. Crutchfield*, 16 Ves. 48; *Ball v. Coutts*, 1 V. & B. 292; *Wade v. Broughton*, 3 V. & B. 172; *Schreiber v. Lateward*, 2 Dick. 592.

³ *Ex parte Mitchell*, 2 Atk. 173.

⁴ *Beavan v. Beavan*, 8 Jur. (N.S.) 1110.

⁵ Parties have been kept in prison as long as seven months. See *Baseley v. Baseley*

⁶ *Cl. & Fin.* 378 n; *Re Sampson and Wall*, 25 Ch. D. 482.

⁷ *Simp. Inf.* 337.

⁸ *Ball v. Coutts* (ubi sup.).

⁹ *Kent v. Burgess*, 11 Sim 361.

¹⁰ *Baseley v. Baseley* (ubi sup.).

¹¹ *Cox v. Bennett*, 22 W. R. 819.

¹² *Field v. Moore*, 24 L. J. Ch. 161.

on her ;¹ so if her husband err in ignorance, the court will be more lenient.²

Marriage Settlements of Wards of Court.

Marriage settlements of wards of court.

This subject will in the following pages be more minutely discussed, and from two points of view: (1) Where the marriage is not in contempt of the court; and (2) where it is in contempt.

Marriage of minor ward with consent of court.

(1) *Marriage of Minor Ward with Leave and Consent of the Court.*—When a marriage of one of its wards is about to take place with its leave and consent, the Court of Chancery directs that a proper settlement shall be made, to take effect upon the intended marriage. The settlements made by infant wards do not derive any force and validity from the approval of the court, independently of the Infants' Settlement Act, 1855,³ under the provisions of which infants can, with the approbation of the court, make binding settlements of their property, if being males they have attained the age of twenty, and if, being females, the age of seventeen;⁴ and the parties must conform to the requirements of the Act, otherwise the settlement will not be binding.⁵

How the court is guided.

The court has not laid down any hard-and-fast rules for its own guidance, but acts as a prudent father would act.⁶ The active interference of the court is usually confined to keeping the proposals of the parties within the limits of what it considers expedient and suitable to the circumstances, and of deciding in case of a difference of opinion.⁷ But the court does impose certain conditions when the parties apply for its leave to marry; thus, where the ward is a female, and the bulk of the property moves from her, it will not sanction an exclusive settlement of her fortune upon the issue of the first marriage; but will cause a clause to be inserted enabling her to provide for the issue of a subsequent marriage.⁸ There is a case of *Re Horne's Trusts*⁹ in which the contrary was held, but the cases cited below in the preceding note in support of the above proposition do not appear to have been mentioned to the court. It will also provide by means of a trust for an equal division among all the children by any marriage;¹⁰ or by giving the ward a power of appointment over the trust funds in favour of a future husband,

¹ *Wilkinson v. Joughin*, 41 L. J. Ch. 234.

² *Richardson v. Merrifield*, 4 De. G. & S. 161.

³ 18 & 19 Vict. c. 43.

⁴ See *ante*, chap. iv. p. 808.

⁵ *Savill v. Savill*, 2 Coll. 72; *Field v. Moore*, 20 L. J. Ch. 161.

⁶ *Martin v. Foster*, 25 L. T. (O.S.) 5.

⁷ 3 Dav. Prec. Part I. 654. For the usual limitations of the settlement, see 3 Dav. Prec. Part I. 68-70, 195.

⁸ *Halsey v. Halsey*, 9 Ves. 471; *Rudge v. Winnall*, 11 Beav. 98; *Long v. Long*, 2 Sim. & St. 119.

⁹ 4 Giff. 254.

¹⁰ *Millett v. Rowse*, 7 Ves. 419.

and the issue of a future marriage.¹ The court usually inserts a clause restraining the ward from anticipating her fortune during coverture, but where it has omitted to do so, and she has incumbered it, it will not rectify the settlement so as to prejudice the claims of her incumbrancers.² Where the ward is illegitimate, and so has no next of kin, the ultimate limitation is to her absolutely.³

It was formerly usual to insert a clause settling after-acquired property; but it remains to be seen whether since the coming into operation of the Married Women's Property Act, 1882,⁴ the court will deem it necessary to make this provision, since the property acquired by the wife during coverture is unaffected by any rights of her husband. The court would have ample jurisdiction to insert such a provision.⁵

The court will rectify, after long lapse of time, a settlement, the terms of which were not in accordance with the intention of the ward, where it is possible to do so without interfering with the acquired rights of others.⁶

A ward of court on attaining twenty-one ceases to be wholly under the control and jurisdiction of the court, and can marry without first obtaining the consent of the court to his or her union. But it does not follow that on the ward attaining majority, the court will in all cases relax its hold over the property of its late ward which it retains in its own possession. A female ward of court, when of age, may make whatever settlement of property she pleases, and may effectuate this by consenting personally in court, or under a commission for the purpose. But where her consent is not so given her property will never be discharged from the protection of the court, except by its order; and, consequently, she and her property will always be considered as having its protection still around her.⁷ The court will not allow a settlement sanctioned by itself to be defeated by the parties delaying their marriage till the ward has attained majority.⁸ But whether the court would enforce a settlement contrary to the wishes of both husband and wife is not a settled point.⁹ And in a recent case, though the wife was still a minor, and there was contempt on the part of the husband of a very flagrant and gross description, the Court of Appeal directed that the settlement (a post-nuptial one) should be so drawn as to give the wife power to appoint an interest in favour of her husband in case she died

Marriage of ward after attaining majority.

¹ 3 Dav. Prec. Pt. I. 656.

² See *Blackie v. Clark*, 15 Beav. 607.

³ *Kent v. Burgess*, 11 Sim. 361.

⁴ 45 & 46 Vict. c. 75.

⁵ Sect. 19. See *ante*, Part I. ch. viii. p. 135.

⁶ *Smith v. Iliffe*, L. R. 20 Eq. 666. This case was disapproved of by the Court of Appeal in *Tucker v. Bennett* (38 Ch. D. 1).

⁷ Per Lord Eldon in *Austen v. Halsey*, 2 Sim. & St. 123 n, 125 n.

⁸ *Money v. Money*, 3 Dr. 256.

⁹ See *Martin v. Foster* (*ubi sup.*).

without leaving issue.¹ The lady's estate consisted of personalty only. Kay, J., whose decision was overruled, had decided that the husband should be excluded from taking any interest whatever in his wife's property, and that she should have no power to make an appointment in his favour, even though there was no issue of the marriage living at her death. The wife strongly objected to this scheme. The court will have regard to the wishes of the parties in the appointment of trustees.² But the court has certainly no jurisdiction to compel a ward after attaining majority to execute a settlement.³

Where proposals for a settlement on the marriage of a ward have been accepted and approved by the court, as above stated, it will not permit the parties by delaying their marriage till the ward attains majority to defeat the original settlement; thus, where a female infant had been made a ward of court, and in contemplation of her marriage terms for the settlement of her property and that of her intended husband (which were for the benefit of the intended husband and wife, and the issue of the marriage) had been approved by the master, and his approval had been confirmed by the court, it was held not to be competent to the husband and wife, by delaying the marriage till after the wife had attained her majority, and entering into fresh settlements, to defeat the settlement of the court.⁴

To attempt purposely to delay or defeat the provisions of the court is a contempt, and can be punished as such.⁵ Where in one case the parties (one being a ward of court), having made proposals for a settlement which the court would not have approved of about six months before the ward came of age, waited until the ward attained her majority, and then executed the settlement in accordance with the proposals, the court claimed to exercise jurisdiction over the ward, and ordered the settlement to be rectified in a manner suitable to the position of the parties.⁶ It will also consider itself not ousted of its jurisdiction by the mere lapse of time, though it will take into consideration the rights and interests of persons who have come into *esse* in the meantime.⁷ The court will rectify an improper settlement made after the ward has attained majority, unless she consents to be bound by it.⁸

Where a female ward of court has attained majority and marries, but she and her husband have not previously agreed upon or executed a settlement, the court cannot, except the conduct of the parties has amounted to what, under other circumstances would be a contempt of court, enforce upon them the

Settlement agreed upon before majority of ward.

Parties by delaying their marriage cannot oust the jurisdiction of the court.

To attempt purposely to do so is a contempt.

Settlement not agreed upon before majority of ward.

¹ *Re Sampson and Wall*, 25 Ch. D. 482.

³ See *Re Leigh*, *Leigh v. Leigh*, 40 Ch. D. 290.

⁴ *Hobson v. Ferraby*, 2 Coll. 412.

⁶ *Money v. Money*, 3 Dr. 256.

⁸ *Long v. Long*, 2 Sim. & St. 119.

² *Ibid.*

⁵ See *Biddles v. Jackson*, W. R. 248.

⁷ *Cave v. Cave*, 15 Beav. 227.

acceptance of any particular settlement.¹ But where the fund belonging to the ward is in the hands of the court, a different practice seems to prevail, and the court retains its jurisdiction over the property of a ward of the court after the ward attains twenty-one, so long as the property remains in court; and if the ward marries, it will order a proper settlement to be made, or reform an improper one, unless the ward consents to the settlement either in court, or under a commission.² But where the sum is small, and expense and inconvenience would attend its being kept in court as a settled fund, the court will order it to be paid out to the ward;³ and now to the ward alone, and not, as was sometimes done, to the husband.⁴ But the court has not the power to compel a male ward to execute a settlement excluding the wife from all participation in his fortune.⁵

(2) *Marriage in Contempt of Court*.—Where the marriage has been in contempt of court, the punishment for the offence is frequently used for the purpose of compelling the party marrying the ward to make or agree to a settlement approved by the court, which refuses to allow the offending party to purge the contempt without making (if able to do so) a proper settlement. The principle by which the court is guided is that the offending party shall not derive any benefit from his wrong.

As has been before pointed out, the contempt may vary in its nature; in some instances it is gross, in others it is venial; and the court always draws a distinction between gross and flagrant cases, and those in which it is mitigated.⁶ In flagrant cases of contempt, the court visits the offending party, if the husband, not only with the physical punishment of commitment, but goes further, and deprives him, as a rule, of all benefit and interest in the ward's fortune;⁷ or gives him but a very small share of it, unless he brings in an equivalent provision, or the depriving him of such interest would be to the detriment of the ward.⁸ The husband who is guilty of contempt is excluded as against the wife altogether, and generally as against the children, but it is usual to allow the wife power to appoint an interest in favour of her husband in the event of there being no issue.⁹ Where the female ward is the wrong-doer, the court will punish her by settling the bulk of her property on the issue of the marriage.

In cases where the contempt is venial in its nature, the court

¹ See *Bolton v. Bolton*, [1891] 3 Ch. 270.

² *Austen v. Halsey*, 2 Sim. & St. 123 n.

³ *Longbottom v. Pearce*, 3 De G. & J. 545 n; *White v. Herrick*, L. R. 4 Ch. App. 345. In *Sams v. Cronin*, 22 W. R. 204, which followed *White v. Herrick*, it does not appear whether the sum in court was large or small.

⁴ Under the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75).

⁵ *Re Murray*, 3 Dr. & W. 83.

⁶ See *ante*, pp. 820 *et seq.*

⁷ *Kent v. Burgess*, 11 Sim. 361; *Wade v. Hopkinson*, 19 Beav. 613.

⁸ *Birkett v. Hibbert*, 3 Myl. & K. 227; *Field v. Moore*, 24 L. J. Ch. 161.

⁹ *Anne Walker's Case*, L. L. & G. 325. See *Re Sampson and Wall*, 25 Ch. D. 482.

Husband's
interest where
wife is ward.

will take that fact into consideration, and be correspondingly lenient in its treatment of the offending party, and if the married ward be a female, will under certain circumstances allow the husband to enjoy a portion of her income during his life;¹ so, where both parties were ignorant that the female infant was a ward, the court on petition settled her property on her for life, with remainder to her children; and with a power for the wife to appoint the property by will to her husband for his life.² Again, where the husband married in ignorance that his wife was a ward of court, the court approved of a settlement by which a considerable portion of the wife's fortune was paid to the husband, and he was given a life interest in the moiety of the residue of her fortune, if he survived her.³ In most of the cases the husband has been a man of no property, who married apparently for the sake of the fortune; and the court has generally refused to give him any interest in the property;⁴ but where he is of equal rank and fortune with the wife, and makes an equivalent provision for her out of his own property, it does not seem that the same rule would be enforced; and where the husband had no property, and the contempt was not a flagrant one, the costs of the settlement (including the husband's) were ordered to be paid out of the funds;⁵ and even in a very flagrant case, in which the husband had been convicted of a conspiracy, he was allowed to receive a sum of £2000 out of his wife's fortune, in order to pay debts which he alleged he had contracted for her.⁶

The matter may be thus shortly put: The court may vindicate its jurisdiction by committing the contemnor to prison; but when he is a person of equal rank and fortune with his wife, and is willing to make an equivalent provision on his side, the court will give him an interest in his wife's fortune, if necessary, which it would refuse to a needy adventurer.

Jurisdiction of
court under
Infants' Settle-
ments Act,
1855.

The court has claimed the power under the Infants' Settlements Act, 1855,⁷ to direct a settlement of a male or female infant's property, being a ward of court, even after the marriage has taken place.⁸ But whether this claim is rightly founded is a question which calls for a clear decision from the highest tribunal.⁹ In a late case the court held it had no jurisdiction under this Act to compel an infant ward of court to make a settlement of his own property because he had been guilty of contempt in marrying without leave.¹⁰

¹ *Bathurst v. Murray*, 8 Ves. 74.

Wilkinson v. Joughin, 41 L. J. Ch. 234.

³ *Richardson v. Merrifield*, 4 De G. & S. 161.

⁴ *Ball v. Coutts*, 1 V. & B. 292, 393.

⁵ *Anon.*, 4 Russ. 473.

⁶ *Pearce v. Crutchfield*, 16 Ves. 48; Dav. Prec. vol. iii. Part I. 659.

⁷ 18 & 19 Vict. c. 43.

⁸ *Re Sampson and Wall*, 25 Ch. D. 482; *Re Phillips (an Infant)*, 34 Ch. D. 469.

⁹ See *Seaton v. Seaton*, 13 App. Cas. 61; *Re Leigh, Leigh v. Leigh*, 40 Ch. D. 290.

¹⁰ *Re Leigh, Leigh v. Leigh (ubi sup.)*.

The Court of Chancery will not, as a rule, allow its wards to be removed out of the jurisdiction; if they could be so removed without its leave, it would have no guarantee that they would be brought up and treated in a manner of which it would approve; and they might contract marriages which it never would have sanctioned; in fact, it would lose all control over them both in the present and in the future. The court will enforce its orders not only against strangers, but against guardians,¹ and even against the father himself.² It will order its wards to be brought back who have been taken abroad without its permission.³

To remove an infant out of the jurisdiction is a serious contempt, which the court will punish severely by commitment to prison; and privilege of Parliament will be no protection against such committal.⁴ Before an infant ward can be properly removed out of the jurisdiction, the leave of the court must be first obtained. The court was wont not to grant it very readily,⁵ but did accede from time to time to the request to remove them.⁶ Its practice was to refuse an order permitting its infant wards to be removed out of the jurisdiction, with a view to their residing permanently abroad, except in a case of imperative necessity, as where it is clearly proved that a constant residence in a warmer climate is absolutely essential to their health;⁷ and such an order, if made, would comprise a scheme for the education of the infants, as well as a provision for informing the court from time to time of their progress and condition, and an undertaking to bring them within the jurisdiction when required.⁸ But in modern times the court is less strict in the exercise of this jurisdiction, and leave is now given to take an infant ward out of the jurisdiction without a case of necessity being shown; but the court must be satisfied that the removal is for the infant's benefit, and that future orders will be obeyed. Security in this respect is generally attained by appointing a guardian to act jointly in this country with the parent.⁹ Where it is intended that the wards should go abroad for a temporary residence, for the purposes of health and recreation, or for education, leave is more readily granted; but the court will insist upon security being given for the due return of the wards, and especially that they should not be married without its leave.¹⁰ The court will not allow its wards without leave to enter the army, or navy, thereby becoming liable to be removed

Taking ward out of the jurisdiction.

Removal without leave serious contempt.

When leave granted.

Court must be informed of ward's progress in education and its whereabouts.

Infant's benefit.

¹ *Newport v. Moore*, 1 Dick. 166.

² *Re Fynn*, 2 De G. & S. 457; *Re Plomley*, *Vidler v. Collyer*, 47 L. T. 283.

³ *Foster v. Denny*, 2 Ch. Cas. 237.

⁴ *Wellesley v. Duke of Beaufort*, 2 Russ. & Myl. 639.

⁵ See *Mountstuart v. Mountstuart*, 6 Ves. 363; and *De Manneville v. De Manneville*, 10 Ves. 52.

⁶ *Jackson v. Hankey*, cited as *Anon.*, Jac. 265 n.

⁷ *Campbell v. Mackay*, 2 Myl. & Cr. 31.

⁸ *Ibid.*

⁹ *Re Callaghan*, *Elliot v. Lambert*, 28 Ch. D. 186.

¹⁰ *Jeffreys v. Wanteswarstwarth*, Barn. Ch. 141; *Re Medley*, 6 Ir. R. Eq. 339.

out of the jurisdiction; ¹ though where it is for their benefit that they should remain in the service, leave will be obtained.² If a father is obliged to leave the jurisdiction, and his children are wards of court, he will in general be permitted to take them with him; but in such a case he will be compelled to keep the court informed from time to time by proper vouchers of the plan of the education of the wards, and of their residence; ³ so, too, a sick mother, who travels abroad to recruit her health, will be permitted to take her infant child (a ward of court) with her.⁴ And where the intention is not to keep the wards permanently abroad, or, in the case of females, where they have arrived at years of discretion, leave of the court to go abroad will be granted, for travelling purposes,⁵ or on account of ill health,⁶ or to visit relations,⁷ or a sick parent.⁸ Wards, too, have been allowed to reside abroad; thus, two sisters, wards, arrived at years of discretion, were allowed to live with their aunts (their only relations), who resided abroad; ⁹ a female ward was allowed to join her stepfather in India, the court being satisfied that she would be properly looked after on the voyage, and on her arrival in India; ¹⁰ and a girl of eighteen was allowed to reside with her brother abroad, her guardian consenting.¹¹

Wards allowed to reside abroad, if for their benefit.

A case for removal must be made out. Except where infant made ward of court purposely to prevent his removal.

But since, under ordinary circumstances, a ward of court cannot be removed out of the jurisdiction, those who seek its removal must make out a case for that purpose. But where an infant is made a ward of court solely for the purpose of preventing his removal from this country, the obligation is shifted, and the *onus* of showing that it is not for his benefit to remain at home lies upon the party seeking to restrain his removal.¹² Leave may now be given to take a ward out of the jurisdiction without a case of necessity being shown, if the court is satisfied that the removal would be for the infant's benefit, and there is sufficient security that future orders will be obeyed.¹³

Disclosure of residence of ward.

It is not only a contempt to take away, or attempt to take away, a ward out of the jurisdiction, but also to conceal from the court the place of residence of the ward, whether it be within or outside of the jurisdiction; and all parties who either know, or are supposed to know, of its place of residence, can be summarily ordered to give such information as is within their knowledge.

¹ *Rochford v. Hackman*, Kay, 308.

² *Harrison v. Goodall*, Kay, 310 n.

³ *Jackson v. Hankey*, cited as *Anon.*, Jac. 265 n.

⁴ *Lyon v. Watson*, cited *Chamb. Inf.* 22.

⁵ *Spencer v. Earl of Chesterfield*, Amb. 146.

⁶ *Wyndham v. Lord Ennismore*, 1 Keen, 467.

⁷ *Ex parte M'Key*, 1 B. & B. 405.

⁸ *Biggs v. Terry*, 1 Myl. & Cr. 675.

⁹ *Jeffreys v. Wanteswarth*, Barn. Ch. 114. See also *Dawson v. Jay*, 23 L. T. (O.S.) 239.

¹⁰ *Campbell v. Campbell*, cited *Chamb. Inf.* 30.

¹¹ *Clogstoun v. Wallcott*, 9 Jur. 649.

¹² Per Jessel, M.R., in *Re Plomley, Vidler v. Collyer*, 47 L. T. 283.

¹³ *Re Callaghan, Elliott v. Lambert*, 28 Ch. D. 185.

This jurisdiction of the court is not based upon the law or theory of contempt of court, for the parties ordered to supply the information may be quite innocent of any contempt, constructive or actual, but on the power of the Court of Chancery as the protector and upholder of the interests of infants, exercising the delegated powers of the crown as *parens patriæ*.¹ It is not absolutely necessary that the infant should be a ward to give the court jurisdiction to insist upon those who are aware of its place of concealment affording the requisite information.² There is no doubt an expression of opinion by Lord Cottenham in the case of *Re Spence*,³ to the effect that the court cannot compel parties who have not the infants in their custody to disclose facts of which they are the mere witnesses; but, as was pointed out by Chitty, J., in *Rosenberg v. Lindo*,⁴ the observation was not material to the decision of that case. The contrary practice has been clearly established, and it is now settled that no person whatsoever is entitled to conceal the residence of a ward, or do anything which will prevent the court from having access to its wards, and putting them under proper protection.⁵ Thus, a solicitor has been held bound to give to the court any information which may lead to the discovery of the residence of a ward of court whose residence is being concealed from the court, although such information may have been communicated to him by his client in the course of his professional employment, and was ordered to produce the envelopes of letters which he had received from her as her solicitor, with the object of discovering her residence from the postmarks.⁶ So, too, a Roman Catholic bishop and the superior of a Roman Catholic convent were in one case ordered summarily to attend before the court on a *prima facie* case for supposing that they were able to give information as to the place of residence of a ward of court who was not in the custody of her parents.⁷

¹ *Rosenberg v. Lindo*, 48 L. T. 478.

² *Re Spence*, 16 L. J. Ch. 309.

³ *Ubi sup.*

⁴ *Ubi sup.*

⁵ *Ramsbotham v. Senior*, L. R. 8 Eq. 575.

⁶ *Ibid.*; *Burton v. Earl of Darnley*, L. R. 8 Eq. 576 n.

⁷ *Rosenberg v. Lindo* (*ubi sup.*).

CHAPTER VI.

REMEDIES FOR THE PROTECTION OF INFANTS.

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THIS chapter will be divided into two portions: First, the remedies possessed by infants in respect of wrongs done to their persons, in which will be included statutes passed for the protection of their life, health and morals; secondly, remedies in respect of wrongs done to their property.

(1) *As Regards the Person.*—If an infant is detained in illegal custody, he is just as much entitled to be liberated from that illegal custody or restraint as if he were an adult; he is, therefore, entitled to a writ of *habeas corpus*. The father or mother,¹ or legal guardian,² is *prima facie* entitled to the writ; but by recent decisions the courts have arrogated to themselves the jurisdiction to interfere with the parental and tutorial rights where they conceive the interests of the infant require them to do so.³

¹ See *ante*, Part II., Parent and Child, chap. ii. pp. 514 *et seq.*

² See *ante*, Part III., Guardian and Ward, chap. v. p. 654.

³ See *Re Brown*, 13 Q. B. D. 614; *Reg. v. Gyngall*, [1893] 2 Q. B. 232; 54 & 55 Vict. c. 3.

As regards the person.

Habeas corpus for illegal detention.

An infant is entitled to redress for personal injuries inflicted upon him by the negligence or default of another, though he himself may be a trespasser.¹

Action for
personal
injuries.

There is no doubt that an infant who has arrived at years of discretion, though not legally of age, may disentitle himself to recover damages by way of compensation for injuries brought about by his own negligence or default. But whether an infant of tender years can by his contributory negligence so disentitle himself is more open to question, and the authorities are somewhat at variance, the earlier cases going to show that he can maintain his action, the later ones that he cannot. Thus, it has been held in one case² that the doctrine of contributory negligence does not apply to an infant of tender age; and to disentitle him to recover, it must be shown that the injury was occasioned entirely by his own negligence. And where the defendant negligently left his horse and cart unattended in the street, and the plaintiff, a child seven years old, got upon the cart in play, and another child incautiously led the horse on, and the plaintiff was thereby thrown down and hurt, the defendant was held liable, though the plaintiff was a trespasser and contributed to the mischief by his own act.³ The question is really whether an infant of tender years can be said, by reason of his want of experience and an incapacity to judge rightly of the probable result of his acts, to be guilty of negligence. In the course of his judgment in *Lynch v. Nurdin* (which was that of the court), Lord Denman said: "In the present case . . . the plaintiff himself has done wrong; he had no right to enter the cart, and, abstaining from doing so, he would have escaped the mischief. Certainly he was a co-operating cause of his own misfortune by doing an unlawful act; and the question arises whether that fact alone must deprive the child of his remedy. The legal proposition, that one who has by his own negligence contributed to the injury of which he complains cannot maintain his action against another in respect of it, has received some qualifications. Indeed, Lord Ellenborough's doctrine in *Butterfield v. Forrester* (3 B. and Ald. 304), which has been generally adopted since, would not set up the want of a superior degree of skill or care as a bar to a claim for redress; ordinary care must mean that degree of care which may reasonably be expected from a person in the plaintiff's situation, and this would evidently be very small indeed in so

Contributory
negligence.

Infant of
tender years.

¹ *Jay v. Whitfield*, cited in *Bird v. Holbrook*, 4 Bing. 644; *Hott v. Wilkes*, 3 B. & Ald. 304; *Collins v. Lefevre*, 1 F. & F. 436.

² *Gardner v. Grace*, 1 F. & F. 359.

³ *Lynch v. Nurdin*, 10 L. J. Q. B. 73. This case has been commented upon in *Lygo v. Newbold*, 9 Exch. 302; but it has in part been restored to the position of an authority by Cockburn, C.J., in *Clark v. Chambers*, 3 Q. B. D. 327; but his lordship did not deal with the question more nearly affecting the present topic, viz., whether an infant could be disentitled to maintain his action by reason of his contributing to his own mishap.

young a child. But this case presents more than the want of care; we find in it the positive misconduct of the plaintiff an active instrument towards the effect. . . . But the question remains, can the plaintiff, then, consistently with the authorities, maintain his action, having been at least equally in fault? The answer is, that supposing that fact ascertained by the jury, but to this extent, that he merely indulged the natural instinct of a child in amusing himself . . . then we think that the defendant cannot be permitted to avail himself of that fact. The most blamable carelessness of his servant having tempted the child, he ought not to reproach the child with yielding to that temptation. He has been the real and only cause of the mischief. He has been deficient in ordinary care. The child, acting without prudence or thought, has, however, shown those qualities in as great a degree as he could be expected to possess them. His misconduct bears no proportion to that of the defendant which produced it."¹

Infant contributing to own hurt.

In the following cases he has been held disentitled to recover. A child three years and a half old strayed upon a railway, and had its leg cut off by a passing train, there being no evidence to show that the child got there through any neglect or default on the part of the company.² The defendants, in another case, were the occupiers of a warehouse on one side of a street into which their cellar opened. The public had a right of way over the whole street subject to the existence of the cellar, but the only flagged footpath was on the other side. The defendants took off the lid which covered their cellar, and left it nearly upright against their wall. A child jumped from the lid and pulled it over, injuring himself and another child. The defendants under these circumstances were held not liable at the suit of the child, who had voluntarily meddled for no lawful purpose with that which if left alone would not have hurt him.³ But where the cause of injury is a nuisance, and the evidence is consistent with the child's injury having been brought about by his own negligent conduct and not by the nuisance, though strictly speaking the *onus* is on the child to prove absence of negligence, yet the want of such direct evidence will not debar him from recovering compensation for the injury.⁴ A later case has decided that where the cause of injury was a nuisance, and the young child

¹ In an American case (*Plumley v. Birge*, 124 Mass. 57) it is said that the age of the plaintiff is an important fact for the consideration of the jury; that is, that want of ordinary care, which would be no bar to redress in the case of an infant of tender years, would disentitle an older child to recover compensation for injuries. This case, however, would probably, on the merits, have been differently decided in England. As to greater protection to be afforded to infants or infirm persons as being unable to take care of themselves, see *Williams v. G. W. Ry. Co.*, L. R. 9 Exch. 137, per Kelly, C. B.

² *Singleton v. Eastern Counties Railway Co.*, 7 C. B. (N.S.) 287.

³ *Hughes v. Macfie*, 33 L. J. Ex. 177.

⁴ *Fenna v. Clare and Co.*, [1895] 1 Q. B. 199.

has only acted as it is natural to suppose he should act, the person who is responsible for the nuisance and injury to the child is liable to him in damages.¹ If another child in no way concerned with the act of the first child which causes the mischief is injured by such act, it would be entitled to recover, though if he were a joint actor with him he would not.² So, where the defendant exposed in a public place for sale, unfenced and without superintendence, a machine which might be set in motion by any passer-by, and which was dangerous when in motion, and the plaintiff, a boy four years old, by the direction of his brother, seven years old, placed his fingers within the machine whilst another boy was turning the handle which moved it, and his fingers were crushed, the plaintiff was held disentitled to maintain any action for the injury.³

An infant of tender years is so identified with the adult who has the charge and control of it that if it receives injuries under circumstances which disentitle the adult to recover, it will itself be unable to recover compensation;⁴ but where such adult is guilty of a mere default or mistake in respect of the infant, which if happening in his own case would not disentitle him to recover, then the infant may recover compensation for injuries notwithstanding such default or mistake.⁵

Infant identified with the adult in whose charge he is.

Where an infant sues for damages for personal injuries, he cannot include a claim for the expenses paid by his parents for his cure; though if they had come out of his own funds, he might so include them.⁶

Several statutes have been passed in recent years for what may be termed the moral, social, and physical protection of young children, some of which will be shortly summarized in the following pages.

Acts for the protection of young children.

No child under ten years of age may be employed in the business of chimney sweeping,⁷ or apprenticed to the business under the age of sixteen,⁸ or taken out to a house where sweeping is to be done.⁹

Chimney Sweepers Acts, 1840 and 1864.

Under the Industrial Schools Acts, 1866,¹⁰ and 1880,¹¹ justices have power to summon a young girl under fourteen who is living with prostitutes, with a view of removing her from their company and sending her to an industrial school;¹² also in the

Industrial Schools Acts, 1866 and 1880.

¹ *Harrold v. Watney*, [1898] 2 Q. B. 320. ² *Abbott v. Macfie*, 33 L. J. Ex. 177.

³ *Mangan v. Atterton*, L. R. 1 Ex. 239; but see *Clark v. Chambers*, 3 Q. B. D. 327.

⁴ *Waite v. North-Eastern Railway Co.*, 28 L. J. Q. B. 258. Though Lord Bramwell disapproved of the decision in this case in *Mills v. Armstrong*, 13 App. Cas. 1, in which he prepared a speech but did not deliver it, yet the other members of the House of Lords thought this case was distinguishable from that of *Thorogood v. Bryan* (8 C. B. 115) which they overruled.

⁵ *Austin v. Great Western Railway Co.*, L. R. 2 Q. B. 442.

⁶ *Collins v. Lefevre*, 1 F. & F. 436.

⁷ 27 & 28 Vict. c. 37, s. 6.

⁸ 3 & 4 Vict. c. 85, s. 3.

⁹ 27 & 28 Vict. c. 37, s. 6.

¹⁰ 29 & 30 Vict. c. 118, s. 14.

¹¹ 43 & 44 Vict. c. 15, s. 1.

¹² *Reg. v. Moore*, 52 J. P. 375.

case of a boy under fourteen who is shown to frequent the company of reputed thieves.¹ Justices are empowered by the Industrial Schools Act, 1866,² to send a juvenile offender to a workhouse instead of a prison while on remand or after sentence, and while being detained for inquiry to be made respecting a school to which he or she may be sent.

So, also, in order to prevent the lives of children of tender years being risked in dangerous performances, it has been provided by the Acts to regulate the employment of children in places of public entertainment in certain places,³ that any person who shall cause any male child under the age of sixteen, and any female child under the age of eighteen,⁴ to take part in any dangerous performances, and the parent or guardian or person having the custody of such child who shall aid and abet the same, may be summarily convicted and fined in a penalty not exceeding £10.⁵ But any prosecution under these Acts must first be sanctioned by the chief of the police of the area in which the alleged offence is committed.⁶

The Criminal Law Amendment Act, 1885,⁷ was passed for the purpose of extending the protection of the law over young girls. Carnal knowledge of a girl under thirteen is a felony;⁸ and the attempt to have such carnal knowledge is a misdemeanour.⁹ The carnal knowledge or attempt to have carnal knowledge of a girl above thirteen and under sixteen is a misdemeanour.¹⁰ It is a defence to a charge of this offence that the accused had reasonable cause to believe the girl was of or above the age of sixteen.¹¹ Any householder who permits on his premises the defilement of a girl under thirteen is guilty of a felony,¹² and of a girl between thirteen and sixteen of a misdemeanour;¹³ this is equally the case where the girl is his own daughter.¹⁴ The abduction of a girl under eighteen for the purpose of being carnally known is a misdemeanour.¹⁵ It is a defence to a charge of this offence that the accused had reasonable cause to believe the girl was of or above the age of eighteen.¹⁶ Any house in which it is reasonably suspected that a girl under eighteen is detained (and if over eighteen against her will) for immoral purposes may be searched, and if the girl is found there she may be delivered up to such person as the court may think fit.¹⁷ When the seduction or prostitution of a girl under sixteen is proved to have been caused, encouraged or favoured by her father,

¹ *Reg. v. Jennings*, [1896] 1 Q. B. 64.

² Sect. 19.

³ 42 & 43 Vict. c. 34, and 60 & 61 Vict. c. 52.

⁴ 60 & 61 Vict. c. 52, s. 1.

⁵ 42 & 43 Vict. c. 34, s. 3. See 4 Edw. VII. c. 15, s. 2.

⁶ 60 & 61 Vict. c. 52, s. 2.

⁷ 48 & 49 Vict. c. 69.

⁸ Sect. 4.

⁹ *Ibid.*

¹⁰ Sect. 5.

¹¹ *Ibid.*; *Reg. v. Pucker*, 16 Cox, C. C. 57.

¹² Sect. 6.

¹³ *Ibid.*

¹⁴ *Reg. v. Webster*, 16 Q. B. D. 134.

¹⁵ Sect. 7.

¹⁶ *Ibid.*; *Reg. v. Pucker* (*ubi sup.*).

¹⁷ Sect. 10.

mother, guardian, master or mistress, the court may divest such father, mother, guardian, master or mistress of all authority over her, and appoint other willing and fit persons to take charge of her.¹

Under the Coal Mines Regulation Act, 1887,² no boy under twelve or girl at all shall be employed in a mine below ground; ³ and no boy over twelve shall be employed in any underground mine for more than fifty-four hours in any week.⁴ No boy or girl under twelve shall be employed in connection with any mine above ground.⁵ No boy or girl under thirteen shall be so employed for more than six days in any week; or if employed for more than three days in any week for more than six hours in any one day, or in any other case for more than ten hours in any one day.⁶ No boy or girl of or above thirteen shall be employed for more than fifty-four hours in any one week or ten hours in any one day.⁷

Coal Mines
Regulation
Act, 1887.

Under the Shop Hours Act, 1892,⁸ a young person, that is, one under eighteen,⁹ shall not be employed in or about a shop more than seventy hours a week, including meal-times.¹⁰ This provision does not apply to the members of the shopkeeper's family or to a person wholly employed as a domestic servant.¹¹

Shop Hours
Act, 1892.

In order to protect young persons from the temptation and dangers of gambling and getting into debt the Betting and Loans (Infants) Act, 1892,¹² was passed, under which any person who for reward or profit sends any document to a person whom he knows to be an infant for the purpose of inciting him to bet,¹³ or to borrow money,¹⁴ shall be guilty of a misdemeanour. If an infant has contracted a loan which is void in law, and has agreed on attaining majority to pay money in respect of such loan, which is not a new advance, such agreement or negotiable security representing such agreement shall be void as against all persons.¹⁵

Betting and
Loans (Infants)
Act, 1892.

For the purpose of removing the temptation which undoubtedly exists in the case of many parents and others of making a profit out of the death of young children, and so causing them to be neglected, it is now provided by the Friendly Societies Act, 1896,¹⁶ that no society, whether registered or unregistered, shall insure or pay on the death of a child under five years of age any sum of money which, added to any amount payable on the death of such child by any other society or branch, exceeds £6, and in the case of the death of a child under ten years of age any sum which, added to any amount payable on the death of such child by any other

Friendly
Societies Act,
1896

¹ Sect. 12.

⁴ Sect. 5.

⁷ Sect. 3.

¹⁰ Sect. 3. See *Hammond v. Pulsford*, [1895] 1 Q. B. 223; *Collman v. Roberts*, [1896] 1 Q. B. 457.

¹² 55 & 56 Vict. c. 4.

¹⁵ Sect. 5.

² 50 & 51 Vict. c. 58.

⁵ Sect. 7.

⁸ 55 & 56 Vict. c. 62.

¹³ Sect. 1.

¹⁶ 59 & 60 Vict. c. 25.

³ Sect. 4.

⁶ *Ibid.*

⁹ Sect. 9.

¹¹ Sect. 10.

¹⁴ Sect. 2.

Collecting
Societies and
Industrial
Assurances
Act, 1896.
Infant Life
Protection
Act, 1897

society or branch, exceeds £10.¹ Such payment shall only be made on the production by the parent or the parent's personal representative of the registrar's certificate of the death of the child.² These provisions do not apply to the insurance on the life of a child of any age by persons who have an insurable interest in the child's life.³ The above provisions apply to the assurances on infants' lives by Industrial Assurance Companies.⁴

In order to protect infant life an Act was passed in 1897⁵ by which any person who retains or receives for hire or reward more than one infant under the age of five years for the purpose of nursing or maintaining such infants apart from their parents for a longer period than forty-eight hours must within forty-eight hours give due and proper notice of the taking in or removal of any such infant to the local authority.⁶ Any person who retains or receives an infant under two years of age in consideration of a payment of one lump sum not exceeding £20 paid down and without any agreement for further payment for the care and bringing up of the child till it is reclaimed or old enough to provide for itself must also give like notice to the proper authority.⁷ The local authority must carry out this Act, and, if need be, appoint inspectors, or nominated women with power to enforce its provisions.⁸ The local authority may fix the number of infants under five years old who may be received or retained in any dwelling-house.⁹ The inspectors may remove any infant who is kept under such circumstances as to endanger its health;¹⁰ and the death of such infant is to be notified within twenty-four hours to the coroner.¹¹ Persons contravening the provisions of this Act are to be summarily dealt with;¹² but the Act does not extend to the relatives or guardians of the infant, or to any person who has been appointed to receive such infants under the Poor Law or Local Government Board, or to hospitals, or convalescent homes or institutions established for the protection and care of infants, and conducted in good faith for religious or charitable purposes.¹³ The Local Authority in the County of London is the County Council, in the City of London the Common Council, and in other places the Board of Guardians.¹⁴

School Attendance Acts,
1893 and 1899.

Under the School Attendance Acts of 1893¹⁵ and 1899¹⁶ a child under the age of twelve cannot obtain a certificate of total or partial exemption from the obligation to attend school so as to be capable of being employed in labour. Under the Act of 1899¹⁷

¹ Sect. 62.

³ Sect. 67.

⁵ 60 & 61 Vict. c. 57 (Infant Life Protection Act), repealing The Protection of Infant Life Act, 1872

⁸ Sect. 3.

⁹ Sect. 4.

¹² Sects. 9 and 11.

¹⁵ 56 & 57 Vict. c. 51.

¹⁷ Sect. 1. Under the Education Act of 1902 (2 Edw. VII. c. 42) the "school authority" is now styled the "education authority."

² See sects. 63, 64, 65 and 84 (*f*) and (*g*).

⁴ 59 & 60 Vict. c. 26, s. 13.

⁶ Sect. 5.

¹⁰ Sect. 7.

¹¹ Sect. 8.

¹⁴ Schedule to the Act.

¹⁶ 62 & 63 Vict. c. 13.

the school authority for any district may fix by by-law for any parish within their district thirteen years as the minimum age for exemption from school attendance in the case of children to be employed in agriculture. In such parish, children over eleven and under thirteen after passing the proper standard for partial exemption need not attend school more than 250 times in any year. A child also may obtain partial exemption on attaining twelve years if it has made 300 attendances in not more than two schools during each year for five preceding years whether consecutive or not. Any person taking a child into his employment in such manner as to prevent it from attending school in accordance with the by-laws in force for the time being in which the child resides is liable to a penalty.¹

The Intoxicating Liquors (Sale to Children) Act, 1901,² makes it an offence for every holder of a licence knowingly to sell or deliver, or allow any person to sell or deliver (save at the residence or working-place of the purchaser) any description of intoxicating liquor to a child under the age of fourteen years for consumption by any person on or off the premises, except such liquor is sold or delivered in corked³ and sealed⁴ vessels in quantities not less than one reputed pint for consumption off the premises only.⁵ An honest belief in the compliance with the requirements of this Act is no excuse or defence if, as a fact, there has been non-compliance with them;⁶ but on the other hand such non-compliance on the part of a servant of the licence-holder in direct contravention of his express orders does not render the licence-holder guilty of the offence of knowingly allowing such contravention.⁷ It is also an offence to send a child under fourteen years of age to any place where intoxicating liquors are sold, delivered, or distributed for the purpose of obtaining any description of intoxicating liquor except in corked or sealed vessels in quantities not less than a reputed pint for consumption by any person off the premises.⁸ This section is directed against parents and those who have the care and custody of young children. A licence-holder, however, is allowed to employ a member of his family or his servant or apprentice (though under fourteen years of age) as a messenger to deliver intoxicating liquors.⁹

¹ 56 & 57 Vict. c. 51, s. 2.

² 1 Edw. VII. c. 27, repealing the like Act of 1886 (49 & 50 Vict. c. 56).

³ "Corked" means closed with a plug or stopper, whether of cork, wood, glass or other material. Sect. 5.

⁴ "Sealed" means secured with any substance without the destruction of which the cork plug or stopper cannot be withdrawn. Sect. 5. For what is "destruction" within this section, see *Mitchell v. Crawshaw*, [1903] 1 K. B. 701; and for what is "not destruction," see *Macey v. McKenzie*, 88 L. T. 631; 67 J. P. 251.

⁵ Sect. 2.

⁶ *Brooks v. Mason*, [1902] 2 K. B. 743.

⁷ *Emery v. Nolloth*, [1903] 2 K. B. 264; *Groom v. Grimes*, 89 L. T. 129; 67 J. P.

⁸ Sect. 2.

⁹ Sect. 3.

Factory and
Workshop Act,
1901.

Under the Factory and Workshop Act, 1901,¹ no child or young person is allowed to clean machinery in motion in a factory; ² young persons ³ and children ⁴ are not allowed to work more than a certain number of hours per week in textile factories, including lace factories ⁵ and laundries,⁶ and a certain number of hours in non-textile factories, including bakehouses.⁷ Restrictions are put on the employment of children outside and inside a factory on the same day; ⁸ also on Sundays; ⁹ except in certain cases by special order; ¹⁰ and in the case of Jews.¹¹ A child or young person is not allowed to clean machinery in motion.¹² Provision is made for the holidays of young persons and children.¹³ A male over fourteen years of age may be employed in night work in certain trades under proper restrictions.¹⁴ The age of young children employed in factories has been raised from eleven to twelve years of age; ¹⁵ and the fitness of a child and young person for work must be certified.¹⁶ A young person employed in a factory is not allowed to do work or be employed during prohibited hours, even though he does it for his own amusement and contrary to orders.¹⁷

Education of
child employed
in workshop
or factory.

A child that is employed in a factory or workshop must attend some recognized efficient school, and non-attendance on the requisite number of times in one week must be made up in the successive week before the employment is resumed.¹⁸ A child over thirteen years of age who has obtained an educational certificate is to be deemed "a young person."¹⁹ No young person or child shall be employed in any dangerous or unhealthy trade.²⁰ The employment of a young person or child contrary to the provisions of the Act renders the employer ²¹ and the parent ²² liable to a fine on summary conviction.²³ The Interpretation Clause of the Act ²⁴ defines a "child" to mean a person who is under the age of fourteen years, and who has not, being of the age of thirteen years, obtained the statutory certificate of proficiency at school; a "parent" to mean a parent or guardian of or person having the legal custody or control over, or having direct benefit from the wages of a young person or child; a "young person" to mean a person who has ceased to be a "child" and is under the age of eighteen years. Hotels are within this Act.²⁵

¹ 1 Edw. VII. c. 22.

² Sect. 13.

³ Sects. 24, 28 and 39.

⁴ Sects. 25, 28 and 39.

⁵ Sect. 37.

⁶ Sect. 103.

⁷ Sect. 38.

⁸ Sect. 31.

⁹ Sect. 34.

¹⁰ Sect. 42, in the case of creameries.

¹¹ Sect. 48. In the case of Jews the factory or workshop must be closed on Saturdays to permit of Sunday labour.

¹² Sect. 13. See *Pearson v. Belgian Mills Co.*, [1896] 1 Q. B. 244.

¹³ Sect. 35.

¹⁴ Sects. 54, 55 and 56.

¹⁵ Sect. 62.

¹⁶ Sects. 63-67 and 89.

¹⁷ See *Prior v. Slaitwaite Spinning Co.*, [1898] 1 Q. B. 881.

¹⁸ Sect. 68.

¹⁹ Sect. 71.

²⁰ Sects. 76 and 77.

²¹ Sect. 137.

²² Sect. 138.

²³ Sect. 144.

²⁴ Sect. 156.

²⁵ *Savoy Hotel Co. v. London County Council*, [1900] 1 Q. B. 665. In this case a page boy was held not to be a person wholly employed as a domestic servant. For what is not a "shop," see *Smith v. Kyle*, [1902] 1 K. B. 286.

Under the Licensing Act, 1902,¹ it is now made an offence Licensing Act, 1902. for a person in charge of a very young child to be drunk; for any person found drunk in a highway or other public place, whether a building or not, or on any licensed premises, while having charge of a child apparently under seven years of age may be summarily punished by a fine not exceeding forty shillings or imprisonment not exceeding one month.²

By virtue of the Employment of Children Act, 1903,³ a local Employment of Children Act, 1903. authority may make by-laws prescribing for all children,⁴ or for boys and girls separately, and with respect to all occupations or to any specific occupation: (a) the age below which employment is illegal; (b) the hours between which employment is illegal; (c) the number of daily and weekly hours beyond which employment is illegal; and prohibiting absolutely or permitting, subject to conditions, their employment in any specified occupation;⁵ also regulating street trading by persons under sixteen years of age, except subject to such conditions as to age, sex, or otherwise, as may be specified in the by-law, or subject to the holding of a licence to trade to be granted by the local authority.⁶ A child must not be employed between 9 P.M. and 6 A.M. (unless these hours are varied by a local authority); and if under eleven years of age must not be employed in street trading at all; or to lift, carry, or move anything so heavy as to be likely to cause injury to it; or in any occupation likely to be injurious to his life, limb, health or education; or if a "half-timer" under the Factory and Workshop Act, 1901, in any other occupation.⁷ If contravention of this Act or any by-law under it takes place in the case of an employer,⁸ or his workman or agent,⁹ as respects a child or young person under sixteen years of age, the offender may be summarily convicted and punished;¹⁰ if in the case of a parent or guardian by conducing to the contravention by wilful default or habitual neglect to exercise due care, the offender may be summarily convicted and punished.¹¹ If a person under sixteen years contravenes this Act or any by-law under it, he may be summarily convicted; and in the case of a second or subsequent offence by a child be in addition sent to an industrial school,¹² or be taken out of the charge or control of the person who has its actual charge and control, and committed to the charge and control of some fit person who is willing to undertake the same till such

¹ 2 Edw. VII. c. 28.

² Sect. 2. Under this section if a child appears to be under seven years of age, it shall be deemed to be so unless the contrary is proved.

³ 3 Edw. VII. c. 45.

⁴ Persons under the age of fourteen years. Sect. 13.

⁵ Sect. 1.

⁶ Sect. 2. This section contains a direction that girls under sixteen years of age ought not to be licensed to trade in streets or public places.

⁷ Sect. 3.

⁸ Sect. 5 (1).

⁹ Sect. 6.

¹⁰ Sects. 5 and 6.

¹¹ Sect. 5 (2).

¹² Sect. 5 (3).

child reaches the age of sixteen years.¹ To enforce the Act the officer of the local authority may enter any place of employment under the authority of a justice of the peace, to examine the place and person touching the employment of any child therein.²

Under the Act for the Prevention of Cruelty to Children, 1904,³ any person over the age of sixteen years who has the custody,⁴ charge,⁵ or care⁶ of any child under the age of sixteen years, and who wilfully assaults, illtreats, neglects, abandons, or exposes such child, or causes or procures such child to be assaulted, ill-treated, neglected, abandoned, or exposed in a manner likely to cause such child unnecessary suffering or injury to its health (including injury to or loss of sight or hearing or limb or organ of the body and any mental derangement) may, on conviction, be subjected to certain punishments.⁷ Any direct or indirect pecuniary gain arising from the death of the child may subject an offender under this Act to a heavier punishment.⁸ Pending the hearing of a charge of an offence under this Act and certain scheduled offences, provision is made for the detention of the child in some place of safety.⁹ After the conviction or committal of an offender the court may take the child out of the custody, charge, or care of the offender, and commit it to the custody of a relation or some fit person (including any society or body corporate established for the reception of poor children or the prevention of cruelty to children) till it attains the age of sixteen years or any shorter period;¹⁰ and the committee of such child is to have full parental control over it, and be responsible for its maintenance even as against the claims of the parent.¹¹ The committee should be, if possible, of the same religious persuasion

¹ Sect. 5 (4); and see Prevention of Cruelty to Children Act, 1904.

² Sect. 8.

³ 4 Edw. VII. c. 15, repealing 57 & 58 Vict. c. 41.

⁴ Any person who is the parent of a child shall be presumed to have the custody of the child. Sect. 23 (2).

⁵ Any person to whose charge a child is committed by its parent shall be presumed to have charge of the child. *Ibid.*

⁶ Any other person having actual possession or control of a child shall be presumed to have the care of the child.

⁷ Sect. 1. A conviction under this section may take place though the child has died; and conversely, on an indictment for manslaughter the jury may convict of an offence under this section. For what evidence is admissible to prove the child's age, see *Reg. v. Cox*, [1898] 1 Q. B. 179.

⁸ *Ibid.*

⁹ Sect. 5. A properly taken deposition of a child against whom any of the above offences are alleged to have been committed may be admitted on the trial of the offender, if the child is certified to run a risk to its life or health if it attended the trial (sect. 14); and the evidence of a child of tender years may be given, though not on oath, if the court be of opinion that such child is of sufficient intelligence, and understands the duty of speaking the truth (sect. 15). The attendance of the child may be dispensed with altogether if in the opinion of the court its presence is not essential to the first hearing of the case (sect. 16). In reality the insertion of sections 14 and 16 was unnecessary, for the judge at the trial of an offence has the power to order or dispense with the presence of a prosecutor, unless some statute deprives him of that power. See *Rex v. Hale*, [1905] 1 K. B. 126, which was a decision on section 16 of the repealed Act, 1896; in which case Alverstone, C.J., held that the word "attendance" was equivalent to "attendance for the purpose of giving evidence."

¹⁰ Sect. 6.

¹¹ Sect. 7.

as the child, or should give an undertaking to bring up the child in its religious persuasion.¹ This power of committing a child to the custody of a relative or other named person may be exercised by the court when a child under sixteen years of age is brought before it under circumstances which would authorize it to send the child to an industrial school.² A warrant may be granted to search for or remove a child where there is reasonable ground for believing that an offence under this Act has been committed against it.³

An offence against this Act punishable on summary conviction is committed by any person who causes or procures a boy under the age of fourteen years or a girl under the age of sixteen years, or who, having the custody, charge or care of such child, allows him or her to be in any street, premises or place for the purpose of begging or receiving alms, or of inducing the giving of alms, under the pretence of singing, playing, performing, offering anything for sale, or otherwise; or who causes or procures any such child, or who, having the custody, charge or care of any such child, allows him or her to be in any street or in any premises licensed for the sale of any intoxicating liquor, other than premises licensed for public entertainments, for the purpose of singing, playing, or performing, or being exhibited for profit, or offering anything for sale between 9 P.M. and 6 A.M.; or (*unless granted a licence under this Act*) causes or procures any child under the age of eleven years, or who, having the custody, charge or care of any such child, allows that child to be at any time in any street, or in any premises licensed for public entertainments, or in any circus or other place of public amusement to which the public are admitted by payment, for the purpose of singing, playing or performing, or being exhibited for profit, or offering anything for sale; or (*unless granted a licence under this Act*) causes or procures any child under the age of sixteen years, or who, having the custody, charge or care of any such child, allows that child to be in any place for the purpose of being trained as an acrobat, contortionist, or circus performer, or of being trained for any exhibition or performance which in its nature is dangerous.⁴ Prosecutions under this Act must be commenced within six months of the date of the offence.⁵

Restriction
on the employ-
ment of
children.

(2) *As regards Property.*—An infant being a person under disability is to a large extent excepted from the effect of the Statutes of Limitations, the operation of which is to effect the creation of new titles and rights of property, or the deprivation of the right to enforce valid claims. These statutes will be shortly discussed as to their effect on (a) real property; (b) personal property; (c) personal injuries or torts.

Infant's rights
protected by
Statutes of
Limitations.

¹ Sect. 8.

² Sect. 9.

³ Sect. 10.

⁴ Sect. 2.

⁵ Sect. 18. A person summarily convicted not on his own confession may appeal to Quarter Sessions. Sect. 19.

Real property. (a) *Real Property*.—By force of 3 & 4 Wm. IV. c. 27, and 37 & 38 Vict. c. 57, in the case of persons under no disability, no land or rent is recoverable but within twelve years (or six years in certain cases¹) after the right of action has accrued to the person who brings the action or to some person through whom he claims.² But if such right is in an infant then he or the person claiming through him, notwithstanding the expiry of such period of twelve or six years (as the case may be) may enforce it at any time within six years next after he shall have ceased to be under disability.³ But the disability of infancy does not prevent the statutes from running against an infant where the person in whose favour it is running went into and obtained possession of the property at a time when the owner was under no disability; and this is so where the infant's title is equitable.⁴

Easements. The period of time in which an easement may now be acquired is twenty years; but if during such period the person against whom the easement is claimed is an infant, such period of infancy shall be excluded in computing the twenty years;⁵ but if the easement has been uninterruptedly enjoyed for thirty years; then the right to it is indefeasible notwithstanding any disability in the owner of the servient tenement during the thirty years.⁶ The same principle applies to claims of profit *à prendre*; only the periods of acquisition and indefeasibility are forty and sixty years respectively.⁷ An indefeasible claim to the easement of light may be obtained in twenty years.⁸

Possession of stranger that of bailiff or trustee. As a rule, where a stranger enters upon land, or gets possession of property belonging to an infant, the latter is entitled to treat him as a bailiff or trustee, so that his uninterrupted possession does not mature into a title, or bar the infant's remedy, and the latter may obtain an account of the rents and profits and a decree for possession.⁹

Account for mesne profits. The account for mesne profits to which the infant is entitled¹⁰ is not limited to the period of the previous six years, for the Statute of Limitations does not run against him;¹¹ though if the infant allow more than six years to elapse after attaining majority his right to such an account will be barred.¹²

Action for recovery of land. Statute of Limitations. There is, however, a distinction to be drawn so far as regards bringing an action for the recovery of land between possession by an actual stranger and one who is the parent or legal guardian of

¹ See 37 & 38 Vict. c. 57, s. 2.

² *Ibid.* s. 1.

³ *Ibid.* s. 3.

⁴ *Murray v. Watkins*, 82 L. T. 796; *Garner v. Wingrove*, [1905] 2 Ch. 233.

⁵ 2 & 3 Wm. IV. c. 71, s. 7.

⁶ *Ibid.*

⁷ Sects. 1 and 7.

⁸ Sect. 3.

⁹ See *Dormer v. Fortescue*, 3 Atk. 124, and *Wall v. Stanwick*, 34 Ch. D. 763. In this case, Kekewich, J., held that it was a legal presumption (if circumstances required it) that when a person is in occupation of an infant's property, he is in as the infant's bailiff; that is, when it is proper to make him accountable for the rents and profits of the infant's estate, and he cannot be shown to be in any other capacity.

¹⁰ *Bennet v. Whitehead*, 2 P. Wms. 644.

¹¹ *Nanney v. Williams*, 22 Beav. 452.

¹² *Lockey v. Lockey*, Prec. Ch. 518.

an infant, or one who is so connected with the infant by relationship or otherwise, as to have the duty imposed upon him of protecting, or, at any rate, not prejudicing, the infant's rights. In the first case the stranger would not be treated as such bailiff or trustee, whereas the parent or guardian would be so treated.¹

This difference is material as regards the time within which the infant could assert his rights. Thus, "where a father is in possession of an estate belonging to an infant child, he will, under ordinary circumstances, be presumed to have entered on it as his guardian or bailiff, and such possession during the infancy is one on which the statute will not operate, and the entry on and possession of an infant's estate by others than his father may be made and retained under such circumstances as to make the same rule applicable to such entry and possession."² And where the person so held to be guardian or bailiff continues in possession after the infancy has ceased, he is supposed to continue in possession in the same character as before, unless something is done to change the character of the possession; and the statutes will not run even after the infancy has ceased until the character of the possession is changed.³ Under ordinary circumstances, if the person in possession is a stranger, the infant could not bring his action to recover the land after six years from the date of his majority, when his disability ceased.⁴

Where person in a fiduciary position is in possession, infant's remedy not barred till twelve years after majority.

(b) *Personal Property*.—The time within which an action must be brought to enforce a claim founded on debt is six years;⁵ if, however, any person entitled to bring such action is an infant at the time of the accrual of the right he may bring his action within six years after attaining his majority.⁶ If the person so entitled dies under age his personal representative would be entitled to bring the action within six years from the death.⁷ Though an action to recover money secured by mortgage, judgment, or lien, or otherwise charged upon or payable out of land or rent, must be brought within twelve years next after the right to receive it accrued, an infant has twelve years from the time of attaining his majority within which to bring any such action.⁸

Where possession is in a stranger, infant's remedy barred six years after majority. Personal property.

(c) *Personal Injuries or Torts*.—The time within which an action must be brought to enforce a claim founded on trespass, detinue and replevin for goods and chattels, and on trespass *quare clausum fregit* is six years;⁹ an action founded on trespass, assault, battery, wounding, or imprisonment must be brought

Torts.

¹ *Thomas v. Thomas*, 25 L. J. Ch. 159.

² *Pelly v. Bascombe*, 11 W. R. 766.

³ *Darb. & Bos. Stat. Lim.* 394, 395. See *Re Hobbs, Hobbs v. Wade*, 36 Ch. D. 553.

⁴ 37 & 38 Vict. c. 57, s. 3; and see *Thomas v. Thomas (ubi sup.)*.

⁵ 21 Jac. I, c. 16, s. 3.

⁶ Sect. 7.

⁷ See *Townsend v. Deacon*, 18 L. J. Ex. 298.

⁸ 37 & 38 Vict. c. 57, s. 8. See *Sutton v. Sutton*, 22 Ch. D. 511.

⁹ 21 Jac. I, c. 16, s. 3.

within four years from the accrual of the right to bring such action; and an action founded on slander must be brought within two years next after the words spoken.¹ If, however, any person entitled to bring any of the above actions is an infant at the time of the accrual of the right, he may bring his action within the before-limited times after attaining his majority.² If the person entitled dies under age his personal representative would be able to bring the action within the above-mentioned periods from the death.³ Purely personal actions would of course die with his death. The court will take the tenderest care of the interests of infants, and in cases of difficulty and doubt will always grant an order that the property in which they are interested shall be administered under its supervision.⁴ But such order will not now be granted as of course at the expense of the estate because a party to the suit is an infant.⁵

National Debt
Act, 1892.

Where an infant is the sole survivor in an account, or holds stock jointly with a person under legal disability, or where stock has by mistake been brought in or transferred into the sole name of an infant, the Bank of England may, at the request in writing of the parent, guardian, or next friend of the infant, receive the dividends and apply them to the purchase of like stock, and the stock so purchased shall be added to the original investment.⁶

Protection of
court extended
beyond infancy.

Even after the infant has attained twenty-one, the court will protect him from binding his interests, if any attempt is shown to derive advantage from his ignorance or inexperience;⁷ or where undue influence is brought to bear upon him.⁸

¹ 21 Jac. 1, c. 16, s. 3.

² Sect. 7.

³ See *Townsend v. Deacon*, 18 L. J. Ex. 298.

⁴ *Re Wilson, Alexander v. Calder*, 28 Ch. D. 457; Ord. LV. r. 10.

⁵ *Re Blake, Jones v. Blake*, 29 Ch. D. 913.

⁶ 55 & 56 Vict. c. 39, s. 3.

⁷ *Grosvenor v. Sherratt*, 28 Beav. 689.

⁸ *Smith v. Kay*, 30 L. J. Ch. 45. See *ante*, pp. 572 *et seq.*

CHAPTER VII.

ACTIONS BY AND AGAINST INFANTS.

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Actions by Infants.

(1) *Actions at Law*.—As an infant is legally lacking in discretion, Actions at law. and is unable to render himself liable to the costs of an action, he is incapable of bringing an action without the assistance of some person who may be responsible to the court for the propriety of the suit in its institution and progress. When an infant becomes a plaintiff, the process is sued out in his name, but some person of full age must conduct it for him. Thus, trover for goods belonging to an infant should be brought in his own name, and not that of his father;¹ and an infant may sue in his own name for wages.² This person used to be styled in common law suits

¹ *Hunter v. Westbrook*, 2 C. & P. 578.

² *Rex v. Chillessford*, 4 B. & C. 94.

"*Prochein amy.*"

the "*prochein amy*," but now the Chancery designation of "next friend" is employed both in common law and equity actions. There is now no distinction between the common law and Chancery method of commencing actions, for the latter practice is to prevail.¹

Equity.
Infant must
sue by next
friend.

(2) *In Equity*.—The Courts of Equity always required that an infant should sue by his next friend, not only because he was supposed to lack discretion, and that, therefore, there must be some one responsible for the suit not being an improper one, but also that there might be some one who would be responsible for the costs incurred; but an infant's next friend is not bound to give security for costs;² but where he is insolvent and seeks to appeal, then he must give security for the costs of the appeal.³ It seems that the defendant may waive his right to have a next friend appointed as security for his costs.⁴ The next friend is required not only in actions, but in petitions,⁵ motions, and all other applications.⁶ A suit may be brought by an infant *en ventre sa mère*.⁷

Infant *en*
ventre sa mère.

Action is at
the suit of
the infant.

The action when brought is at the suit of the infant, and not that of the next friend,⁸ though if an action is commenced on behalf of an infant without a next friend, the defendant may move to have it dismissed with costs to be paid by the solicitor.⁹ But where an action has been commenced by the plaintiff as an adult, and the defendant subsequently discovers that he is an infant, the former may be allowed to amend by inserting a next friend.¹⁰ So where an infant is made a co-plaintiff without proper authority, the solicitor who wrongly joins him may be ordered to pay the costs of such improper joinder.¹¹

Infant, gene-
rally, cannot
sue by next
friend *in formâ*
pauperis.

An infant, broadly speaking, cannot sue by next friend *in formâ pauperis*; ¹² but where he is so circumstanced that he can only obtain a pauper as next friend, and a special application is made on his behalf, it seems that he might be allowed to sue by such next friend *in formâ pauperis*.¹³

In matters relating merely to procedure or to the conduct of the cause, the next friend or guardian is competent to act so as to bind the infant without obtaining an order of the court.¹⁴

¹ Judicature Act, 1873, Ord. XVI. r. 8; Rules of the Supreme Court, 1883, Ord. XVI. r. 16. "Infants may sue as plaintiffs by their next friends, in the manner heretofore practised in the Chancery Division."

² *Hind v. Whitmore*, 2 K. & J. 458; Set. Judg. & Ord. 824.

³ *Swain v. Follows*, 18 Q. B. D. 585; R. S. C. Ord. LVII. r. 15.

⁴ *Ex parte Brocklebank, Re Brocklebank*, 6 Ch. D. 358.

⁵ *Jones v. Lewis*, 1 De G. & S. 245.

⁶ *Coe v. Wright*, 9 Jur. (N.S.) 981.

⁷ See *Wallis v. Hodson*, 2 Atk. 114, 117; *Robinson v. Litton*, 3 Atk. 209, 211.

⁸ *Flight v. Bolland*, 4 Russ. 298.

⁹ Dan. Ch. Pr. 106.

¹⁰ *Ibid.*; *Flight v. Bolland* (*ubi sup.*).

¹¹ *Geilinger v. Gibbs*, [1897] 1 Ch. 479.

¹² *Anon.*, 1 Ves. 409.

¹³ *Lindsay v. Tyrrell*, 2 De G. & J. 7.

¹⁴ *Knatchbull v. Fowle*, 1 Ch. D. 604. Ord. XVI. r. 21, provides that in all causes or matters to which an infant is a party, any consent as to the mode of taking evidence,

An infant in equity was not permitted to make an admission against himself, nor was his representative, such as a next friend. Discovery against an infant. This was the rule till recent years, but now under the Rules of the Supreme Court¹ discovery, whether of documents or by way of interrogatories, may be had against infant plaintiffs and defendants, and against their next friends and guardians *ad litem*.

An infant cannot validly bind himself to refer his cause or action to arbitration² and the court would not seem to have any power under the Arbitration Act, 1889,³ to refer a cause or matter or question in dispute unless all the parties to it are under no disability. If any matter in dispute has been referred by him to arbitration, it is clear that his death before the award revokes the submission.⁴ After an award it is too late for an adult party who was aware that the other party was an infant to object to the award on the ground of the infancy of the other party.⁵ No special case in any cause or matter to which an infant is a party shall be set down for argument without leave of the court or a judge, the application for which must be supported by sufficient evidence that the statements contained in the special case, so far as they affect the interest of the infant, are true.⁶ If after a special case affecting property belonging to certain infants is filed, another child in the same interest as the other infants is born, the latter infant need not be made a party.⁷

The court is not obliged to accept any and every person as the next friend of an infant. The nearest relative of the infant is supposed to be the person who will take the infant under his protection (when circumstances require it), and prosecute an action for the assertion of his rights, or the redress of his wrongs. But as it frequently happens that the nearest relation of the infant is the person who invades his rights, or at least neglects to give that protection to the infant which his consanguinity or affinity calls upon him to give, the court, in favour of infants, will permit any person to institute suits on their behalf; and whoever thus acts the part which the nearest relation ought to take is styled the next friend of the infant. The father, however, is the natural guardian of his children, and if not adversely interested or otherwise disqualified, has a paramount vested right to be appointed their next friend in substitution for a stranger, who, without communicating with him, has constituted himself their next friend and commenced an action on their behalf.⁸ Who may be next friend.

or as to any other procedure, shall, if given with the consent of the court or a judge by the next friend or guardian of the person under disability, have the same force and effect as if such party were under no disability, and had given such consent.

¹ Ord. XXXI. r. 29.

² See *Biddle v. Douse*, 6 B. & C. 255.

³ 52 & 53 Vict. c. 49, s. 14.

⁴ See *Bristow v. Binas*, 3 D. & R. 184.

⁵ *Wrightson v. Bynwater*, 3 M. & W. 199; *Bowyer v. Worksidge*, 3 Lev. 17.

⁶ R. S. C. Ord. XXXIV. r. 4.

⁷ *Palmer v. Flower*, L. R. 13 Eq. 250.

⁸ Dan. Ch. Pr. 106; *Woolf v. Pemberton*, 6 Ch. D. 19.

Who may not
be next friend.

The next friend should not be a defendant, or a person whose interests conflict with those of the infant;¹ nor can he be a receiver in the cause.² He ought to be an independent person and in no way connected with the defendant; and if he is so connected, he will be removed, though as regards his personal character and pecuniary position he would be a fit person.³ The personal incapacity of a married woman to act as a next friend seems not to be removed.⁴ As the next friend is not a party to a cause or action it would seem that the provision of Order XVII. Rule 1, of the Rules of the Supreme Court against the abatement of such cause or action by the marriage of a party to it does not apply to the case of a female next friend who marries; consequently the old practice would prevail, and the suit would be deemed to have abated; and the infant would require to have a new next friend, and obtain an order to revive;⁵ and on the failure of the infant to do so, the defendant might obtain an order that the plaintiff should revive or the action be dismissed.⁶

Next friend
need not give
security for
costs.

The next friend should be a person of substance, but he is not required to give security for costs on the ground of poverty, because the court is anxious not to discourage suits on behalf of infants, and may restrain them if it thinks them improper.⁷ The court will, therefore, whenever it can be done, allow the next friend the costs out of the infant's estate of any proceeding instituted by him on behalf of the infant, even though unsuccessful, if undertaken *bonâ fide*.⁸

Authority of
next friend
must be in
writing.

Before the name of any person shall be used in any action as next friend of any infant, such person shall sign a written authority to the solicitor for that purpose.⁹ But if his name be used without his consent, it will be struck out on his application.¹⁰

Powers of the
next friend.

The next friend has the conduct of the action in his power, but only the conduct of it, and whatever he does must be for the benefit of the infant; and if his conduct is not beneficial as regards the interests of the infant the latter is not bound by it.¹¹ But he is now a party to the action so as to be compellable to make discovery as to documents, or to answer interrogatories.¹²

¹ *Lewis v. Nobbs*, 8 Ch. D. 591.

² *Stone v. Wishart*, 2 Madd. 64; *Re Lloyd, Allen v. Lloyd*, 12 Ch. D. 447.

³ *Re Burgess, Burgess v. Bottomley*, 25 Ch. D. 243.

⁴ *Re Duke of Somerset, Thynne v. St. Maur*, 34 Ch. D. 465.

⁵ *Jones v. Jones*, 17 W. R. 103.

⁶ *Crispe v. Braddy*, 9 L. J. Ch. 108.

⁷ *Fellows v. Barrett*, 1 Keen, 119; *Murrell v. Chapman*, 8 Sim. 74; and see *Pennington v. Alvin*, 1 Sim. & St. 264.

⁸ *Staines v. Maddox*, Mos. 319; *Pritchard v. Roberts*, L. R. 17 Eq. 222; Dan. Ch. Pr. 115.

⁹ R. S. C. 1883, Ord. XVI. r. 20. This authority is to be filed in the Central Office, or in the District Registry, if the cause or matter is proceeding therein.

¹⁰ *Ward v. Ward*, 6 Beav. 251.

¹¹ *Rhodes v. Swithenbank*, 22 Q. B. D. 577. For compromises sanctioned by the court, see *Simp. Inf.* 516.

¹² R. S. C. 1893, Ord. XXXI. r. 29.

The court has no jurisdiction to force a compromise on him on behalf of the infant.¹

Though the court favours the bringing of suits on behalf of infants, it will yet check any tendency to bring actions which are clearly not for their benefit. Where a suit has been commenced on behalf of an infant, under circumstances raising a strong suspicion against the motives of the next friend, the court will direct an inquiry whether the suit is for the benefit of the infant, and if so, whether such next friend is a proper person to conduct it, or otherwise who is a proper person to be appointed next friend in his place.² Where upon inquiry it appears that the action is not for the benefit of the infant, either the proceedings will be stayed, or else, if there is no excuse for the fact of the action having been instituted, it will be dismissed with costs to be paid by the next friend,³ and in a clear case even without an inquiry.⁴ The result of the cases seems to be that the court exercises a very careful discretion on the one hand, in order to facilitate the proper exercise of the right which is given to all persons to bring an action on behalf of infants, and, on the other, to prevent any abuse of that right, and any wanton expense to the prejudice of infants.⁵ An application by the next friend of an infant for an inquiry as to whether a suit which he has himself instituted is for the infant's benefit will not be entertained, because the next friend, in commencing a suit, undertakes on his part that such suit is for the benefit of the infant;⁶ but this does not apply where the next friend *bonâ fide* applies for the purpose of ascertaining whether *another* suit which is pending by which the infant's property is subject to the control and disposition of the court is more to the advantage and benefit of the infant.⁷ The court has now ample power to check suits or other proceedings which in its opinion ought not to proceed.⁸

Inquiry as to whether suit beneficial, and as to fitness of next friend.

When proceedings stayed or dismissed.

Where more than one action for the same purpose has been instituted by different persons, each acting as the infant's next friend, the court will, before judgment, direct an inquiry as to which suit is most for his benefit; and when that fact has been ascertained, it will stay proceedings in the other action or actions;⁹ and where the first is to be stayed, and the second prosecuted, the court will give the first next friend his costs.¹⁰ The principle upon which the court acts is to give a preference to that action which is capable from its nature and frame of being most

Inquiry where there is more than one suit.

¹ *Re Birchall, Wilson v. Birchall*, 16 Ch. D. 41.

² *Nalder v. Hawkins*, 2 Myl. & K. 243; *Richardson v. Miller*, 1 Sim. 133; *Towsey v. Grimes*, 32 L. J. Ch. 225.

³ *Fox v. Suwerkrop*, 1 Beav. 583.

⁴ *Sale v. Sale*, 1 Beav. 586; *Gold's v. Kerr*, W. N. (Feb. 23, 1884) p. 46.

⁵ Dan. Ch. Pr. 108, 109, and the cases there cited.

⁶ *Jones v. Powell*, 2 Mer. 141.

⁷ *Taner v. Ivie*, 2 Ves. Sen. 466.

⁸ Ord. Lv. r. 10.

⁹ *Mortimer v. West*, 1 Swanst. 358.

¹⁰ *Starten v. Bartholomew*, 6 Beav. 143.

beneficially and effectually prosecuted, though in point of form the relief sought by the other is more extensive.¹ But where the merits of both suits are equal, then priority should prevail.² Where more than one suit is being brought, then it is open to either or any of the next friends to make an application as to whether the suit commenced by him should or should not be prosecuted.³ Again, where the property of an infant is the subject of an action already depending, and it becomes necessary that another action should be brought on his behalf, it is usual before any steps are taken in it to obtain in chambers on summons an order sanctioning such contemplated proceedings as being for his benefit.⁴ If both suits are proper both may be allowed to proceed.⁵

Inquiry as to
fitness of next
friend.

An inquiry, if necessary, will be ordered to ascertain whether or not the person acting as the infant's next friend should continue so to act; and if the result of the inquiry proves his unfitness, the court will not hesitate to remove him.⁶ The modern method of inquiry into the fitness of the next friend is by motion of which notice is given to the next friend.⁷

Removal of
next friend.

On what
grounds.

A next friend will be removed, if he have an interest in the suit adverse to the infant,⁸ or be an accounting party in the suit;⁹ or be so closely connected with a defendant having an adverse interest, that the infant's interest will probably not be protected;¹⁰ or if he will not proceed with the cause;¹¹ or conducts it improperly.¹² But he will not be removed merely on the ground of poverty;¹³ nor on grounds of suspicion, with no substantial case against his solvency, character, or conduct;¹⁴ nor merely because he is connected with the defendants, as by being clerk to their solicitor,¹⁵ if there is no probability that the infant's interest will be injuriously affected thereby,¹⁶ even if he be a stranger to the infant;¹⁷ and he will not be removed without being given an opportunity of explaining his conduct.¹⁸ But where the same solicitor acted for the next friend of the infant plaintiffs, and also for their father, who was a defendant, whose confidential solicitor he had been for years, it was held that he ought not to continue in the character of solicitor of the next friend.¹⁹ Unless there was some reason to the contrary in the interests of the infant,

¹ *Campbell v. Campbell*, 2 Myl. & Cr. 25.

² *Ibid.*

³ Dan. Ch. Pr. 110; and see *Taner v. Ieie*, 2 Ves. Sen. 466.

⁴ Dan. Ch. Pr. 309; and see *Harrison v. Richards*, L. R. 1 Ch. App. 473.

⁵ *Ashby v. Allen*, 16 Jur. 460.

⁶ Dan. Ch. Pr. 110; and see *Taner v. Ieie* (*ubi sup.*).

⁷ Dan. Ch. Pr. 108 *n. b*; but see *Anderton v. Yates*, 5 De G. & S. 202, in which case there was a petition.

⁸ *Gee v. Gee*, 12 W. R. 187.

⁹ *Hopkinson v. Roe*, 9 L. J. Ch. (O.S.) 7.

¹⁰ *Peyton v. Bond*, 1 Sim. 390; *Re Burgess, Burgess v. Bottomley*, 25 Ch. D. 243.

¹¹ *Ward v. Ward*, 3 Mer. 706.

¹² *Russell v. Sharpe*, 1 J. & W. 482.

¹³ *Squirrel v. Squirrel*, 2 P. Wms. 297 *n.*

¹⁴ *Smallwood v. Rutter*, 9 Ha. 24.

¹⁵ *Lloyd v. Davies*, 10 Jur. (N.S.) 1041.

¹⁶ *Sandford v. Sandford*, 9 Jur. (N.S.) 398.

¹⁷ *Piffard v. Beeby*, 14 W. R. 948.

¹⁸ *Re Corsellis, Lawton v. Elwes*, 50 L. T. 703.

¹⁹ *Peyton v. Bond* (*ubi sup.*); *Re Burgess, Burgess v. Bottomley* (*ubi sup.*).

the father,¹ and now the surviving mother,² or a testamentary guardian,³ has the right to apply to remove the next friend and be substituted in his place.

When the next friend finds it necessary to retire from his office, he may apply to the court to have another person substituted for him; and he will, as a rule, be permitted to retire on giving security to the defendant for the costs already incurred;⁴ but he cannot withdraw on his own motion without giving security for costs, if necessary.⁵ Any person may commence a suit as a next friend of an infant; but when once he has assumed that character, he will not be removed unless the court is informed of the circumstances and respectability of the party proposed to be substituted in his place; and that such person is not interested in the subject of the suit.⁶ But where the next friend of an infant plaintiff dies, his nearest paternal relations are entitled to nominate the new next friend; and in such a case no affidavit of fitness of the new next friend is required.⁷ This would also be the case where the first next friend became incapacitated,⁸ or removed.⁹ Before appointing a person as a new next friend, the written authority of such person expressing his willingness to act in such capacity must be filed.¹⁰ An infant is not to suffer from the negligence or want of knowledge of the next friend; and he may impeach a judgment founded on error of fact, and is not required to adduce the usual evidence that the facts relied on for relief were not known and could not have been discovered with reasonable diligence.¹¹

When next friend retires, the court must be satisfied of fitness of person substituted.

Infant attaining majority during pendency of suit

Where an infant sole plaintiff attains twenty-one, he may then elect whether to go on with or repudiate the suit that has been begun in his name. If he elect to continue the suit, it will be carried on in his name, and he becomes liable for the costs from the beginning, as though the suit had been begun by him as an adult;¹² and his next friend should not take any further proceedings in the action in the plaintiff's name, though they might be consequential on proceedings taken anterior to his coming of age.¹³ If he repudiate it, he may obtain an order on motion or petition of course, on the payment of costs by himself, and the repudiation dates back from the beginning of the suit;¹⁴ but

¹ *Woolf v. Pemberton*, 6 Ch. D. 19.

² *Guardianship of Infants Act*, 1886 (49 & 50 Vict. c. 27).

³ *Hutchinson v. Norwood*, 31 Ch. D. 237.

⁴ *Melling v. Melling*, 4 Madd. 261; *Davenport v. Davenport*, 1 Sim. & St. 101.

⁵ *Melling v. Melling* (*ubi sup.*).

⁶ *Harrison v. Harrison*, 5 Beav. 130.

⁷ *Talbot v. Talbot*, L. R. 17 Eq. 347.

⁸ As to the capacity or incapacity of a married woman, see *Re Duke of Somerset, Thynne v. St. Maur*, 34 Ch. D. 465. See *ante*, p. 848.

⁹ *Dan. Ch. Pr.* 112, which see for the proper proceedings to be taken on the death, removal, or incapacity of the next friend.

¹⁰ *Ord. XVI. r. 20*, R. S. C. 1883.

¹¹ *Re Hoghton, Hoghton v. Fiddey*, L. R. 18 Eq. 573.

¹² See *Bligh v. Tredgett*, 21 L. J. Ch. 204.

¹³ *Brown v. Weatherhead*, 4 Ha. 122.

¹⁴ *Dunn v. Dunn*, 7 De G. M. & G. 25.

he cannot make the next friend pay the costs unless the suit is proved to be an improper one.¹

If the infant is a co-plaintiff, and on attaining twenty-one wishes to repudiate the suit, he should move on notice not to dismiss the suit, but to have his name struck out as plaintiff;² and this by way of special application;³ but if the next friend requires it, the infant will be added as a defendant.⁴ If he fails to go on with the action, the defendant may move to dismiss it, but he cannot make the plaintiff pay the costs.⁵

When the infant comes of age he cannot appear by a fresh solicitor, unless he has obtained an order to change solicitors.⁶

Costs.

Next friend
liable.

If an action on behalf of an infant is dismissed, the defendant is entitled to his costs, just as though the suit had been brought against him by an adult, notwithstanding it may have been sanctioned by the court.⁷ As against the defendant the next friend is liable to pay the costs of an unsuccessful suit or application.⁸ In a case, however, in which charges of misconduct were unsuccessfully made against a trustee, who at the same time was defending the trust estate, and the next friend was unable to pay the costs, the court allowed the trustee's costs to be raised out of the estate.⁹ Costs as between the infant plaintiff and the defendant are generally given much upon the same principle as in suits by adult parties.¹⁰

Costs of next
friend *primâ
facie* recover-
able against
infant.

Costs as between the infant and his next friend are entirely in the discretion of the court.¹¹ *Primâ facie* the next friend is entitled to recover costs against the infant,¹² if the suit be a proper one, or for such part of it as is proper,¹³ and this is so even though the next friend have in fact taken a mistaken view,¹⁴ so that the suit is dismissed.¹⁵ But if the suit is unnecessary or improper, and the next friend might with reasonable care have known it to be so, he must pay the costs personally,¹⁶ and the same rule applies to any improper application in a suit.¹⁷ The next friend is entitled to his costs as between solicitor and client where the infant's fund is one in possession; but where it is in reversion only, then only as between party and party; and he must wait for his full costs until the fund or part of it comes into possession.¹⁸ The solicitor's lien for his costs and charges

¹ *Anon.*, 4 Madd. 461. ² *Acres v. Little*, 7 Sim. 138; *Cook v. Fryer*, 4 Beav. 13.

³ *Ballard v. White*, 2 Ha. 158.

⁴ *Bicknell v. Bicknell*, 3 L. T. 377.

⁵ *Turner v. Turner*, 2 Stra. 708.

⁶ See *Swift v. Grazebrook*, 13 Sim. 185.

⁷ *Frank v. Mainwaring*, 4 Beav. 37.

⁸ *Buckley v. Puckeridge*, 1 Dick. 395.

⁹ *Walters v. Woodbridge*, 7 Ch. D. 504.

¹⁰ *Macph. Inf.* 393.

¹¹ *Clayton v. Clarke*, 3 De G. F. & J. 682.

¹² *Ibid.*; *Pritchard v. Roberts*, L. R. 17 Eq. 222.

¹³ *Thompson v. Sheppard*, 2 Cox, Eq. Cas. 161.

¹⁴ *Whittaker v. Marlar*, 1 Cox, Eq. Cas. 285.

¹⁵ *Taner v. Irie*, 2 Ves. Sen. 466.

¹⁶ *Pearce v. Pearce*, 9 Ves. 548.

¹⁷ *Simp Inf.* 483; *Buckley v. Puckeridge* (*ubi sup.*).

¹⁸ *Damant v. Hennell*, 33 Ch. D. 224.

may be enforced against the late infant who adopts a suit after attaining his majority;¹ but if the infant repudiate the suit then the solicitor has no lien on the deeds belonging to the infant which had been deposited by the defendant in the suit for inspection.²

An infant is in general bound by the acts of his solicitor,³ and is also usually bound by the effect of any action or proceedings instituted on his behalf and for his benefit; but if there has been any mistake in the form of such action, or in the proceedings under it, or in the conduct of them, the court will upon application permit such mistake to be rectified.⁴

Infant bound by acts of solicitor and beneficial proceedings.

Where the plaintiff in an action for administration refused to add infants in the judgment that had been pronounced before their birth, the defendants applied under Order XVII. Rule 4, to add the infants as parties, and obtained the order and the conduct of the case though they were themselves accounting parties.⁵

Infant plaintiff born after judgment.

Actions against Infants.

An infant cannot in *in propria personâ* appear to defend a suit brought against him any more than he can sue by himself; but as he was capable of being made a defendant in an action, a proper person was always appointed to defend on his behalf; and this person was called his guardian *ad litem*. Where an infant is a married woman, she must defend by her guardian *ad litem*.⁶

Actions against infants.

Infant defendant must appear by guardian *ad litem*.

(1) *Actions at Law*.—The mode of appointing a guardian *ad litem* at common law, and the general method of conducting an action, differed considerably from the Chancery practice. But it is now no longer necessary to notice this difference, because by the Judicature Act, 1873,⁷ infants may now defend by their guardians appointed for that purpose in the manner formerly practised in the Court of Chancery. The effect of this rule is to constitute the Chancery practice the sole practice in the matter. Where the infant is a lunatic the application to appoint a guardian must be made in Chancery and not in lunacy.⁸

Actions at law

(2) *In Equity*.—An infant may be sued just as much as an adult, but he is not permitted to conduct the suit in person. Formerly, where an infant was a defendant, an appearance was entered in his name, and then it became necessary to apply to the court, on motion or petition of course, for an order for the appointment of a proper person to conduct the suit on his behalf; and this person was called in equity, as in law, his guardian *ad litem*. But by the recent Rules of the Supreme Court, 1883, the

In equity.

¹ *Baile v. Baile*, L. R. 13 Eq. 497.

³ *Tillotson v. Hargrave*, 3 Madd. 495.

⁵ *Wicks v. Wicks*, W. N. (1887) 15.

⁶ *Colman v. Northcote*, 7 Jur. 528. See *ante*, p. 444.

⁷ 36 & 37 Vict. c. 66; Ord. XVI. r. 16, R. S. C. 1883.

⁸ *Pidcock v. Boulton*, 22 L. J. Ch. 611.

² *Dunn v. Dunn*, 24 L. J. Ch. 581.

⁴ *Dan. Ch. Pr.* 110.

Appearance to
be entered by
guardian *ad*
litem.

practice has been altered. The appearance is no longer entered in the infant's name, and the order of course has been dispensed with. It is now provided that "an infant shall not enter an appearance except by his guardian *ad litem*. No order for the appointment of such guardian shall be necessary, but the solicitor applying to enter such appearance shall make and file an affidavit in the Form No. 8 in Appendix A, Part II., with such variations as circumstances may require."¹ And "every infant served with a petition or notice of motion, or summons in a matter, shall appear on the hearing thereof by a guardian *ad litem* in all cases in which the appointment of a special guardian is not provided for. No order for the appointment of such guardian shall be necessary, but the solicitor by whom he appears shall previously make and file an affidavit as in the last rule mentioned."²

Who may and
may not be
appointed.

The guardian *ad litem* ought to be a fit and proper person, who is not a mere volunteer; and a relative will be chosen in preference to a mere volunteer;³ but a co-defendant may be appointed.⁴ But the plaintiff, or a married woman,⁵ or a person out of the jurisdiction cannot be appointed.⁶

Service on in-
fant defendant.

When an infant is a defendant to the action, service on his father or guardian, or if none, then upon the person with whom the infant resides or under whose care he is, shall, unless the court or judge otherwise orders, be deemed good service on the infant; provided that the court or judge may order that service made or to be made on the infant shall be deemed good service.⁷ Thus, where an infant resided with his mother and stepfather, and the notice was served at their house;⁸ and where the plaintiff was unable to discover where the infant's parents lived, and he served the notice at the head of the college of which the infant was an undergraduate,⁹ in each case the service was deemed sufficient. Where an infant is a member of a partnership, a judgment for goods supplied to the firm can only be recovered against the defendants "other than the infant partner"; and a receiving order against such a firm can only be made against the firm "other than the infant partner."¹⁰

Defence by
infant.

An infant may file a defence if it is to his interest to do so;¹¹ and on attaining twenty-one he is entitled to put in a new

¹ Ord. XVI. r. 18.

² Ord. XVI. r. 19. Where he is interested as a bare trustee only, he must be served and a guardian *ad litem* appointed. *Re Adams*, 57 L. T. 337.

³ *Banfield v. Grant*, 11 W. R. 275; *Simp. Inf.* 489.

⁴ See *Re Dawson, Johnston v. Hill*, 41 Ch. D. 415. The court prefers a competent person with no adverse interest already a party. *Simp. Inf.* 489.

⁵ See *Re Duke of Somerset, Thynne v. St. Maur*, 34 Ch. D. 465.

⁶ *Dan. Ch. Pr.* 173.

⁷ Ord. IX. r. 4.

⁸ *Hitch v. Wells*, 8 Beav. 576.

⁹ *Christie v. Cameron*, 2 Jur. (N.S.) 635.

¹⁰ *Lovell v. Beauchamp*, [1894] App. Cas. 607.

¹¹ *Holden v. Hearn*, 1 Beav. 445.

defence;¹ and if he take no further step, his defence filed during minority will bind him by acquiescence after majority.²

Where the infant fails to put in an appearance, the practice is different. It is now provided that where no appearance has been entered to a writ of summons for a defendant who is an infant, the plaintiff shall, before further proceeding with the action against the defendant, apply by motion to the court or a judge for an order that some proper person be assigned guardian of such defendant, by whom he may appear and defend the action. But no such order shall be made unless it appears on the hearing of such application that the writ of summons was duly served, and that notice of the intended application was, after the expiration of the time allowed for appearance, and at least six clear days before the day in such notice named for hearing the application, served upon or left at the dwelling-house of the person with whom or under whose care such defendant was at the time of serving such writ of summons; or, where the infant does not reside with or under the care of his father or guardian, served upon or left at the dwelling-house of the father or guardian, if any, of such infant, unless the court or judge at the time of hearing such application shall dispense with such last-mentioned service.³ Where a plaintiff signs judgment for default of appearance the court has entire discretion whether such judgment shall be set aside.⁴ In cases where the application for the appointment of a guardian is made at the instance of the plaintiff, the official solicitor to the Suitors' Fund is usually appointed.⁵ The court provides for the costs of the latter by making the plaintiff pay them, who in his turn may add them to his own.⁶ It is the duty of the guardian to defend the action in the interests of the infant, and he will be held responsible for the propriety of its conduct;⁷ though he will not be rendered personally liable for costs, except in the case of gross misconduct.⁸

Default of appearance by infant.

Application to court to assign a guardian.

Where an infant defendant is out of the jurisdiction, the notice of an application for the appointment of a guardian *ad litem* must be served on the parent or guardian of such infant;⁹ and where the foreign guardian refuses to appear, the court may nominate the official solicitor as the infant defendant's guardian *ad litem*.¹⁰ But where the infant is abroad, and has no substantial interest in the suit, the court may dispense with the notice.¹¹

Where infant defendant is out of the jurisdiction.

¹ *Fawkner v. Watts*, 1 Atk. 405; Dan. Ch. Pr. 181.

² *Cecil v. Salisbury*, 2 Vern. 224; and see *Money Penny v. Dering*, 4 De G. & J. 175.

³ Ord. XIII. r. 1.

⁵ *Thomas v. Thomas*, 7 Beav. 47.

⁷ Dan. Ch. Pr. 175.

⁹ *O'Brien v. Mailand*, 10 W. R. 275.

¹⁰ *White v. Duvernay*, [1891] 1 P. 290; Ord. XIII. r. 1.

¹¹ *Lambert v. Turner*, 10 W. R. 335.

⁴ *Furnival v. Brooke*, 49 L. T. 134.

⁶ *Harris v. Hamlyn*, 3 De G. & S. 470.

⁸ *Morgan v. Morgan*, 11 Jur. (N. S.) 233.

Appointment
of new guar-
dian *ad litem*.

On the death of a guardian *ad litem* a new one will be appointed.¹ The guardian will be removed if he does not do his duty, or for other sufficient grounds,² or if he have been improperly appointed.³ The Probate Court has like power to inquire whether a guardian *ad litem* is a fit and proper person, and to discharge the order of his appointment if he be found an unfit person, and whether the action should or should not be continued.⁴

Allegations of
fact not denied
by the infant's
pleading do
not bind him
as admissions.

Allegations of fact in pleadings which are not specifically or impliedly denied do not bind infants as they do adults;⁵ consequently judgment cannot be obtained against them on admissions or on the pleadings.⁶ Where it is unnecessary a defence on behalf of an infant should not be filed.⁷ But as a judgment cannot be obtained on express admissions by an infant a plaintiff must, as a rule, prove his case; though where the action involves inquiries by the court, the latter will not insist upon such proof, as in conducting the inquiries it can protect the infant.⁸ But where the plaintiff moved for judgment in a case where the guardian *ad litem* put in no defence, and did not disapprove of the minutes of judgment, the plaintiff was allowed to prove his claim by affidavits, without having recourse to trial in order to prove his case; but such a course was to the advantage of the infant.⁹

Infant now
liable to make
discovery.

Discovery can now be sought against an infant either by way of interrogatories, or by discovery of documents.¹⁰ It is a matter of some doubt whether interrogatories can be served on a minor who is a suitor in the Divorce Court, but they cannot be served for the purpose of obtaining an admission of adultery from him or her.¹¹ An admission in an action of a person from whom an infant derives title may be used against him.¹² But an infant heir when plaintiff is not so bound.¹³

Consent of
next friend,
&c., as to pro-
cedure binds
infant if with
consent of
court.
New defence
after majority.

The consent of a next friend or guardian *ad litem* as to the mode of conducting a cause shall bind the infant if given with the consent of the court or a judge.¹⁴ A guardian *ad litem* is now such a party to the action as to render him compellable to answer interrogatories.¹⁵

If an infant defendant on coming of age is dissatisfied with

¹ *Needham v. Smith*, 6 Beav. 130.

² *Russell v. Sharpe*, 1 J. & W. 482. This application must be made by the infant by his next friend for the purpose of the application, *Cox v. Wright*, 11 W. R. 870; Dan. Ch. Pr. 175.

³ *Sandys v. Cooper*, 4 L. J. Ch. 162.

⁴ *Percival v. Cross and Others*, 7 P. D. 234.

⁵ Ord. XIX. r. 13.

⁶ See R. S. C. Ord. XXXII. r. 6; *Byrne v. Byrne*, 5 L. R. Ir. 493.

⁷ *Re Fitzwater*, *Fitzwater v. Waterhouse*, 52 L. J. Ch. 83.

⁸ *Ripley v. Sawyer*, 31 Ch. D. 494. In this case, on a motion for judgment in default of pleading in a partition action where some of the defendants were infants, an affidavit by the plaintiff was dispensed with, as the usual inquiries were deemed sufficient protection to the infants.

⁹ *Re Fitzwater*, *Fitzwater v. Waterhouse* (*ubi sup.*). See *Gardner v. Tapling*, 33 W. R. 473.

¹⁰ R. S. C. 1893, Ord. XXXI. r. 29.

¹¹ *Redfern v. Redfern*, [1891] P. 139.

¹² *Holder v. Hearn*, 1 Beav. 145.

¹³ *Thorns v. Bowyer*, 4 L. J. Ch. 68.

¹⁴ Ord. XVI. r. 21. See *Knatchbull v. Fowle*, 1 Ch. D. 604.

¹⁵ R. S. C. 1893 Ord. XXXI. r. 29.

the defence put in by his guardian, he may apply, whether before or after judgment, to the court for leave to amend his defence or put in a new one ;¹ but his application must be made as soon as possible after reaching majority, otherwise his laches will disentitle him to relief.² How far an infant, whether plaintiff or defendant, is bound by a judgment or decree, has been discussed above.³

The practice as to bringing in an infant born after judgment in an action in which he becomes an interested or necessary party on his birth has not been uniform, especially in cases where proceedings had been taken between the birth and the obtaining of an order under 15 and 16 Vict. c. 86, s. 52, now Order XVII. Rule 4, of the Rules of the Supreme Court, 1883,⁴ in the nature of a supplemental action, and it has been held that where such proceedings had taken place, such order was insufficient, and that a supplemental action was necessary.⁵ But the weight of authority is to the effect that such supplemental action is not now under all circumstances necessary. The late Sir G. Jessel drew up an order which he directed in such a case should be obtained. The order was to the following effect: that "an inquiry be made whether any proceedings affecting the interest of the infant in this action have been had therein since his birth, and if so, whether it will be fit and proper, and for the benefit of the infant, that he should be bound by the said decree (or judgment, or order) and the proceedings thereunder; and if it shall be so certified, it is ordered that the infant be bound accordingly, as from the date of the said decree, &c.; and in that case, or in case it shall appear that no proceedings affecting the interest of the infant in this action have been had since his birth, it is ordered that the accounts and inquiries directed by the said decree, &c., be carried on and prosecuted by the plaintiff against the infant in like manner as if the infant had been originally a defendant to this action."⁶ But this order is conditional upon the appearance of the infant by his guardian, and if the latter refuses to appear, the order would be inoperative.⁷ This difficulty has been obviated by prefacing the above order with a direction that the proceedings in the action be carried on between the plaintiffs and defendants and the infant. By means of such additional direction regular appearance can be entered. The first part of the order will make the infant a defendant in the action, and then regular service will be effected, and the

Infant born after judgment in an action in which he becomes an interested party.

Supplemental action.

Direction that proceedings in the action be carried on.

¹ Dan. Ch. Pr. 178, 181.

² See *Bennett v. Leigh*, 1 Dick. 89.

³ *Ante*, chap. ii. p. 759.

⁴ This was Order IV. Rule 4, of the Judicature Act Rules, 1875. See *Scruby v. Payne*, W. N. (1876) p. 227; *Williams v. Williams*, in Chambers, May 16, 1876.

⁵ *Haldane v. Eckford*, W. N. (1879) p. 80. This case can be considered no longer law.

⁶ This was followed by Chitty, J., in *Peter v. Thomas-Peter*, 26 Ch. D. 181. See Set. Judg. & Ord. 102.

⁷ *Peter v. Thomas-Peter* (*ubi sup.*).

result will be that he has been made a party to the action. The practice will therefore be assimilated to a case where the new party added is *sui juris*; and although a party *sui juris* can waive any objection, but an infant cannot, yet the court can waive the objection on behalf of the infant, if it be satisfied that by so acting it is acting for the benefit of the infant. The practice, therefore, is for the infant first to be made a regular party, and then for the inquiry to proceed. If the inquiry be answered in the affirmative, the infant forthwith becomes bound, but if the inquiry be answered in the negative, it will be open for the plaintiff to proceed by supplemental action.¹ Notice of an order or judgment must be served on an infant in the same manner as a writ of summons in an action.²

Infant first
made a party.
Inquiry if suit
be beneficial.

Costs.

The guardian *ad litem* and the infant defendant may be ordered to pay the costs of a successful action against them.³ The infant's costs may be charged on his share in a partition action.⁴ Where an infant has become liable for costs, the solicitor should not deliver the bill to the infant himself, but to his parent or guardian.⁵

Injunction.

A person after attaining majority is liable to have an injunction granted restraining him from committing a breach of an agreement entered into by him during infancy.⁶

Proof of infancy in an action.

When a defendant sets up the plea of infancy in an action the *onus* of proof lies on him;⁷ and strict evidence of it is required. The best evidence of a person having been born on a particular day is that of some one who was present at his birth, or in the house on that date,⁸ and can identify him. Hearsay evidence of it is insufficient; thus, a letter of a deceased parent stating the exact age of the infant is inadmissible;⁹ so, too, an affidavit stating the date of the defendant's birth made by his dead father in an action to which the plaintiff was not a party has been held inadmissible as evidence of the defendant's age.¹⁰ An entry in the register of baptisms of the date of birth is not evidence of the date of birth, but only of the baptism;¹¹ and an entry in the register of births under the Registration Act, 1836,¹² is only evidence of the fact of registration on a particular day, and that the person was born before that day, but not of the exact date of birth.¹³

¹ *Cupps v. Cupps*, L. R. 4 Ch. App. 1; *Peter v. Thomas-Peter*, 26 Ch. D. 181; Set. Judg. & Ord. 106.

² Ord. XVI. r. 34.
³ *Vician v. Kennelly*, 63 L. T. 778. See *Chubb v. Griffiths*, 35 Beav. 137, in which case an infant who had acted fraudulently was condemned in costs occasioned by his misconduct.

⁴ *Frazer v. Thompson*, 1 Giff. 337.
⁵ Rule 7 of the General Order of the Solicitors' Remuneration Act, 1881.

⁶ See *Evans v. Ware*, [1892] 3 Ch. 502.

⁷ *Jeune v. Ward*, 2 Stark. 328; *Hartley v. Wharton*, 4 Jur. 576.

⁸ *Burghart v. Angerstein*, 6 C. & P. 690, 696.

⁹ See *Figg v. Wedderburne*, 11 L. J. Q. B. 45.

¹⁰ *Haines v. Guthrie*, 13 Q. B. D. 818.

¹¹ *Burghart v. Angerstein*, 6 C. & P. 690; *Re Turner, Glenister v. Harding*, 29 Ch. D. 985.

¹² 6 & 7 Wm. IV. c. 86, s. 38.

¹³ *Re Wintle*, L. R. 9 Eq. 373.

PART V.

MASTER AND SERVANT.

CHAPTER I.

DOMESTIC AND MENIAL SERVANTS.

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BLACKSTONE in his Commentaries¹ says that the relation of Master and Servant "is founded in convenience, whereby a man is directed to call in the assistance of others where his own skill and labour will not be sufficient to answer the cares incumbent upon him." Slavery with its incidents may be dismissed from consideration as being utterly repugnant to modern English social and legal notions. Freemen alone are concerned.

Without venturing to attempt to define exhaustively (which would be next to an impossibility), the following is put forward as a rough definition of the terms "servant" and "master." A "servant" is a person who voluntarily agrees, whether for wages or not, to subject himself at all times during the period of service to the lawful orders and directions of another in respect of certain work to be done. A "master" is the person who is legally entitled to give such orders and have them obeyed.² This definition does not embrace a large number of persons who from time to time, and for various purposes, are styled servants; thus, "in actions for seduction, a person who does any trifling act of service is regarded as a servant. Mere casual temporary employ-

Definition of
"master" and
"servant."

¹ 1 Com. 422.

² See *Townshend v. Windham*, 2 Vern. 546. Mr. Justice Stephen in his "Digest of the Criminal Law" (p. 220) thus defines a servant: "A servant is a person bound either by an express contract of service or by conduct implying such a contract, to obey the orders and submit to the control of his master in the transaction of the business which it is his duty as such servant to transact." See *Reg. v. Negus*, L. R. 2 C. C. R. 34.

ment for a particular purpose will not suffice to make a person a servant within the meaning of some statutes. In the case of others this is enough. Servant is used, for example, in one sense in the Carriers Act (11 Geo. IV. & 1 Wm. IV. c. 68, s. 8), and in another in the Larceny Act (24 & 25 Vict. c. 96, s. 68)."¹

Hale in his Analysis² classifies the relationship now under discussion among the "relationships æconomical," or domestic relations; and Blackstone also styles it an "æconomical relation." It is a thoroughly domestic relationship, and in more ancient times the respective positions of wife and of child and of servant in regard to the head of the family were much nearer akin to one another than they are at present. The family of the Eastern patriarch or Roman father was constituted of units owning implicit obedience to their head, whose word was a law to them. There is not a relationship between men which exemplifies in a more marked degree the truth of the pregnant remark that the progress of human institutions is from status to contract, than that of master and servant. Of old the servant was in the condition of a slave, a bondsman, a captive of war, of one sold into servitude, or reduced into slavery by creditors, or by those whom he had wronged. In that state he remained; and his children after him were slaves also; his life and body and freedom were at the disposal of his master, who could deal with him as seemed best in his eyes. In time, and more especially under the softening influences of Christianity, the lot of the slave was bettered. In England all traces of slavery seem to have vanished by the end of the sixteenth century; and the relation of master and servant flowed from a pure contract of hiring and service; but it is not until more recent periods that statutes legalizing compulsory labour have been repealed. There is another class of servants who more nearly approach the older type and statutes of slavery, namely, apprentices; but their bonds are for a limited period of years, and their work is for their own advancement and good.

The scope of this portion of the law of Domestic Relations will be confined to domestic and menial servants, and will embrace but a small portion of the law that is ordinarily treated of under the head of Master and Servant. Indeed, strictly speaking, the very term domestic or family relations would exclude all those persons who could not satisfy its requirements. That wide branch of the law which deals with the relations of those who are popularly known as "Employers and Employed" (especially as regards the compensation of those who are personally injured in the course and by reason of their employment) will not be discussed in the succeeding chapters; nor will there be any need to have

Relation of
master and
servant a
domestic
relation.

Relation of
master and
domestic or
menial ser-
vants only
discussed.

recourse to the intricate legislation which in more recent years has appeared on the Statute Book, owing to the great increase of commercial wealth and the development of trade and the general resources of the country. Domestic servants are still excluded from the purview of this class of legislation. At the same time it will be necessary to illustrate and gather up the principles affecting the more limited relations of domestic servants and their hirers by the case law which deals primarily with the relations of those who are excluded from present consideration, where such principles are common to both classes. The reason lies in the fact that the every-day circumstances of the non-domestic employed, such as farm labourers, factory operatives, workers in mines, railway servants, and others engaged in risky trades, are more likely to cause litigation; their relations to their employers are in more pronounced contrast, and there is less status than contract in their mutual dealings, and so provocative of sharper disagreement. Further, the position in which non-domestic servants stand to each other and the community at large affords more frequent facilities than that of domestic servants for testing the mutual relations of employers and employed, and the responsibility of both towards third persons affected by the acts of the employed. Yet because the principles of law are to a considerable extent common to the different classes of servants, the more numerous illustrations afforded by certain classes of them as set forth in the case law may be used to explain the relations of the other classes which are less frequently litigated in the courts.

There are, then, three classes of servants: (1) Menial, including domestic servants; (2) Apprentices; (3) Workmen employed in non-domestic occupations. The present discussion will be concerned with domestic servants and apprentices.

There is no hard-and-fast rule as to who are domestic or menial¹ servants; and each case must depend upon its own

¹ The term "menial" is derived through the French "*meisnee*," "*menie*," from the low Latin word "*mansionata*," signifying a household. Its meaning was afterwards extended, and it signified under the form "*meiny*," a following, or retinue. Shakespeare thus uses it: "They summoned up their meiny: straight took horse; commanded me to follow, and attend" (*King Lear*, Act ii. sc. 4). It is also found in Chaucer:

"And in her hows she abode with such meyne
As to her honour nede was to holde."

Troilus and Cryseide, Book I. 127.

The word "menialty," signifying "common people," is formed from it. Blackstone derives the word from "*mænia*," signifying that such servants dwelt within the walls of the domestic establishment of their master, as distinguished from those who lived out of doors and away from the house, but this derivation has no philological basis. The suggested derivation of Mr. Manley Smith from the Greek μήν (a month) is more quaint than accurate; for the term "menial" was in vogue long before it became the custom to pay domestic servants by the month, which is the growth of quite modern days. Their hiring is still legally by the year. It is not likely that a Greek word would be employed to express such a homely every-day relation as that of master and hired servant. The term "menial" bears at the present time a narrow signification indicative almost of degradation; but that does not prevent its being a convenient word to designate those servants who are in the exclusive service of their master.

particular circumstances. The word "menial" is of wider import than the word "domestic," and includes it.¹ Every servant who at all times during the period of his service is under the immediate control, discipline, and management of his master, and is also liable to attend his person, falls within the category of menial; whereas domestic servants are those who form part only of the family household of their employer.

Menial servants, as including domestic, will form the subject-matter of the succeeding pages. All indoor servants whose duty it is to attend the master, and perform household acts, and who are under the immediate and exclusive control of the master, are clearly menial and domestic servants; but others whose work and duties could not be so described have been held to be menial servants; thus, a head-gardener, at £100 a year, residing in a detached house belonging to his master, with the privilege of taking apprentices (of which he had availed himself), and having five under-gardeners under him, has been held a menial servant.² So, a huntsman, engaged on the following terms: "£100 a year; draft hounds; house; coals, and bones; leave to keep a pig; two coats; two waistcoats; two pairs of breeches; two pairs of boots; one cap; one whip; and one pair of spurs," was held to be a servant;³ so also, one who entered into service under a written agreement that he was to have six shillings a week, three bolls of wheat, to set potatoes for his family's use, to have a cow kept, house and firing, and to keep a pig, no poultry to be kept, his wife to keep the museum clean, he himself to keep the gardens and pleasure-grounds in clean and good order, to assist in the stables, and, when required, at hay and corn harvest, to make himself generally useful;⁴ and one who was employed as a potman in a public-house.⁵ On the contrary, a farm bailiff has been held not to be a menial servant;⁶ also a governess,⁷ from the position she holds in the family of her employer and society generally; and a tutor, on like reasoning, would be held not to be a domestic or menial servant. It has also been held that the housekeeper of a large hotel is not a menial servant, and cannot be dismissed on a month's notice in the absence of an express agreement;⁸ also that a steward is not a menial servant.⁹

The question as to who are or are not domestic or menial

¹ Schouler, Dom. Rel. s. 454, following the inaccurate definition given by Blackstone, would make *menial* of narrower import than *domestic*; but it is submitted that the latter is included in the former, for by domestic servants it is difficult to designate those not engaged in the domestic establishment; again, the common expression "menial acts" can be applied to services rendered equally by outdoor as well as indoor servants.

² *Nicoll v. Graves*, 33 L. J. C. P. 259.

³ *Nowlan v. Ablett*, 2 C. M. & R. 54.

⁴ *Johnson v. Blenkinsopp*, 5 Jur. 870.

⁵ *Pearce v. Lansdowne*, 62 L. J. Q. B. 441.

⁶ *Louth v. Drummond*, cited Smith, M. & S. 95.

⁷ *Todd v. Kerrick*, 22 L. J. Ex. 1.

⁸ *Lawler v. Linden*, 10 Ir. C. L. Rep. 188.

⁹ See *Forgan v. Burke*, 12 Ir. C. L. Rep. 495.

Who are
menial or
domestic
servants.

Who are not.

Legacies to
servants.

servants has frequently been discussed in cases dealing with legacies to "servants"; and it is possible to gather from these cases certain principles which may serve as guides. The servant to whom, as such, a legacy is left must have given up his time exclusively to the service of the testator,¹ and must not be subject to the orders of any other person than the testator;² so, a coachman supplied by a job-master, who paid him weekly wages, not living in the testator's house, but paid by him a weekly sum as board wages, and returned as his coachman, was held *not* to be a servant of the testator;³ but where a coachman had been hired by and lived many years with a testatrix, though his wages were paid by a job-master, he was held to be a servant of the testatrix.⁴ The above are instances of those who are not domestic servants; but if the legacy is bequeathed to "domestic servants" or "servants in my domestic establishment," or "household servants," a distinction must be drawn between indoor and outdoor servants to the exclusion of the latter.⁵ Another test is the period for which the servant has been hired; if the hiring has been a yearly one, and a legacy of a year's wages is left to the servant, he would be entitled to it; and it is only servants that are usually hired by the year that are entitled to such legacies.⁶ If the servant has been hired at weekly wages he is not entitled to the legacy.⁷ But in the case of *Thrupp v. Collett*,⁸ the direct contrary was held, seemingly on the ground that it was a very unusual thing to pay the wages of the servants in question (head- and under-gardeners) by the week. A bequest of a year's wages to each of the servants of the testator living with him at his decease, who should then have lived three years in his service, does not exclude servants of the testator living in a different house from that in which the testator lived.⁹

Servant must have given up his time exclusively to service of testator.

Legacy of a year's wages.

Servant at weekly wages not entitled.

Whether the servants must be in the testator's service at the date of his death,¹⁰ or it is sufficient that they were in his service at the date of the will,¹¹ depends upon the wording of the bequest; thus, if a testator bequeaths an annuity to his servant, providing he is in his service at the time of his decease, and the servant is wrongfully discharged,¹² or voluntarily leaves the service of the testator,¹³ he loses the benefit of the legacy.

Servant in testator's service at date of death.

¹ *Townshend v. Windham*, 2 Vern. 546.

² *Smith, M. & S.* 565.

³ *Chilcot v. Bromley*, 12 Ves. 114.

⁴ *Howard v. Wilson*, 4 Hag. Eccl. Rep. 107.

⁵ *Ogle v. Morgan*, 1 De G. M. & G. 359; *Re Drax, Savile v. Yeatman*, 57 L. T. 475; *Re Ogilby, Cochrane v. Ogilby*, [1903] 1 Ir. Rep. 525.

⁶ *Booth v. Dean*, 1 Myl. & K. 560. See *post*, chap. iii. p. 868.

⁷ *Blackwell v. Pennant*, 16 Jur. 420; *Re Ravensworth, Ravensworth v. Tindale*, [1905] 2 Ch. 1.

⁸ 26 Beav. 147.

⁹ *Blackwell v. Pennant* (*ubi sup.*).

¹⁰ *Jones v. Henley*, 2 Ch. Rep. 361.

¹¹ *Parker v. Marchant*, 6 Jur. 292; on appeal, 7 Jur. 547.

¹² *Darlow v. Edwards*, 32 L. J. Ex. 51.

¹³ *Re Serres' Estate, Venus v. Marriott*, 31 L. J. Ch. 519.

CHAPTER II.

PARTIES TO THE CONTRACT OF HIRING AND SERVICE.

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All persons of full age and independent can be parties to the contract.

As a general rule, every person of the full age of twenty-one years, and not under any legal disability, is capable of becoming either a master or servant. But in order that a contract of hiring and service may be legally binding, it is necessary that, at the time such a contract is entered into, the party about to be hired should be free from any other engagement incompatible with that into which he is about to enter; in other words, he must be *sui juris*.¹ The demands, however, of social life have necessitated a relaxation of the above rule, and it will be seen upon inquiry that valid contracts may be made by those who are not *sui juris*, both as to hirers and the hired. Thus, married women, infants and lunatics may be parties to this contract.

Persons not independent. Married women. Hirers.

A contract for the hire of a servant by a married woman, as mistress of a household, is a good and binding one, and her husband will in most cases be bound by it to pay the servant's wages; for the authority of the wife during cohabitation is that of her husband's agent.² The presumption that has been raised against a married woman by the Married Women's Property Acts, will not be likely to have a general application to such contracts as these, in which the authority of the husband and the agency of the wife are easily inferred from her position in the domestic establishment. This authority need not be given to the wife by writing.³ It may be given expressly, or may be implied from circumstances. A servant suitable to their degree in life, engaged

¹ Smith, M. & S. 1.

² See Part I., Husband and Wife, chap. xiv. pp. 309 *et seq.*

³ *White v. Cuyler*, 1 Esp. 200.

and hired by the wife, can recover wages from the husband.¹ Where the husband and wife do not cohabit, the liability or non-liability of the husband depends upon the circumstances of the case, such as whether the wife had or had not a sufficient separate maintenance from any source.² If the wife has been expressly forbidden to hire a servant, and the servant is aware of it, the husband is not liable for the wages.³ Where the wife has separate property, or her act of hiring has taken place apart from her husband, and has been disowned by him, the court would enforce the contract against her,⁴ and under the present state of the law her liability in this respect is greater than it was formerly.

A married woman when living with her husband was at common law, as has been already seen,⁵ incapable of entering into a valid contract, and this incapacity included contracts of service; thus, under the Master and Servant Act, 1867,⁶ a married woman was held incapable of entering into a valid contract of service under that Act independently of her husband.⁷ A wife could effect a valid contract of service where her husband was *civiliter mortuus*, or she had been judicially separated,⁸ or had obtained an order protecting her earnings from the claims of her husband.⁹ Under the Married Women's Property Act, 1870,¹⁰ the wages earned by her separately from her husband, and the invested savings the result of such wages, were hers absolutely, and she possessed the like remedies, civil and criminal, for the protection and security of her wages and earnings as though she were unmarried.

Married women as hired servants.

The question now arises whether a married woman has under recent legislation the capacity to enter into a valid contract of service independently of her husband with whom she is cohabiting. The Married Women's Property Act, 1870, has been held not to have conferred upon her any further contractual power than she at that time possessed in equity.¹¹ Though the Married Women's Property Act, 1882,¹² is much wider in its effects than the earlier Act of 1870, which it repeals, and does confer upon the married woman enlarged contractual powers, yet, it is submitted, these are confined to matters involving her proprietary relations to her separate estate, and does not confer upon her the power of entering into a binding contract of service without the assent of her husband; and for this reason, that she might put an end to the

Capacity of married women under M.W.P. Act, 1882.

¹ *Jewsbury v. Newbold*, 26 L. J. Ex. 247.

² *Clifford v. Laton*, M. & M. 101; *Reeve v. Marquis Conyngham*, 2 C. & K. 444.

³ *Etherington v. Parrott*, 1 Salk, 118.

⁴ See *Hope v. Carnegie*, L. R. 7 Eq. 254.

⁵ See Part I., Husband and Wife, chap. xiv. pp. 285 *et seq.*

⁶ 30 & 31 Vict. c. 141.

⁷ *Tomkinson v. West*, 32 L. T. 462.

⁸ 20 & 21 Vict. c. 85, s. 25; and 58 & 59 Vict. c. 39, s. 4, repealing 41 Vict. c. 19,

s. 4. ⁹ 20 & 21 Vict. c. 85, s. 21. See Part I., Husband and Wife, chap. xiv. s. 4.

¹⁰ 33 & 34 Vict. c. 63, ss. 1, 11.

¹¹ *Howard v. The Bank of England*, L. R. 19 Eq. 295.

¹² 45 & 46 Vict. c. 75.

matrimonial cohabitation without his consent and for no fault of his—a power which it never could have been intended by the Legislature to confer upon her. If, then, the wife leaves the husband and goes into service against his wish, and the latter gives the employer notice of his dissent, who notwithstanding keeps her in his service, the husband will be able to maintain an action for harbouring his wife and depriving him of the comfort of her society. Of course, with his consent a wife may hire out her services and labour as she pleases, and whatever she receives in return by way of remuneration is and remains her separate property. No doubt the husband's assent is very readily inferred; in fact, non-dissent on his part, where he could express it, would be sufficient. Where he has deserted her, or she has been judicially separated from him, his assent is not required, for she is in most respects a single woman. If during his absence she entered into a contract of service, it would be valid until he elected to put an end to it on his return; and all wages earned by her in respect of it would remain her separate property. Since the altered state of the law, payment to a married woman of her wages or earnings is good, and her receipt for them is a good discharge to the hirer; whereas under the old law, when her earnings became her husband's property, payment to her did not discharge the hirer.¹ Such payment to the wife would be good, even if the husband dissented from her contract of service; for, as he now has no interest of any sort (*inter vivos*) in her property, including wages and earnings, consequently, though he might refuse to ratify the contract, he could not make any valid demand under it; and if he sued the employer for her wages, it would be a good defence to allege that he took no interest under the contract, and that by force of the statute the wife alone could give a valid receipt for them.

Marriage does not put an end to the woman's contract of service;² but, as before stated, it must be allowed that the husband should have power and authority to decide whether she should continue in service, or in what particular kind of service, and to assert his right of matrimonial cohabitation, if she leaves him for the purpose of earning an independent living.

Infants.—An infant in many cases, it has been seen, cannot make contracts binding on himself; but where such contracts are made by him to supply himself with what are found to be necessities, then they are binding on him. Therefore, by analogy, a contract by an infant for the hire of a servant or servants suitable to his degree in life would be binding on him, and such servant could recover the stipulated wages.³

¹ *Offley v. Clay*, 2 M. & G. 172.

² *Rez v. Tardebigg*, Burr. Sett. Cas. 322.

³ See *Chapple v. Cooper*, 13 M. & W. 252.

A wife's earnings her own.

Payment of wages to married woman a good discharge.

Marriage does not put an end to woman's contract of service.

Hirers.

Not only is a contract of apprenticeship in most instances ^{Hired.} deemed to be for an infant's benefit and so binding on him,¹ but a contract of hiring and service may be for his benefit and generally binding on him, and he would have a right of action under it for wages earned;² but the contract must be one clearly for the infant's benefit.³ An infant may sue in the County Court for money due to him as wages, up to £50, as though he were of full age.⁴

The capacity of infants to make such contracts has already been discussed under the head of "Infants."⁵

Lunatics.—"Strictly speaking, a person of unsound mind is ^{Lunatics.} incompetent to contract, yet there can be no doubt that a lunatic would be held liable to pay for any services which had been rendered to him, provided they were such as might reasonably be considered necessary for a person in his station in life. In such a case the law could imply a promise to pay for them; and modern cases show that where a party entering into a contract is a lunatic, but the state of his mind is unknown to the other party, who has taken no advantage of the lunatic, he would not be allowed to set up his lunacy as a defence to the action on the contract, especially in a case where the contract was not merely executory, but executed in the whole or in part, and the parties could not be restored altogether to their original position."⁶ In the case of an executory contract the knowledge of the lunacy of the defendant must be brought home to the plaintiff.⁷ The services of a servant to attend to his wants would be deemed a necessary in most cases, and it is only fair that such should be paid for if supplied to him in good faith.⁸

¹ *Cooper v. Simmons*, 31 L. J. M. C. 138.

² *Reg. v. Chillesford*, 4 B. & C. 94.

³ *Reg. v. Lord*, 12 Q. B. 757; *Leslie v. Fitzpatrick*, 3 Q. B. D. 229; *Corn v. Matthews*, [1893] 1 Q. B. 310; but see *Meakin v. Morris*, 12 Q. B. D. 352.

⁴ 51 & 52 Vict. c. 43, s. 96; now £100 under section 3 of the County Courts Act, 1903 (3 Edw. VII. c. 42).

⁵ See Part IV. chap. ii. pp. 784 *et seq.*

⁶ *Sm. M. & S.* 15; *Molton v. Camroux*, 18 L. J. Ex. 356.

⁷ *Imperial Loan Co. v. Stone*, [1892] 1 Q. B. 599.

⁸ *Barter v. Earl of Portsmouth*, 5 B. & C. 170.

CHAPTER III.

THE CONTRACT OF HIRING AND SERVICE.

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The considera-
tion.

IN a contract of hiring and service, as in other contracts, there must be consideration on which to found the agreement between master and servant, and it must be express, or necessarily implied. Whether there is consideration or not is sometimes a matter of great doubt and nicety, and would, of course, in most instances, depend upon the terms used by the parties; but the authorities do not supply any clear rule in cases where the consideration is not expressed in so many words.¹ The courts, however, will not inquire into the adequacy of the consideration, for otherwise they would be taking upon themselves to decide whether the parties had made a proper bargain for themselves.² But where the consideration is altogether illegal or immoral, the courts would decline to enforce the contract based upon it.³

Duration of
the contract.

In the absence of any express or implied stipulation as to its duration, the contract of hiring between a master and a servant is deemed to be a general one, and to last for the period of a year;⁴ and this rule of law is applicable to the hiring of domestic servants.⁵ Where a domestic servant is hired, and there is no mention made of the duration of the hiring, or of the time for giving notice or warning, it is now a well-established and judicially recognized custom that the hiring is for the space of a year, but may be determined at any moment by either party giving the other a month's notice or warning, or a month's wages

Yearly hiring.

Domestic service may by custom be terminated by a month's notice, or month's wages in lieu of notice.

¹ See *Macd. M. & S.* 139 *et seq.* ² *Hitchcock v. Coker*, 6 A. & E. 438.
³ See *Cope v. Rowlands*, 2 M. & W. 149; *Rea v. Northwillingfield*, 1 B. & Ad. 912.
⁴ *Fawcett v. Cush*, 5 B. & Ad. 904; *Buckingham v. The Surrey and Hants Canal Co.*, 46 L. T. 885.
⁵ See *Rea v. Worfield*, 5 T. R. 506.

in lieu of such notice.¹ If necessary, such custom can be proved by parol evidence.²

Where the term of service is express, or the contract contains stipulations, conditions, or other matters which clearly show that the parties to it meant some period other than a year, the legal presumption is rebutted. It is where the contract is for an indefinite time that the period of a year is implied;³ and such presumption is excluded where the terms of the contract are inconsistent with it, as where either party shall be at liberty to determine the contract at any time;⁴ or if the hiring be for less than a year,⁵ as, for instance, when a servant is taken "on trial" for a month; or where the master has not the exclusive control over the servant.⁶ Again, where well-established custom permits the hiring to be terminated after a certain notice, the giving of such customary notice, though but a short time after the commencement of the contract, puts an end to it.

Variation of the terms of the hiring.

Where there is nothing in the contract to show that it is not intended to be a yearly hiring, but rather the opposite conclusion may be inferred, the paying of wages at short intervals, such as a fortnight, will not render it less a contract to endure for a year,⁷ and even the payment of wages by the week, where the contract contained a stipulation that a month's notice should be given to determine the hiring, was held not to take it out of the category of general hiring.⁸ But in the cases where the only means of ascertaining the duration of the contract is the reservation of weekly wages, then the period of service is deemed to be but weekly:⁹ thus, a weekly hiring at so much a week for a year is a weekly and not yearly hiring.¹⁰ There is no contract of service at all when the circumstances tend to rebut such a presumption,

Period for payment of wages not necessarily a test of the duration of the contract.

When hiring weekly.

¹ *Fawcett v. Cash*, 5 B. & A. 904. "In the case of domestic servants, the rule is well established that the contract may be determined by a month's notice or a month's wages." Per Littledale, J., in *Turner v. Mason*, 14 L. J. Ex. 311. See *Moult v. Halliday*, [1898] 1 Q. B. 125. In this case an additional custom of giving the right to either party to determine the service at the end of the first calendar month by notice given at or before the expiration of the first fortnight was sought to be upheld; and though it was decided that the custom was not notorious enough to be taken judicial notice of, yet it was not an unreasonable one, if it could be established by evidence. With all due deference this statement, which was really *obiter*, seems hardly to be correct, for the proposed custom is quite inconsistent with and destructive of the existing one; and two such customs cannot exist side by side with equal legal results. Customs must be consistent with each other, one custom cannot be set up in opposition to another; for if both are really customs, then they are of equal antiquity, and must have been established by mutual consent, which to say of contradictory customs is absurd (Per Bayley, J., in *Rogers v. Brenton*, 10 Q. B. 57). Again, it is not unlike the old custom to pay sometimes twopence and sometimes threepence an acre in lieu of tithes, as the occupier pleased, which Sir William Blackstone (1 Com. 78) described as bad for its uncertainty.

² *Johnson v. Blenkinsopp*, 5 Jur. 870.

³ *Ree v. Newton*, 10 B. & C. 838; see also *Baxter v. Nurse*, 1 C. & K. 10.

⁴ *Ree v. Great Bowden*, 7 B. & C. 249.

⁵ *Ree v. Standon Massey*, 10 East, 756.

⁶ *Ree v. Killingholme*, 10 B. & C. 802.

⁷ *Ree v. Birdbrook*, 4 T. R. 425.

⁸ *Ree v. Great Yarmouth*, 5 M. & S. 114.

⁹ *Ree v. St. Andrews*, 8 B. & C. 679; *Towne v. Campbell*, 3 C. B. 921.

¹⁰ *Robertson v. Jenner*, 15 L. T. 514.

as where a person is taken and housed *out of charity*,¹ or where the agreement was for cohabitation and not merely for service.²

Servant
wrongfully
quitting ser-
vice or rightly
discharged
without notice
not entitled to
current wages.

The contract of service of domestic or menial servants by a custom which is well known may be determined on either side *at any time* by giving a month's³ notice or warning, or by paying a month's wages in lieu of notice.⁴ The servant discharged is entitled to a proportionate amount of wages for the time served at the moment of leaving service.⁵ But where a domestic servant wrongfully quits his employment he forfeits all claim to wages for that portion of time during which he has served, and cannot, after having wilfully violated the contract according to which he was hired, claim the sum to which his wages would have amounted if he had not broken his contract, merely deducting therefrom one month's wages.⁶ Thus, if a servant were paid quarterly according to the terms of his hire, and wrongfully left in the middle or towards the end of a quarter, he would forfeit all the wages of the current quarter.⁷ The effect of this is to compel the servant to give his master proper and timely notice if he wishes to save his wages. This is equally the case where the servant is rightfully discharged by his master at a moment's notice and without payment in lieu of notice. Wages due but unpaid at the last period fixed for their payment would, however, be recoverable by the servant though he subsequently left his master's service without giving proper notice, or was rightfully discharged without notice.⁸

Contract of
hire within
Statute of
Frauds.

A contract for the hire of a servant may be either by deed or by parol. If the contract (whether made in England or out of England⁹) is one that on its face cannot be performed within a year from the date of its inception, then the fourth section of the Statute of Frauds¹⁰ is applicable, and its terms must be reduced into writing, though not necessarily in the shape of a formal agreement, and a proper compliance must be made with the provisions of that section if an action is to be founded on it.¹¹ An oral agreement made on May 27, that a servant should enter service for a year to commence from the 30th of June following,¹² and a like agreement (though there was a memorandum, but unsigned) made on July 20, to take effect from the 24th of July,

¹ *Rex v. Sow*, 1 B. & Ald. 178.

² *Rex v. Northwinkfield*, 1 B. & Ad. 912.

³ Calendar month. *Simpson v. Margetson*, 11 Q. B. 27.

⁴ *Fawcett v. Cash*, 5 B. & Ad. 904; *Beeston v. Collyer*, 4 Bing. 309, 313. See *Moult v. Halliday*, [1898] 1 Q. B. 125.

⁵ See *Gordon v. Potter*, 1 F. & F. 644.

⁶ See *Walsh v. Walley*, L. R. 9 Q. B. 367.

⁷ *Ibid.*; *Boston Deep Sea Fishing and Ice Co. v. Ansell*, 39 Ch. D. 329, 359.

⁸ See *Taylor v. Laird*, 25 L. J. Ex. 329; *Button v. Thompson*, 38 L. J. C. P. 225.

⁹ *Leroux v. Brown* 22 L. J. C. P. 1.

¹⁰ 29 Car. II. c. 3.

¹¹ *Leroux v. Brown* (*ubi sup.*).

¹² *Bracegirdle v. Heald*, 1 B. & Ald. 722.

were both held to be within the statute.¹ Though such contract may be defeasible within the year, it is none the less within the statute.² But the statute does not affect contracts which have been completely executed on one side,³ or apply to a hiring which is merely implied from circumstances;⁴ nor does it extend to cases where the contract need not necessarily be performed within a year, and as a matter of fact has not been performed, if it is such that it might be performed within the year, and there is no stipulation to the contrary.⁵ The equitable doctrine of part performance is not extended to a contract of service by section 25, sub-section 7, of the Judicature Act, 1873.⁶ The plaintiff servant suing for wages cannot bring his action under a contract which fails to comply with the statute, but must rely on a *quantum meruit* for the services he has rendered to his employer.

An agreement for the hire of a menial servant is exempted from the necessity of being stamped by virtue of the Stamp Act, 1891.⁷ Stamp not required on contract.

Domestic service does not *per se* confer upon the servant the domicile of his master.

¹ *Snelling v. Lord Huntingfield*, 1 C. M. & R. 20. See also the two cases which clearly decide the point, *Banks v. Crossland*, L. R. 10 Q. B. 97; *Davey v. Shannon*, 4 Ex. D. 81.

² *Dobson v. Collins*, 25 L. J. Ex. 267; but see *Cawthorn v. Cordery*, 32 L. J. C. P. 152, which was decided on the ground of implication of a fresh contract for a year's hire on a subsequent day.

³ *Cherry v. Heming*, 19 L. J. Ex. 63.

⁴ *Beeston v. Collyer*, 4 Bing. 309.

⁵ *Souch v. Strawbridge*, 2 C. B. 808.

⁶ *Britain v. Rossiter*, 11 Q. B. D. 123.

⁷ 54 & 55 Vict. c. 39. Schedule, *sub voce* Agreement.

⁸ See *Jopp v. Wood*, 34 L. J. Ch. 211.

CHAPTER IV.

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THE contract of hiring and service may be put an end to or determined in various ways; it is usually terminated by the discharge of the servant, whether by his master or by himself.

The death of the master puts an end to the contract; and in respect of service after death, the contract is dissolved, unless there be a stipulation express or implied to the contrary;¹ so, where a farm bailiff was engaged at weekly wages, and his contract of service was to be determined by six months' notice or payment of six months' wages, and the master died, his administratrix was held not bound to continue the bailiff in her employment or pay him six months' wages after his master's death.² The rule that a contract of service, unless otherwise stipulated for, is determined by the death of the hirer, and that, if for a time certain, and the death occur before the expiration of that time, the servant cannot recover wages for any portion of the time that he has served, does not apply to the case of domestic servants, who are by custom paid for the actual services rendered by them; therefore, if a domestic servant be discharged on the death of the master, he can make good a claim for wages earned by him during

Termination
of contract by
death of
master.

Servant
entitled to
wages earned
up to master's
death.

¹ *Farrow v. Wilson*, L. R. 4 C. P. 744.

² *Ibid.*

his period of service.¹ Servants must look for their wages, if so discharged, to the personal representatives of their masters, that is, their executors or administrators.

A question of some doubt arises where a domestic servant is the servant of two or more partners. Of course where a hirer goes into partnership, the ordinary domestic servants employed in his household are not affected by his partnership. But if the servant is the hired servant of the partnership, which is dissolved either by death or mutual agreement, is the hiring at an end, or does the servant remain in the employ of the continuing partner? Where in such a case one of the partners dies, unless there is a special provision to the contrary, the partnership is at an end, and so, on principle, the service of the servant would be determined, notwithstanding there was no real change in the duties of the servant.² A dissolution of partnership by mutual agreement would amount to a dismissal, and being wrongful would entitle the servant to damages, though only nominal, if the remaining partners were willing to employ him.³ So, too, the appointment of a receiver of the partnership assets would amount to a dismissal of the servant.⁴

The death of the servant clearly determines the contract, for the rendering of the personal services of the hired is no longer possible. There is very little to be said on this point except that the personal representatives of the servant are not liable on such a contract, even if it were worth while to sue them; and that where the servant dies during the currency of his service, custom entitles his representatives to sue for the wages due for the broken period of service.⁵

The contract is likewise put an end to by the discharge of the servant. This may be brought about by the servant himself giving notice. A domestic servant is by custom entitled to discharge himself by giving at any time a month's notice or warning; also at any time and at a moment's notice on payment of a sum equivalent to a month's wages in advance. If a servant wrongfully leave, without any warning, he forfeits all wages which may have accrued since the last proper day of payment; thus, if his wages were agreed to be paid on the first of a month, and he left without warning on the fifteenth, the wages that had accrued from the first to the fifteenth would be forfeited.⁶

¹ See *Cutter v. Powell*, 6 T. R. 320. In the course of this case Lawrence, J., said: "With regard to the common case of a hired servant . . . such a servant, though hired in a general way, is considered to be hired with reference to the general understanding upon the subject that the servant shall be entitled to his wages for the time he serves, though he do not continue in the service during the whole year."

² See *Tasker v. Shepherd*, 30 L. J. Ex. 207.

³ See *Brace v. Calder and others*, [1895] 2 Q. B. 253.

⁴ See *Reid v. Explosives Co.*, 19 Q. B. D. 264.

⁵ See *Cutter v. Powell* (*ubi sup.*).

⁶ *Spain v. Arnott*, 2 Stark. 256.

Discharge
of servant :
Master giving
notice.

A correlative right exists in the master to discharge a domestic servant at any time by giving him a month's warning or notice, as well as at any time to discharge him at a month's notice by paying a month's wages in advance. If a servant be discharged, but refuse to go, the master may use sufficient force to put him from the house,¹ for the servant's conduct justifies that which would otherwise be an assault.

Grounds of
discharge
without notice.

The next step to be considered is the grounds which will justify the master in discharging a servant without notice; and it may here be mentioned that a ground for such discharge is in most instances a reason for refusing to pay wages. The following are the principal grounds which may be taken to justify the discharge of a servant:—

- (a) Wilful disobedience of any lawful order of the master.
- (b) Gross moral misconduct.
- (c) Habitual negligence in business, or conduct calculated seriously to injure the master's business.
- (d) Incompetence, or permanent disability from illness.

Wilful dis-
obedience of
master's order.

(a) Wilful disobedience to the lawful orders of the master entitles the latter to discharge the servant without notice.² If a servant wilfully refuses obedience to the lawful order of the master, he must suffer for his obstinacy; so, where a female servant persisted in leaving her master's house against his orders, though to go and visit a dying mother, her conduct was held to justify her dismissal.³ The master's orders should be confined to those services for which the servant was hired; and the latter cannot be peremptorily dismissed without compensation for refusing to perform services which he never bargained to undertake. Mere obstinate refusal to do a particular act will not justify such a dismissal.⁴ The refusal to do work or disobedience that causes a loss to the master is a ground for the servant's discharge, but such loss must be proved, if reliance is to be placed on it.⁵

Gross moral
misconduct.

(b) Gross moral misconduct is a good ground for discharging a servant.⁶ Theft from his master,⁷ embezzlement,⁸ pregnancy of a maid-servant,⁹ being the father of a bastard child,¹⁰ an attempt to ravish a maid-servant,¹¹ and drunkenness,¹² all constitute good

¹ *Mackay v. Ford*, 29 L. J. Ex. 404.

² *Callo v. Brouncker*, 4 O. & P. 518.

³ *Turner v. Mason*, 14 L. J. Ex. 311. See also *Amor v. Fearon*, 9 A. & E. 548; *Spain v. Arnott*, 2 Stark. 256.

⁴ *Jacquot v. Boura*, 3 Jur. 776. "It is not every failure in faithful service which will warrant a master in discharging his servant, and if he does, he must discharge him on the occasion of the misconduct, and not at any time after, at the master's option." Per Bramwell, B., in *Horton v. M'Murtry*, 5 H. & N. 667, 675; and see *Edwards v. Levy*, 2 F. & F. 94.

⁵ *Cussons v. Skinner*, 11 M. & W. 161.

⁶ *Callo v. Brouncker* (*ubi sup.*).

⁷ *Cunninghame v. Fonblanque*, 6 C. & P. 44, 49.

⁸ *Spotswoode v. Barrow*, 16 L. J. Ex. 226.

⁹ *Connors v. Justice*, 13 Ir. C. L. Rep. 451.

¹⁰ *Rex v. Welford*, Cald. 57.

¹¹ *Atkin v. Acton*, 4 C. & P. 208.

¹² *Speck v. Phillips*, 5 M. & W. 279.

grounds for discharge of servant and forfeiture of wages. If a servant is grossly rude and insolent he may be at once dismissed;¹ so if he is violent and uses abusive language towards his master he may be rightfully given into custody.² It seems, however, that the discovery of the servant's misconduct in a previous situation, unless fraudulently concealed from the second master, is not a ground for instant dismissal, but notice is required.³

(c) If a servant absent himself from his work, or is habitually negligent in it, he may be summarily dismissed, for otherwise his master might be seriously injured by his misconduct.⁴ So, too, where he acts in a way incompatible with the due and faithful discharge of his duty to his master.⁵ But mere temporary neglect which does not injure the master, does not justify an instant dismissal.⁶ But an isolated act of negligence, whether of omission or commission, which caused injury to his master, might be a sufficient ground for his instant dismissal. A servant who is entrusted with the goods of his master is bound to use ordinary diligence in their care and preservation; and if he fail to use it, and loss ensues, he is liable to an action at the suit of his master.⁷ The issues of fact which go to justify dismissal of a servant on the ground of misconduct are for the jury; and while there is no fixed rule of law defining the degree of misconduct which will justify dismissal, it may be laid down with certainty that conduct inconsistent with the fulfilment of the express or implied conditions of service is misconduct justifying dismissal.⁸

Knowledge on the part of the master of the actual fact justifying the dismissal is not necessary at the time when he dismisses the servant. If a master discharge a servant, and can subsequently show that at the time of the dismissal a good ground of discharge existed, though he was ignorant of its existence, he can justify his conduct.⁹ The case of *Cussons v. Skinner*¹⁰ seems to be opposed to the above doctrine; but apparently it was decided on its own peculiar circumstances; and Parke, B., in the later case of *Spotswoode v. Barrow*,¹¹ though one of the judges

¹ *Fras. M. & S.* 71; *Maed. M. & S.* 213.

² *Shaw v. Chairitie*, 3 C. & K. 21.

³ *Andrewes v. Garstin*, 31 L. J. C. P. 15.

⁴ *Callo v. Brouncher* (*ubi sup.*); *Robinson v. Hindman*, 3 Esp. 235; see also *Turner v. Robinson*, 5 B. & Ad. 789.

⁵ *Pearce v. Foster*, 17 Q. B. D. 536.

⁶ *Fillieul v. Armstrong*, 7 A. & E. 557.

⁷ See *Walker v. British Guarantee Association*, 18 Q. B. 277.

⁸ *Clouston and Co. v. Corry*, [1906] A. C. 122. In this case it was further laid down that in actions for wrongful dismissal the judge, when he leaves the issues of fact to the jury, should direct, guide, and assist the jury—direct by informing them of the nature of the acts which, as a matter of law, will justify dismissal; guide them by calling their attention to the facts material to the determination of the issues raised; and assisting them as best he may. This case was a decision of the Privy Council on appeal from New Zealand, but is an authoritative exposition of English law and practice on the subject.

⁹ *Willetts v. Green*, 3 C. & K. 59; *Spotswoode v. Barrow* (*ubi sup.*).

¹⁰ *Ubi sup.*

¹¹ *Ubi sup.*

who had taken part in its decision, did not feel bound by it. In *Willets v. Green*,¹ Alderson, B., said: "If an employer discharge his servant, and at the time of the discharge a good cause of discharge in fact exists, the employer is justified in discharging the servant, although at the time of the discharge the employer did not know of the existence of the cause. This point has been much discussed in the House of Lords and elsewhere, but what I have stated is the result."

Incompetence,
or permanent
disability from
illness;

(d) If a servant be hired for a particular service or purpose, and he prove utterly incompetent to perform his part of the contract, his employer has clearly a good ground of discharge, for he who cannot is much the same as he who will not perform his duty; *imperitia culpæ adnumeratur*.² In the case of ordinary domestic servants, it would not be safe to dismiss them for incompetence without notice or payment of wages, for it is common knowledge that a great number of servants offer themselves, and are hired to perform services which they are wholly incapable of properly rendering. Want of experience, clumsiness, absence of skill and finish about their work must be expected when untrained servants at low wages are hired, and must be taken as part of the bargain; and it would be safe to dismiss only in the higher branches of domestic service, where special knowledge and skill were necessary, but which were not forthcoming in the servant who professed to furnish them; as, for instance, a cook who held himself out to be a proficient in the art of cooking and demanded high wages for his services, might justifiably be dismissed if he altogether failed to redeem his professions in any essential particular.

but not mere
temporary
illness.

A temporary illness with incapacity for work is not a good ground for discharging a servant, unless the contract has been rescinded.³ But a permanent sickness would constitute a ground for dismissal;⁴ so would it be where the master was compelled to hire another servant in the place of the sick one.⁵ The wages that had been earned by the servant up to the time of his illness would be payable to him, because the contract had been determined through no fault of his own. Unless the contract is put an end to, there is no suspension of the right of the servant to his wages because of his illness and incapacity to work.⁶

Remedy of
servant on
wrongful
dismissal.

If a domestic servant be wrongfully discharged, his remedy is an action against his master for the breach; and the utmost measure of damages would be the amount of a month's wages,⁷ but a jury might give less. If arrears of wages are due to him,

¹ 3 C. & K. 59.

² *Harmer v. Cornelius*, 28 L. J. C. P. 85; *Searle v. Ridley*, 28 L. T. 411.

³ *Cuckson v. Stones*, 28 L. J. Q. B. 25.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Fewings v. Tisdal*, 1 Exch. 295; *Robinson v. Hindman*, 3 Esp. 235.

or wages have been earned and accrued due since the last day of payment, the servant can recover them on a *quantum meruit*; ¹ but he cannot recover for any further period than that during which he has served.² He may treat the contract as rescinded, and sue for his wages for the period of actual service rendered by him.

Domestic servants are not entitled to greater damages than are represented by a month's wages, because, as before pointed out,³ it is a well-established custom that their contract of hiring and service can be terminated by a month's notice, or discharge and payment of a month's wages. Measure of damages.

A servant who is allowed to occupy premises belonging to his master for the convenient performance of his services acquires no estate in them, and must give them up when he ceases to be such servant; and this is so, even where he is allowed to use the premises for the purpose of carrying on an independent business of his own.⁴ Holding of premises servant.

¹ *Robins v. Power*, 27 L. J. C. P. 257; see also *Smith v. Hayward*, 7 A. & E. 544.

² *Archard v. Hornor*, 3 C. & P. 349.

³ *Ante*, chap. iii. pp. 868 *et seq.*

⁴ *White v. Bayley*, 10 C. B. (N.S.) 227.

CHAPTER V.

THE CONTRACT OF APPRENTICESHIP.

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The relation of master and apprentice is essentially a domestic relation. Formerly it was more akin to that of parent and child than at the present day. In many trades the master used to receive the apprentice into his house, supplying him with food and lodging, and treating him as one of his own household, and had more control over him than over an ordinary domestic servant.

Definition of
contract.

The term apprentice is derived from the French word *apprendre*, "to learn." The contract of apprenticeship is between the master on the one side and the apprentice on the other; and the essence of the contract is that the master should *teach*, and the apprentice *serve and learn*. It is this contract to teach and to learn that distinguishes it from the ordinary contract of hiring and service;

but no technical words are necessary to create the relation of master and apprentice, provided the intention of the parties that such should be the result can be gathered from the contract between them.¹

Apprenticeship was devised less for the advancement of handicrafts than as a convenient and powerful weapon for upholding trade monopolies; for at one time no one was permitted to exercise certain crafts or trades who had not served his proper apprenticeship. In England this relation had an importance over and above the mere rights and duties of the master and apprentice; for it was involved largely in the settlement of paupers under the Poor Laws; for if an apprentice serves a specified time as such in a particular parish, he thereby acquires a settlement in it, until he displaces it by acquiring a fresh one. But this is not a matter which need here be further pursued.

At common law any person capable of making a contract may take an apprentice; and it seems that an infant can take one.² An alien trader may now take one.³ It has been held that a married woman could not take an apprentice; but it would be difficult to maintain such a proposition now, when she is enabled to carry on a separate trade, and to enter into contracts, and become liable as a *feme sole* in respect of such trade.⁴ An adult may of course bind himself. A minor, even without his parent's consent, may voluntarily bind himself, an indenture of apprenticeship being considered *prima facie* beneficial to him;⁵ but he will be only subject for its enforcement to the jurisdiction of the justices under the Conspiracy and Protection of Property Act, 1875,⁶ and the Employers and Workmen Act, 1875;⁷ and not to an action for any breach of his covenant,⁸ except by the custom of the City of London when over fourteen,⁹ or to an injunction.¹⁰ Because in the large majority of instances the apprentices bound are under age, and so cannot be sued for their breaches of covenant, it is usual to make the parents or guardians, or friends, parties to the agreement as sureties; not for the purpose of enforcing the agreement, for the justices have summary power to compel the apprentice to serve, but for the purpose of enabling the master to sue on the covenants.¹¹ A parent has no common law right to bind a child an apprentice.¹² The minor must execute

Parties to the contract.
² Infant master.
 Married woman mistress.

Minor apprentice; covenants by.

Sureties.

¹ *Ree v. Rainham*, 1 East, 531. It is enough if it can be gathered that the apprentice is to be taught a trade by and not merely to serve his master. *Ree v. Laindon*, 8 T. R. 379.

² *Ree v. St. Petrox, Dartmouth*, 4 T. R. 196.

³ Effect of Repeal of 14 & 15 Hen. VIII. c. 2, by 19 & 20 Vict. c. 62.

⁴ 45 & 46 Vict. c. 75, s. 1, sub-s. 5.

⁵ See *Cooper v. Simmonds*, 31 L. J. M. C. 138; see Part IV. chap. ii.

⁶ 38 & 39 Vict. c. 86; this repealed 4 & 5 Eliz. c. 4.

⁷ 38 & 39 Vict. c. 90, ss. 5, 6, and 7.

⁸ *Gylbert v. Fletcher*, Cro. Car. 179.

⁹ *Stanton's Case*, Moore, 135 (25 Eliz.); *Burton v. Palmer*, 2 Bulst. 192.

¹⁰ *De Francesco v. Barnum*, 43 Ch. D. 165.

¹¹ See *Ree v. Hindringham*, 6 T. R. 557.

¹² *Ree v. Aresby*, 3 B. & Ald. 584.

as well as the surety, either in person¹ or by agent;² and if the latter execute the deed but the former refuses to do so, the intended master has no right of action against the surety.³

Covenants of
apprenticeship
independent.

The covenants in an indenture of apprenticeship are independent, and the breach of a covenant on the part of one party is no answer to an action brought by him on a breach of covenant on the part of the other party; thus, an act of misconduct on the part of an apprentice is no answer to an action brought for breach of the covenant by the master to teach and maintain the apprentice.⁴ But gross misconduct on the part of the apprentice which would render it dangerous to the interests of the master to keep him on the premises, *e.g.*, habitual theft, would be an answer to an action against the master on his covenant to teach and maintain the apprentice.⁵ If the master on his side fail to teach or perform his part of the contract, the apprentice should not leave him, but sue him on his covenant to teach.⁶ As has been seen, if the provisions of the deed are unreasonable and disadvantageous for the infant they cannot be enforced either against the infant or his sureties, but the deed will be treated as void for all purposes.⁷ If, however, a minor enter into a covenant to pay a reasonable premium for his instruction, the covenant may be enforced against him on reaching majority on the principle that such instruction may be deemed a "necessary" for him, and his covenant to pay it is no more than a "single" bond given to secure the payment of the price of necessities supplied to him.⁸

When
enforced
after reaching
majority.

Partners.

An apprentice may be bound to a partnership, and on the death of one of the partners he becomes in law the apprentice of the survivor.⁹ He may be likewise bound to the members individually, and to a firm and their successors; and he will be bound to remain the apprentice of those who do succeed to the original business. But where an apprentice was bound to a firm which afterwards dissolved and became two separate firms in different places, and the business to learn which the apprentice was bound was not carried on in its entirety by either of the new firms, it was held that neither of them was the successor of the original firm, or entitled to the services of the apprentice.¹⁰ He may be also bound to a corporation, if it provides for his proper instruction.¹¹

Corporation.

¹ *Rex v. Aresby*, 3 B. & Ald. 584; *St. Nicholas v. St. Botolph*, 31 L. J. M. C. 258.

² *Rex v. Longnor*, 4 B. & Ad. 647.

³ *Bluck v. Mather*, W. N. (1886) 120.

⁴ *Winstone v. Linn*, 1 B. & C. 460; *Phillips v. Clift*, 4 H. & N. 168.

⁵ *Leaoyd v. Brook*, [1891] 1 Q. B. 431.

⁶ See *Eaton v. Western*, 9 Q. B. D. 636.

⁷ *De Francesco v. Barnum*, 45 Ch. D. 430.

⁸ Co. Litt. 172 a; *Walter v. Everard*, [1891] 2 Q. B. 369.

⁹ *Rex v. St. Martin's, Exeter*, 2 A. & E. 655.

¹⁰ *Eaton v. Western* (*ubi sup.*).

¹¹ *Burnley Equitable Co-operative and Prudential Society v. Casson*, [1891] 1 Q. B. 75.

The principal statutes regulating the binding out of pauper children as apprentices are 43 Eliz. c. 2; 4 & 5 Wm. IV. c. 76 (s. 15); and 7 & 8 Vict. c. 101. Under this last Act the sole power of binding pauper apprentices was conferred on the guardians of the Poor Law Unions,¹ but under the Local Government Act, 1894,² the duties of the Poor Law guardians have been transferred to the District Councils; consequently the District Councils would be now the proper authorities for the apprenticing of the pauper children of their district. The term "parish apprentice," though inaccurate, is convenient. No child under nine years of age can be apprenticed;³ a male infant can be bound till he reaches majority, and a female till she reaches majority or marries;⁴ though the binding may extend to a shorter period.⁵ Parish apprentices over fourteen years of age are not bound without their own consent. It would seem that the authorities may bind out other children than those whose parents, or who themselves, are in receipt of parish relief.⁶ A parish apprentice cannot be discharged under age without his consent or that of his parent, and the consent of the authorities is requisite;⁷ though it is otherwise after the apprentice comes of age;⁸ nor can he be put away, transferred, or in any way discharged or dismissed from his service without the consent of two justices;⁹ and if a master wilfully abandon him, or remove out of the country, or forty miles from the parish where the apprentice is bound, he renders himself liable to a penalty of £10.¹⁰ On the death of the master, where the apprenticeship premium has not exceeded £5, the justices may, within three months of the death of the master or mistress, order the apprentice to serve the residue of his term with the widow, husband, son or daughter, or brother or sister, executor or executrix, or administrator or administratrix of the master or mistress.¹¹ Where insolvency or reduced circumstances render a master incapable of employing his apprentice, in whose case no more than a £5 premium has been paid, the master may apply to two justices to discharge the apprentice.¹² A youthful offender, or a child detained in a reformatory or industrial school, may be, with his own consent, apprenticed by the managers, though the period of detention has not expired; and such apprenticing is as valid as if done by his parents.¹³

Parish apprentices, binding of.

District Councils.

Limits of age.

Protection of apprentices.

Youthful offenders.

The agreement of apprenticeship must be in writing. Under General requisites.

¹ Sect. 12.

² 56 & 57 Vict. c. 73.

³ 56 Geo. III. c. 139, s. 7.

⁴ See *Rex v. St. Petrox*, 1 Bott, 607.

⁵ 4 Burns' Justice, 209-233.

⁶ See Glen, Poor Law Orders (5th edit.), 35.

⁷ *Rex v. St. Austrey*, 1 Burr. Sett. Cas. 441.

⁸ Per Lord Mansfield in *Rex v. St. Austrey* (*ubi sup.*).

⁹ 32 Geo. III. c. 57, s. 13; 56 Geo. III. c. 139, s. 9.

¹⁰ Sect. 8.

¹¹ 32 Geo. III. c. 57, s. 2.

¹² Sect. 8.

¹³ 54 & 55 Vict. c. 23, s. 2 (Reformatory and Industrial Schools Act, 1891).

Agreement
in writing.

Master and
apprentice
parties to the
agreement.

Consideration
and stamp.

Apprentice-
ship must not
be disadvan-
tageous to the
infant.

the early statute of 5 Eliz. c. 4, s. 25, the agreement by which an apprentice was bound to exercise a trade must have been by indenture, but this is now no longer absolutely necessary,¹ but the document must be duly stamped.² Formerly the period of apprenticeship for learning a trade was not less than seven years,³ but now no minimum time is imposed.⁴ It is necessary, for the double purpose of carrying on a trade and obtaining a settlement, that the master and apprentice should be named as parties to the agreement, and that the former stipulate to instruct and the latter to learn and to serve,⁵ and if there be no stipulation to serve there will be no apprenticeship.⁶ It is not necessary to the validity of the apprentice's indenture that the master should sign the counterpart,⁷ and in one case it was held sufficiently executed by the apprentice and his father (who were both unable to write) desiring a friend to write their names for them opposite the seals, the apprentice then taking the deed and delivering it to his master.⁸ It is requisite that the consideration or premium be duly set forth,⁹ but instead of an *ad valorem* stamp one of half a crown only is now chargeable.¹⁰

The apprenticeship deed, as has been seen, must not be disadvantageous to the apprentice who is an infant,¹¹ and if it is, he may treat it as not enforceable against him;¹² thus, where an infant was apprenticed by a deed containing a provision that the master should not be liable to pay wages to the apprentice so long as his business should be interrupted or impeded by or in consequence of any turn-out, and that the apprentice might, during such turn-out, employ himself in any other manner, or with any other person for his own benefit, it was held that this provision could not be enforced against him.¹³ But if the master only fairly protects himself against the exigencies of the trade in the matter of strike clauses, the deed will not be invalidated.¹⁴

¹ See 54 & 55 Vict. c. 39, s. 25, which enacts that every writing relating to the service of an apprentice placed with any master to learn any profession, trade, or employment is to be deemed an instrument of apprenticeship.

² *Woodstock Union v. Shipston-on-Stour Union*, 62 L. J. M. C. 43.

³ When an apprentice entered into a covenant to serve for a less period, the indenture was voidable at his election. *Burnley v. Jennings*, 6 Esp. 8.

⁴ See *Rea v. Rainham*, 1 East, 531.

⁵ See *Rea v. Chesterfield*, 2 Salk. 479.

⁶ *Rea v. Cromford*, 8 East, 25.

⁷ See *Millership v. Brookes*, 29 L. J. Ex. 369.

⁸ *Rea v. Longnor*, 4 B. & Ad. 647.

⁹ *Rea v. Amersham*, 4 A. & E. 508; *Westlake v. Adams*, 22 L. J. C. P. 271.

¹⁰ 54 & 55 Vict. c. 39, Schedule.

¹¹ Part IV. chap. ii. pp. 785 *et seq.*

¹² *Meakin v. Morris*, 12 Q. B. D. 352; *De Francesco v. Barnum*, 43 Ch. D. 165; 45 Ch. D. 430.

¹³ *Meakin v. Morris* (*ubi sup.*); and see *Leslie v. Fitzpatrick*, 3 Q. B. D. 229.

¹⁴ *Leslie v. Fitzpatrick* (*ubi sup.*). It is doubtful whether Lord Coke's dictum, that an infant's bond or writing with a penalty shall not bind him, could be at the present day properly applied to this class of contract; for, notwithstanding the penalty, the contract as a whole might be distinctly advantageous to him. See *Clements v. London & North-Western Railway Co.*, [1894] 2 Q. B. 482. It is also to be noticed that the words of the dictum are limited to a bond or writing for payment; therefore, if the penalty in a bond or deed of apprenticeship or service did not involve the payment of money, Lord Coke's proposition would seem not to apply at all.

But it is now settled law that where a master in an apprenticeship deed secures to himself the right of not paying wages to or of discontinuing the instruction of the apprentice at his own free will, as by lock-outs in the trade or profession, such stipulation as against the infant and his sureties makes the contract unenforceable either in law or equity.¹ But where he merely provides in the deed against liability to pay wages or find work for the apprentice while his business is at a standstill through an accident beyond his control (which would include a strike but not a lock-out) such provision does not render the deed inequitable against the apprentice, and so unenforceable.² The true rule on this subject is: "If there be a stipulation in the contract entered into by an infant so much to his detriment as to render it unfair that he should be bound by it, then the deed cannot be enforced at all."³

When claim of master to discontinue payment of wages or tuition unenforceable against infant and sureties.

The Master.—The master is entitled to the due and proper discharge of the services of his apprentice.⁴ As an incident to the right of the master to the service of his apprentice, he is entitled to all the earnings and gains which an apprentice may acquire by his labour, either in the service of another or in an employment on his own account.⁵ A master may justify such a battery as is necessary to defend his person,⁶ and may bring an action against those who detain an apprentice, after knowing him to be such;⁷ also for enticing him away,⁸ or injuring him.⁹ The master has more authority over an apprentice than over an ordinary servant, for he may legally correct the former, if under age, for negligence or misbehaviour, provided it be done with moderation; whereas if a master or his wife beat any other servant, it is a good cause for departure and action.¹⁰ This authority he cannot delegate to another.¹¹ Where the misconduct of the apprentice has been gross, it is preferable that the master should summon him before the justices, and settle their disputes. For mere trivial acts of misconduct he cannot turn his apprentice away.¹² He cannot send or take him out of England.¹³ The master does not appear to have any legal right to the custody of his apprentice, that is, he cannot recover him by *habeas corpus*.¹⁴

Rights and duties of the parties.

Rights of the master.

Right to moderately correct.

¹ *Reg. v. Lord*, 17 L. J. M. C. 181; *Meakin v. Morris*, 12 Q. B. D. 352; *De Francesco v. Barnum*, 43 Ch. D. 165 (Chitty, J.); *De Francesco v. Barnum*, 45 Ch. D. 430 (Fry, L.J.). (In the case of *De Francesco v. Barnum* it is difficult to appreciate the prejudice suffered by the infants under their contract of apprenticeship). *Corn v. Matthews*, [1893] 1 Q. B. 310. ² *Green v. Thompson*, [1899] 2 Q. B. 1.

³ Per Smith, L.J., in *Corn v. Matthews*, [1893] 1 Q. B. 316.

⁴ The enforcement of his rights in this respect will be considered lower down, under the head of the dissolution of the contract, pp. 885 *et seq.*

⁵ *Anon.*, 12 Mod. 415; *Thompson v. Havelock*, 1 Camp. 527; *Foster v. Stewart*, 3 M. & S. 191. ⁶ Roll. Abr. 546 D. pl. 2; Bac. Abr. Mast. & Serv. (P.).

⁷ *Rex v. Edwards*, 7 T. R. 745.

⁸ *Hodson v. Stallebrass*, 11 A. & E. 301.

⁹ *Rex v. Daniel*, 6 Mod. 182.

¹⁰ 1 Bl. Com. 428.

¹¹ See *Coombe's Case*, 9 Rep. 76 a.

¹² *Winstone v. Linn*, 1 B. & C. 460.

¹³ *Coventry v. Woodhall*, Hob. Rep. 134.

¹⁴ See *Rex v. Edwards* (*ubi sup.*).

Duties of the master.

It is the duty of the master to receive the apprentice into his service, and teach him his trade, and carry out generally his covenants in the deed. He must not put him to learn any other trade than that which he was bound to learn. When the apprentice is to be supported by him, he must find the necessary food and lodging for him. Not only must he feed him in such a case, but if he fall sick he must find him proper medicine and medical attendance.¹ If he fail without lawful excuse in the performance of these duties, and the health of the apprentice suffers or is likely to be seriously or permanently injured, he is liable to a fine or imprisonment.² As apprenticeship is a personal trust and confidence imposed in the master, he cannot of his own will either at law or in equity assign it over to another,³ though he may do so with the consent of the apprentice; but this will not make the apprentice an apprentice of the assignee for all purposes.⁴ But if the master has no employment for the apprentice at any particular time, it seems he may find temporary employment for him in the service of another person.⁵

Assignment and turning over.

Rights of the apprentice.
Proper instruction.

The apprentice has the right to be properly instructed by his master in the trade or art which he is bound by his indenture to learn, and if the master refuse to teach him his trade, he has an action on the covenant against him; this is so not only where the master has covenanted to teach him one trade, but more than one. Thus, if he has covenanted to teach three trades, and ceases to carry on one of them, he is guilty of a breach of contract, and the apprentice may, if he pleases, refuse to continue to serve.⁶ The apprentice has a right to be taught the whole of his trade, and not a mere part of it.⁷ If the master absolutely refuses to perform his part of the contract, and a dispute arises, the justices may summarily rescind the instrument, and order the whole or part of the premium paid on the binding of the apprentice to be repaid.⁸ The apprentice may also sue him on the covenants. Where two partners agreed to teach an apprentice his trade, and one of them retired from the business, and so failed to teach him, the contract was held to be broken.⁹ If the contract entitles the apprentice to wages he must be paid them, and unless otherwise stipulated for, such wages are due to him though he is temporarily absent from illness.¹⁰ He also will be entitled to them without any deduction for damage or injury done to his master's property, unless such deduction is stipulated for.¹¹ Where an apprentice is injured in his employment and claims compensation under the Employers' Liability Act, 1880, only the amount

Wages.

¹ *Reg. v. Smith*, 8 C. & P. 153.

³ *Coventry v. Woodhall*, Hob. Rep. 134.

⁵ See *Smith v. Francis*, 55 J. P. 407.

⁷ See *Eaton v. Western*, 9 Q. B. D. 636.

⁹ *Couchman v. Sillar*, 22 L. T. 480.

¹¹ Austin, Apprentices, 53, 54.

² 38 & 39 Vict. c. 86, s. 6.

⁴ *Baxter v. Burfield*, 2 Stra. 1266.

⁶ *Ellen v. Topp*, 20 L. J. Ex. 241.

⁸ 38 & 39 Vict. c. 90, s. 6 (2).

¹⁰ *Patten v. Wood*, 51 J. P. 549.

of his actual earnings can be taken into consideration as the basis of compensation, and not the amount which he might earn when out of his apprenticeship articles.¹ This principle would seem applicable to similar cases under the Workmen's Compensation Act, 1897.²

An apprentice living at home, and not forming part of his master's household, is entitled to stop in the place in which it was intended he should learn his trade, unless there is an express provision to the contrary; and if the master insist upon his removing, he can put an end to the contract.³ But where the apprentice resides in the master's house, and forms part of his household, the master is entitled to take him with him to any part of England.⁴

Right to remain in the place where engaged to serve.

It is a corresponding duty on the apprentice to enter the master's service and continue in it; and when in it, to be obedient, diligent, and respectful. He must obey all lawful commands of his master, that is, commands and orders in connection with the trade or business which he has been apprenticed to learn. He must also, if required, teach other apprentices in his trade not so far advanced as himself.

Duties of the apprentice.

The contract of apprenticeship may be dissolved in various ways: by the effluxion of time, that is, where the term of the apprenticeship agreed on by the indenture has expired. A master has no common law right to discharge an apprentice who has been bound to him by indenture on which a premium has been paid;⁵ if the conduct of the apprentice warrants his discharge the master in most cases should bring an action on the covenants.⁶ It may also be avoided by the apprentice on coming of age;⁷ but in such a case he should give his master reasonable notice of his intention of putting an end to their engagement.⁸ The apprenticeship may be dissolved with the consent of all parties concerned.⁹ The indenture must either be cancelled,¹⁰ or given up *animo cancellandi*, though not actually cancelled.¹¹ It is also dissolved by the death of the apprentice, or of the master, whose covenant to teach and instruct must of course fail;¹² but if the covenant is to serve the executors of the master, the apprentice is bound to serve them;¹³ and it seems that where the master has covenanted to find the apprentice in meat, drink, and

Dissolution of the contract. Effluxion of time.

Majority of apprentice.

Consent of parties.

Death of apprentice or master.

¹ *Noel v. Redruth Foundry Co.*, [1896] 1 Q. B. 453.

² 60 & 61 Vict. c. 37.

³ *Eaton v. Western* (*ubi sup.*), overruling *Royce v. Charlton*, 8 Q. B. D. 1.

⁴ *Coventry v. Woodhall* (*ubi sup.*); and see *Eaton v. Western* (*ubi sup.*).

⁵ See *Phillips v. Clift*, 4 H. & N. 168; *Westwick v. Theodore*, L. R. 10 Q. B. 124.

⁶ *Winstone v. Linn*, 1 B. & C. 168; *Westwick v. Theodore* (*ubi sup.*).

⁷ *Moore v. Wright*, 39 J. P. 772.

⁸ *Coghlan v. Callaghan*, 7 Ir. C. L. Rep. 291; *Wray v. West*, 15 L. T. 180. What would be a reasonable time depends on the facts of each case. Eighteen months has been held an unreasonable time. *Wray v. West* (*ubi sup.*).

⁹ *Re v. Weddington*, Burr. Sett. Cas. 766.

¹⁰ *Re v. Spawnton*, *ibid.* 801.

¹¹ *Re v. Titchfield*, *ibid.* 511.

¹² *Re v. Peck*, 1 Salk. 65.

¹³ *Cooper v. Simmonds*, 31 L. J. Ex. 138.

other necessities during the term, his executor is bound to perform the covenant so far as the maintenance is concerned, if he have assets.¹

If the master die during the term, his representatives are not bound to return any part of the premium, as there is only a partial failure of consideration.² And where the apprentice dies during the term the premium remains with the master.³ If there is a special provision between the parties that on the happening of a certain condition a portion of the premium shall be returned, it will be enforced on the happening of that condition.⁴ In a dispute between a master and apprentice the court of summary jurisdiction seised of the matter may not only rescind the instrument of apprenticeship, but order the whole or any part of the premium to be repaid.⁵

It is also dissolved by the bankruptcy of the master, which operates as a discharge of the contract of apprenticeship; and the trustee of the bankrupt's property may pay such sum out of the bankrupt's property to or for the use of the apprentice, regard being had to the amount paid by him or on his behalf, and to the time during which he had served with the bankrupt under the indenture, and to the other circumstances of the case.⁶ Where an apprentice is bound to a partnership firm without more, the dissolution of the firm terminates the contract.⁷ It would also be dissolved by the cruelty or ill-treatment of the master, if such would cause the apprentice reasonable ground to fear bodily harm.⁸

The contract is practically dissolved by the permanent illness of the apprentice;⁹ but it is not dissolved by the illness of the master, though he is precluded from teaching him his trade, and the master cannot discharge him for this cause.

It may also be dissolved by the misconduct of the apprentice. The covenants in an indenture of apprenticeship are distinct from and independent of each other;¹⁰ consequently misconduct not gross in character in an apprentice affords no justification to the master for putting an end to the contract,¹¹ unless the agreement in express terms gives the master power to dismiss the apprentice for such misconduct;¹² but a refusal to be taught would be a good defence to an action brought by the apprentice.¹³ The remedy of the master is an action against the sureties (if the apprentice is a minor), for breach of the covenants.¹⁴ Mere trifling acts of

¹ *Wadsworth v. Gye*, Sid. 216.

² *Whincup v. Hughes*, L. R. 5 C. P. 78. See *Ferns v. Carr*, 28 Ch. D. 409.

³ See *Whincup v. Hughes* (*ubi sup.*).

⁴ *Derby v. Humber*, L. R. 2 C. P. 247.

⁵ 38 & 39 Vict. c. 90, s. 6 (2).
⁶ 46 & 47 Vict. c. 52, s. 41. See *Ex parte Sandby*, 1 Atk. 149.

⁷ *Brook v. Dawson*, 20 L. T. 611.

⁸ See *Hallivell v. Counsell*, 38 L. T. 176.

⁹ *Boast v. Firth*, L. R. 4 C. P. 1.

¹⁰ *Winstone v. Linn*, 1 B. & C. 168.

¹¹ *Phillips v. Clift*, 4 H. & N. 168.

¹² *Westwick v. Theodore*, L. R. 10 Q. B. 124.

¹³ *Hughes v. Humphries*, 6 B. & C. 680.

¹⁴ *Winstone v. Linn* (*ubi sup.*).

Premium on death of apprentice or master, not returnable.

Bankruptcy of master.

Cruelty of master.

Permanent illness of apprentice.

Gross misconduct of the apprentice.

Trifling misconduct insufficient.

misconduct will not entitle the master to put an end to the contract, or maintain an action on the covenant against a person who has become bound for the due performance of the indenture.¹ But if his misconduct be gross, and his behaviour incorrigible, and attended with substantial injury to the master, it would be a ground for putting an end to the contract;² as, for instance, habitual theft,³ or repeated absence after remonstrance and rebuke.⁴ If the apprentice desert his master's service, and does that which disables him from lawfully returning to his master, as by enlisting, the latter is not bound to take him back;⁵ and under the Volunteer Regulations, 1887,⁶ an apprentice is not to be enrolled without his master's consent. Where the apprentice unlawfully absents himself, but the contract remains in force, the damages recoverable by the master in an action for the breach are confined to the period from the beginning of the apprentice's absence to the commencement of the action; and the master has no right to prospective damages.⁷ The apprentice himself cannot avoid his indenture by his own delinquency.⁸ The marriage of a minor apprentice (not being one of the City of London) does not put an end to the contract, and if the master suffers damage by reason of it his remedy is by action against the sureties.⁹

Habitual theft.

Enlisting.

Damages against apprentice.

Marriage of apprentice.

Disputes between master and apprentice may be entertained by justices under the Employers and Workmen Act, 1875,¹⁰ and the apprenticeship may be put an end to or rescinded by their order under the same Act.¹¹ The Court of Chancery will not as a rule exercise jurisdiction over disputes between master and apprentice, as it is impossible for it to exercise its coercive jurisdiction with any effect. Thus, it will decline to grant an injunction against an apprentice.¹² The High Court would have, no doubt, jurisdiction to cancel an apprentice's indenture of contract if its terms were manifestly unfair to him.¹³

Disputes between master and apprentice.

¹ *Wright v. Gihon*, 3 C. & P. 583.

² *Wise v. Wilson*, 1 C. & K. 662; *Mercer v. Whall*, 14 L. J. Q. B. 267.

³ *Coe v. Mathews*, 2 F. & F. 397; *Leaoyd v. Brook*, [1891] 1 Q. B. 431.

⁴ See *Wright v. Gihon* (*ubi sup.*).

⁵ *Hughes v. Humphries* (*ubi sup.*); *Rayment v. Minton*, L. R. 1 Ex. 244.

⁶ Para. 231.

⁷ *Lewis v. Peacey*, 31 L. J. Ex. 496.

⁸ *Gray v. Cookson*, 16 East, 13.

⁹ Austin, Apprentices, 58.

¹⁰ 38 & 39 Vict. c. 90.

¹¹ For the jurisdiction of justices as courts of summary jurisdiction over apprentices, see sections 5 to 7 and 10. It would seem that the jurisdiction of the County Court over disputes between master and apprentice is specially excluded by this Statute. See section 3.

¹² *De Francesco v. Barnum*, 43 Ch. D. 165.

¹³ See *Leslie v. Fitzpatrick*, 3 Q. B. D. 229.

CHAPTER VI.

THE SERVANT'S CHARACTER.

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Master not bound to give servant a character.

No master is legally bound to give his domestic or menial servant a character.¹ If the master does make to a third person in confidence a communication in the nature of a character, such communication is *primâ facie* privileged, and no action can be maintained by the servant against him on account of it, if done *bonâ fide* and without malice.

Character given *bonâ fide* a privileged communication.

A communication made *bonâ fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, although it contain criminary matter which without this privilege would be slanderous and actionable.² But this duty is not to be confined to legal duties which may be enforced by legal process, but must include moral and social duties of imperfect obligation.³ Indeed, this privilege in the matter of servants' characters arises from the duty (moral and not legal), which is cast by the requirements of society on the master, of stating fully and fairly the truth about his servant

Ground of privilege.

¹ *Currol v. Bird*, 3 Esp. 201.

² A canon propounded by counsel during argument and adopted by Lord Campbell in *Harrison v. Bush*, 5 E. & Bl. 344. 348.

³ Per Lord Campbell in *Harrison v. Bush* (*ubi sup.*).

whether in his favour or against him, and because masters should be as fully protected as possible if they honestly discharge their duty in speaking of the characters of those who have quitted their service, and acquainting those with the truth who are about to take them into their homes and service. "It is of importance to the public that characters should be readily given. The servant who applies for the character, and the person who is to take him, are equally benefited. Indeed, there is no class to whom it is of so much importance that characters should be freely given as honest servants. It is for that object that communications are protected."¹ Again: "In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned. In such cases the occasion prevents the inference of malice which the law draws from unauthorized communications, and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society, and the law has not restricted the right to make them within any narrow limits."²

The employers, then, of domestic servants have a duty cast upon them to state fairly and honestly what they know of them when applied to by those who may be about to take them into their homes; and those who are about to employ them have a corresponding interest in knowing the truth concerning them, so that they may be rightly informed as to those who are coming to form part of their domestic household. Masters and mistresses should be freely, unreservedly, and truthfully outspoken as to their opinion of those servants who have left their service; not keeping back that which is unfavourable to them, nor wilfully speaking ill of them, nor recklessly exaggerating their faults and shortcomings. For while the law in the interests of society holds the communication of the character of a servant privileged, yet a deliberately stated falsehood would be evidence of malice; and would tend to deprive the communication of its privilege.³

Duty of master to state the truth fairly and honestly.

The master is in duty bound not only to state what he knows of the servant at the time of his discharge, but if he knows of any

Facts learnt after discharge of servant should be communicated.

¹ Per Wightman, J., in *Gardner v. Stale*, 18 L. J. Q. B. 334.

² Per Parke, B., in *Toogood v. Spring*, 3 L. J. Ex. 347. This has been approved of in *Whiteley v. Adams*, 33 L. J. C. P. 89; and *Cowles v. Potts*, 35 L. J. Q. B. 247.

³ *Post*, p. 893.

circumstance subsequently happening, of which the inquirer is entitled to be informed, also to tell him further what he conscientiously believes to be the case;¹ therefore, if a good character is at first given, and the master subsequently find out matters unfavourable to the servant, it is his duty to communicate his discovery to the person to whom the character has been given. This point was decided in the case of *Child v. Affleck*;² there the defendant, with whom the plaintiff had lived as servant, in answer to inquiries respecting her character, wrote a letter imputing misconduct whilst in her service, and after she had left it; the defendant also made similar parol statements to persons that had recommended the plaintiff to her. It was held that neither the letter itself nor the parol statements proved malice, and that consequently the letter was a privileged communication, and the plaintiff not entitled to recover.

Former master
courting in-
quiries to be
made by new
master; privi-
lege.

The privilege is not taken away even where the former master courts inquiries to be made by the new master. Thus, in *Gardner v. Slade*,³ the plaintiff, a domestic servant, about to enter the service of Mrs. M., referred Mrs. M. to the defendant, in whose service she had been. The defendant being then unwell, her husband answered the application, and gave the plaintiff a good character; and Mrs. M. took the plaintiff into her service. The defendant subsequently recovered, and, in a letter written to Mrs. M. on other matters, said that she (the defendant) had been much imposed upon in her kitchen. Mrs. M. in consequence made further inquiries of the defendant as to the plaintiff's character; and the defendant in answer spoke the words complained of, namely, that she suspected the plaintiff of dishonesty. The jury found the defendant intended by her letter to induce Mrs. M. to make inquiries as to the plaintiff, and found for the plaintiff, subject to leave to move for a non-suit. The court subsequently made the rule for a non-suit absolute; Lord Denman, C.J., saying:⁴ "I think the privilege which protects a master in giving a character lasts as long as anything is discovered, before unknown to the master; as, for instance, if I give a good character to a servant, and next day discover the servant is dishonest, surely in such a case it becomes my duty to communicate my discovery to the person to whom I have given the character."

Former master
may be com-
municated
with.

So, where a master writes a letter to the former master of the servant on whose recommendation he had taken him, to the effect that his conduct had not justified the character given of him, it is a privileged communication.⁵ This privilege is based upon the propriety of warning the former master that the

¹ Per Kelly, C.B., in *Jones v. Duke of Westminster* (Times, April 26, 1879).

² 9 B. & C. 403.

³ *Ubi sup.*

⁴ 13 Q. B. 799.

⁵ See *Dixon v. Parsons*, 1 F. & F. 24.

character originally given by him to the servant is no longer deserved. So, too, if a servant knowing the character which his master will give of him, procures a letter to be written, not with a fair view of inquiring the character, but to procure an answer upon which to ground an action for a libel, no action can be maintained.¹

Where the servant can establish the malice of the master in making the communication of which he complains, then the privilege is taken away; for the master is found to have acted no longer in the proper and honest discharge of the moral duty cast upon him, but has deliberately and intentionally devised a wrong to another person, for which he should be justly held responsible. Thus, where a master officiously volunteers to inform a person into whose service he hears that a discharged servant of his is about to enter as to that servant's unfitness, it may be used against him as evidence of express malice towards the servant;² for "upon the question whether a man who has written a libel injuring the character of a servant has acted *bonâ fide* or not, it makes a very material difference whether he volunteered to give the character, or had been called upon so to do. At all events, when he volunteers to give the character, stronger evidence will be required that he acted *bonâ fide* than in the case where he has given the character after being required so to do."³

Where malice is established, privilege disappears.

Officious interference of master may be proof of express malice.

There is an important distinction in their legal effect between words *primâ facie* slanderous spoken by a master of a servant, and such words spoken by one person of another not in that relationship. In the latter case malice in law which will ground an action is all that need be proved. "Malice in common acceptance means ill-will against a person, but in its legal sense it means a *wrongful act done intentionally*, without just cause or excuse. . . . If I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional."⁴ But where an action for slander is brought on a communication of a servant's character, it is not to be considered as an action in the common way for defamation by words, but that the gist of it must be malice, which is not implied from the occasion of speaking, but should be directly proved;⁵ and no action lies for giving the true character of a servant, upon application made to his former master, to inquire into his character, with a view of hiring him, unless there should be

Express malice and not mere malice in law must be proved against the master.

Malice in law.

¹ Per Lord Alvanley in *King v. Waring*, 5 Esp. 15. See *Weatherston v. Hawkins*, 1 T. R. 110.

² *Pattison v. Jones*, 8 B. & C. 578.

³ Per Littledale, J., in *Pattison v. Jones*, p. 585.

⁴ Per Bayley, J., in *Bromage v. Prosser*, 4 B. & C. 247, 255.

⁵ Per Lord Mansfield in *Edmondson v. Stevenson et uxorem*, cited Bull. N. P. 8.

*extraordinary circumstances of express malice.*¹ This privilege, as before seen, is not confined to communications made on application, but even where they are volunteered, if not found to be malicious.² Communications, therefore, as to the character of a servant will be deemed *prima facie* to be true, and not actionable, but privileged, and the *onus* of proving malice is cast upon the plaintiff, and before the question of malice can be submitted to the jury, the evidence must raise a probability of malice, and be more consistent with its existence than its non-existence.³ Indeed, the protection of the master (for the benefit of society) is carried a long way, and before the privilege of the communication is taken away, clear proof of malice must be forthcoming. It is the existence of the moral duty (before alluded to) cast upon the master, that makes his communication privileged; thus, where a master had dismissed a servant on a charge of theft, and warned his other servants against associating with him, and informed them of the reasons for dismissing him, his communication was deemed privileged.⁴ A servant cannot maintain an action against his former master for words spoken or a letter written by him in giving a character of the servant, unless the latter prove *the malice as well as the falsehood* of the charge, even though the master make specific charges of fraud against him.⁵ Thus, though the statement should be untrue in fact, the master will be held justified by the occasion in making that statement, unless it can be shown to have proceeded from a malicious mind.⁶

Where defamatory words (such, for instance, as impute fraud to a servant) are *prima facie* privileged, as being spoken with honesty of purpose, and to a person interested in the inquiry, the mere fact that they are spoken in the presence of a third person does not of necessity take away the privilege; ⁷ so, where a master discharged his footman and cook, and they asked him his reason for dismissing them, and he told the footman in the absence of the cook that he charged him with robbing him along with the cook, and told the cook in the absence of the footman that he charged her with robbing him along with the footman; these communications were held privileged, both as regards the absent parties as well as those to whom they were respectively made.⁸ But the master must not exceed the occasion; ⁹ and if he should deliberately seek an opportunity of making such communication before a third person,

¹ Per Lord Mansfield in *Hargrave v. Le Breton*, 4 Burr. 2423, 2425.

² See *Whiteley v. Adams*, 33 L. J. C. P. 89.

³ *Somerville v. Hawkins*, 20 L. J. C. P. 131.

⁴ *Ibid.*

⁵ *Weatherston v. Hawkins*, 1 T. R. 110.

⁶ Per Lord Denman, C.J., in *Fountain v. Boodle*, 3 Q. B. 5, 12.

⁷ *Toogood v. Spyring*, 3 L. J. Ex. 347; *Taylor v. Hawkins*, 20 L. J. Q. B. 313.

⁸ *Manby v. Witt*, *Eastmead v. Witt*, 25 L. J. C. P. 294.

⁹ See *Jones v. Thomas*, 53 L. T. 678.

Onus of proof of malice on the plaintiff.

Evidence of malice must be clear;

and mere proof of the falseness of the charge insufficient.

Privilege not taken away because defamatory words spoken in the presence of an interested third person.

which might have been made in private, it is evidence of malice which may displace the privilege.¹

Malice may be established by various proofs; one may be that the statement is false to the knowledge of the party making it. In the majority of the cases in which servants have maintained actions against their masters for defamation of character, express malice has been substantiated by proof of the falseness of the communication being known to the masters. The master or mistress must believe the communication to be true. To entitle matters otherwise libellous to the protection which attaches to communications made in the fulfilment of a duty, *bona fides*, or, to use our own equivalent, honesty of purpose, is essential; and to this again two things are necessary: (1) that the communication be made not only in the course of duty, that is, on an occasion which would justify the making it, but also from a sense of duty; (2) that it be made with a belief of its truth.² Malice may also be shown by evidence of the communication not being made *bona fide* by the master. The following cases are a few instances of the above propositions.

A person applied to a master for the character of his servant, the master gave the servant a bad character, the truth of which he was unable to prove; he also officiously stated to a former master a trivial act of misconduct on the part of the servant, in order to prevent him giving a second character. Malice on the part of the master was held to be rightly inferred.³ A master having discharged his servant, and hearing that he was about to be engaged by another person, wrote a letter to him, and informed him that he had discharged him for misconduct; the person communicated with in answer desired further information; the master then wrote a second letter, stating the grounds on which he had discharged the servant. In an action for libel on the second letter the jury found that it was not communicated *bona fide*, and found a verdict for the servant. The court refused to disturb the verdict.⁴ A master in giving the character of his late servant to a person intending to take her, charged her with theft; and in support of the charge stated that she had borrowed money when she came into his service, and repaid it before she received any wages. In reply to an inquiry made afterwards by a relation of the servant, he admitted that the time when he paid the wages was entered in a book, which he produced, but refused to state what the time was; and on the same party remonstrating, and observing that the servant in consequence of her loss of character might have gone upon the town, he answered, "What is that to us?" It was held that this conduct was

How malice established

Master volunteering information.

¹ *Toogood v. Spyring*, 3 L. J. Ex. 347.

² *Per Cockburn, C.J.*, in *Dawkins v. Lord Paulet*, L. R. 5 Q. B. 102.

³ *Rogers v. Clifton*, 3 B. & P. 587.

⁴ *Pattison v. Jones*, 8 B. & C. 578.

evidence to go to the jury (though slight) that the communication to the intended master was made maliciously.¹ The plaintiff having been employed by the defendant as governess to her children for upwards of a year, during which the defendant twice recommended her to other similar situations, was dismissed in an abrupt manner without cause assigned, and lost a new engagement in consequence of the defendant giving the following answer to an inquiry respecting her qualifications: "I parted with her on account of her incompetency and not being ladylike nor good-tempered"; to which a postscript was added, "May I trouble you to tell her that this is the third time I have been referred to. I beg to decline any more applications." The plaintiff gave general evidence of her competency, ladylike manners, and good temper. The previous applications referred to in the postscript were on the occasions on which the defendant had recommended the plaintiff to other situations. *No evidence was given for the defendant.* The judge at the trial directed that the communication was privileged, unless there was direct evidence that it was influenced by some malicious feeling; but that, if a *prima facie* case of intentional falsehood had been made out, the defendant ought to have shown, and could not under the circumstances have had much difficulty in showing, the assertion to have been made under a belief of its truth; and that the question was whether, looking at the whole case, there was sufficient proof that the defendant had been influenced by an improper feeling. It was held that the direction was right, and that there was evidence of malice for the jury.²

If a married woman slander or libel a servant by knowingly giving him an untrue and defamatory character, she will, notwithstanding modern legislation, render her husband liable with herself to an action for damages at the election of the plaintiff; she binds him as his agent, though he may be totally ignorant of the transaction; and the Married Woman's Property Act, 1882, has not in this particular taken away his liability.³

If a master knowingly give a false character of a servant to another who is about to hire him, and the servant afterwards rob or otherwise injure his new employer, an action for deceit lies against the master.⁴ But a false character *bonâ fide* believed to

Giving a false character actionable, if damage ensue.

¹ *Kelly v. Partington*, 4 B. & Ad. 700.

² *Fountain v. Boodle*, 3 Q. B. 5. In an action for an alleged libel, contained in an answer to inquiries respecting the character of a servant, the plaintiff establishes a case to go to the jury, if there is any evidence, as a matter of fact, that the answer complained of was untrue to the defendant's knowledge, or as to matters of opinion, that the defendant in giving the character did not really act on the opinion which he professes to have entertained.

³ *Seroka v. Kattenberg*, 17 Q. B. D. 117; *Earle v. Kingscote*, [1900] 2 Ch. 585.

⁴ See *Wilkin v. Reed*, 15 C. B. 192.

be true would not subject the giver to an action.¹ The giving of false and fictitious characters has also been made a criminal offence; thus, if any person personate a master or mistress, or knowingly give a false, forged, or counterfeited character, he is liable on conviction to forfeit a penalty of £20, or in default of payment may be committed to prison with hard labour for a period not exceeding three months.²

Also punishable by fine or imprisonment.

It is an indictable offence at common law to utter a forged document with intent to deceive, the forging of which is an offence at common law, and a testimonial to character is such a document.³

Uttering forged testimonials with intent to deceive indictable.

¹ See *Evans v. Collins*, 5 Q. B. 805; *Thom v. Bigland*, 8 Exch. 731; 9 Exch. 426 n.

² 32 Geo. III. c. 56, ss. 1 and 6.

³ *Reg. v. Sharman*, 25 L. J. M. C. 51; *Reg. v. Moah*, 27 L. J. M. C. 204.

CHAPTER VII.

RIGHTS AND DUTIES OF MASTER AND SERVANT.

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THIS chapter is concerned with the mutual rights and duties of master and servant. The right of the one implies a corresponding

duty upon the other. When a servant engages with a master to enter his service, it is the servant's duty to enter upon and fulfil his engagement. If he does not fulfil his part of the bargain, he is liable to be sued for the breach, although in the case of domestic servants it would be nearly always futile and unwise to pursue the remedies provided by the law. The further duties of a servant to his master during the service, so far as a domestic servant is concerned, are—to be honest, respectful, and diligent;¹ to evince due and proper care of his master's property, and so he will be rendered liable for gross negligence,² and for fraud, or misfeasance;³ and to obey all lawful orders.⁴ The orders must be lawful, and within the scope of the servant's employment. A domestic servant need not obey an order which is attended with a risk,⁵ or which would necessitate his performing a task which he did not engage himself to do; a lady's maid, for instance, would not be obliged to milk the cows. If the order be lawful, though harsh, the servant must obey it, and where a maid-servant insisted, contrary to her master's orders, upon visiting her dying mother, and was dismissed, she was held to be properly dismissed because of her disobedience.⁶ The master has the right to expect, if not extraordinary diligence and care on the part of the servant, yet that he shall not persistently neglect his duty,⁷ and disobey his orders.⁸

to be honest, respectful, and diligent;

to take due care of master's property;

to obey all lawful orders.

If a master has to make good any loss or damage caused to third persons by reason of his servant's negligence or misconduct, such loss or damage can be recovered from him,⁹ that is, in law, if not in fact.

A master nowadays has no right to chastise his servants if of full age for dereliction of duty, whatever may have been his rights in former times. He may moderately punish an apprentice if under age, and perhaps a domestic servant, if of tender age. If he exceed the bounds of moderation in the correction, and the death of the servant ensues, it is certainly manslaughter, and may be murder.¹⁰ In these days, when corporal punishment is viewed with disfavour, and convictions are a frequent result of charges of assault, and heavy damages are given in civil suits, a master would be wise who refrained from lifting his hand against even a young servant, except perhaps it be for an offence which would be better punished by a whipping at home than by exposure and

Rights of the master.

No right to chastise servant.

¹ *Limland v. Stephens*, 3 Esp. 269.

² See *Countess of Salop v. Crompton*, Cro. Eliz. 777.

³ *Turner v. Robinson*, 5 B. & Ad. 789; Bae. Abr. Mast. & Serv. M.

⁴ *Turner v. Mason*, 14 L. J. Ex. 311; *Spain v. Arnott*, 2 Stark, 256.

⁵ See *Turner v. Mason* (*ubi sup.*); *Woodley v. Metropolitan District Railway Co.*, 2 Ex. D. 384.

⁶ *Turner v. Mason* (*ubi sup.*).

⁷ *Pritchard v. Hitchcock*, 6 M. & G. 165.

⁸ *Fillieul v. Armstrong*, 7 Ad. & El. 557.

⁹ *Pritchard v. Hitchcock* (*ubi sup.*).

¹⁰ 1 Hale, 473; and see *Reg. v. Leggett*, 8 C. & P. 191.

disgrace in a public court. If a servant be incorrigible, let him be discharged.

It is quite clear that a master is entitled to the earnings of his apprentice, and though there is no direct authority on the point, he would seem to be equally entitled to the earnings of his domestic servant, so long as he remains with and works for him.¹ *Quicquid acquiritur servo acquiritur domino*. This is not a very important point as regards the class of servants under discussion, because, from the nature of their employment, their services would not be likely to be let out, but the claim of the master would seem to be rightly based, for as the servant hires himself to do exclusively the work of his master, who in his turn is liable to pay him wages, if he works for and earns reward from another, whether with or without his master's permission, the master would be entitled to his earnings, and could recover them from the servant in either case, but from a third person only where permission was given, for then the servant would have been his agent.² The permission of his master for the servant to work for another would not be of itself a waiver of his right to his earnings. If a servant were hired to do a particular thing, the result of his work would belong to his master.³

As the master, then, has the right to the work, services, and earnings of his servant, if any one deprives him against his will of those services, by enticing or taking away the servant, an action at his instance will clearly lie;⁴ also for detaining the servant after notice of the prior contract of service;⁵ and the strict relation of master and servant need not exist.⁶ It is not, however, actionable to induce a servant to leave his master's service at the expiration of the time for which he was hired, though the servant otherwise had no intention of leaving his master's service.⁷

¹ See *Rex v. Wantage*, 1 East, 601; Co. Litt. 117 a.

² But this maxim has very little application nowadays even in the use of apprentices, and still less in that of mere domestic servants. Mr. Lloyd, in his note to Paley on Agency, in discussing the question whether a master might bring an action for the recovery of his servant's earnings, says: "The question would be: First, Was the transfer of service originally made with the master's assent? If not, it seems clear that the master might, by subsequently adopting the act, maintain an action for work and labour done by his servant. If yes, there is then the further question: Whether the servant in that particular employment was to be considered as the servant of this original master, or that of the person immediately employing him; and it is submitted that if the master were liable for wages to the servant during the period of the substituted employment, the inference would arise that he still considered the servant as his own, and did not intend to waive the benefit of his earnings. But if by previous agreement he were released from a proportionate amount of wages, then the contrary conclusion would be the more reasonable. If the payment had been made to the servant in ignorance that he was the servant of another, probably in that case the employer would be discharged." (3rd edit. 339.) See Story (Agency, s. 421), who approves of the above note.

³ *Makepeace v. Jackson*, 4 Taunt 770.

⁴ *Lumley v. Gye*, 22 L. J. Q. B. 463.

⁵ *Blake v. Lanyon*, 6 T. R. 221; *De Francesco v. Barnum*, 63 L. T. 514.

⁶ *Sykes v. Dixon*, 9 Ad. & El. 693; *Lumley v. Gye* (ubi sup.); *Evans v. Walton*, L. R. 2 C. P. 615; *Bowen v. Hall*, 6 Q. B. D. 333; *De Francesco v. Barnum* (ubi sup.).

⁷ *Nicol v. Martyn*, 2 Esp. 734.

Master entitled to earnings of servant.

Action for enticing away a servant.

A cognate subject to this is the action for the seduction of a daughter; but as the relationship of master and servant is in most cases a fiction, and is in reality that of parent and child, the discussion will be found under that head.¹ It may, however, be here stated that a master may maintain an action for debauching his servant, though he is in no way related to her in blood.² A master may also recover damages from a wrong-doer for injuries inflicted by him on his servant,³ and this action is based, like the last, on the loss of services; but it has been held that this right of action does not exist for injuries inflicted by the person with whom the servant had contracted in the course of the fulfilment of the contract.⁴ If the servant die from the injuries he has received, the master cannot maintain his action for damages.⁵ Medical expenses form an item of damages.⁶

Action for injuries inflicted on servant.

As it is the duty of a servant who has engaged himself in a binding contract of service to enter and fulfil his part of the agreement, so is it the master's correlative duty to receive the servant into his service, and if he refuse to do so, except for some such good reason as the servant's misconduct, incompetency, or inability to perform his part of the contract, the servant may maintain an action against him for breach of the contract.⁷ On the authority of *Hochster v. De la Tour*,⁸ a servant may bring such action even before the date assigned for the beginning of the service, if the master announce his intention not to receive him into his employ. Not only must the master receive the servant into his service, but must keep him there during the specified period, and if he dismiss him within that time, except on justifiable grounds, he does so at his peril. There is no duty on the master to provide work for the servant;⁹ for the mere contract of hiring and service does not import that duty; there must be either some agreement between the parties that work must be provided, or the nature of the service would compel the master to provide it.¹⁰

Rights of servants and duties of masters.
Duty of master to receive servant into employ;

none *primâ facie* to provide work;

There is also a duty on the master to protect the servant, and if he fails in that duty the court may remove the servant from his control; thus, if a master or mistress has caused or encouraged or favoured the seduction or prostitution of a young servant under sixteen, the court before whom the offence is tried and proved may remove the child out of his or her control.¹¹

to protect servant;

It is the duty of the master to pay the wages he has agreed to give in return for the services rendered. When master and

to pay agreed wages.

1 Part II., Parent and Child, chap. ii.

2 *Fores v. Wilson*, Peake, 55.

3 *Hall v. Hollander*, 4 B. & C. 660.

4 *Alton v. Midland Railway Co.*, 34 L. J. C. P. 292.

5 *Osborn v. Gillett*, L. R. 8 Ex. 88.

6 *Dixon v. Bell*, 1 Stark. 287. See 49 & 50 Vict. c. 48, s. 6.

7 *Bracegirdle v. Heald*, 1 B. & Ald. 722.

8 22 L. J. Q. B. 455.

9 *Emmens v. Elderton*, 4 H. L. 624; *Turner v. Sawdon*, [1901] 2 K. B. 653.

10 See *Bunning v. Lyric Theatre*, 71 L. T. 396.

11 48 & 49 Vict. c. 69, s. 12.

servant have agreed, one to hire and the other to serve, they should be clear and explicit towards each other on the subject of wages; for by so doing much unpleasantness, and perhaps some litigation, will be saved. It must be borne in mind that service, however long continued, creates no claim for remuneration without a bargain for it, either express or implied from circumstances showing an understanding that there should be payment.¹ There may be a valid contract of hire and service without any express or implied promise to pay for the service, for it not infrequently happens that board and lodging alone are the wages of hire;² another may be a long-continued service, which would not entitle the person who has rendered it to any wages or pecuniary compensation in the absence of an express or implied bargain to that effect.³ There must be evidence, supported by the circumstances of the services rendered, of a contract, either express or implied, to pay for the services rendered, otherwise there is no duty on the hirer to do so. Where there is an express contract to pay wages, then the matter is clear; but where there is no such direct contract, then the facts of the case must be left to the jury to say whether there has been an implied contract or not to pay wages. There is a marked distinction to be drawn between the case where a person works for a near relative, such as father, mother, brother, grandfather, and the like, and where he works for a stranger; for, unless in the former case there is an express contract for remuneration, no right to be paid will be inferred;⁴ but where work is done for strangers, much less direct evidence of a contract for remuneration would suffice.

If from the nature of the circumstances an implied promise can be made out, the servant will be entitled on a *quantum meruit* to a fair remuneration; but it is open to the defendant to rebut such presumption by producing evidence to the contrary effect, as that the plaintiff cohabited with him and was not his servant,⁵ or that the misconduct of the plaintiff rebutted any inference of an implied promise to pay.⁶ A servant can only recover on a promise to pay wages; so, a promise to pay a *gratuity*, unless stipulated to form a portion of the wages, is no ground of action;⁷ but if a gratuity is stipulated for it can be recovered.⁸

Where there has been a promise to pay an agreed sum, the servant cannot claim additional wages for the rendering of additional services, unless there has been some express or implied

¹ Per Martin, B., in *Reeve v. Reeve*, 1 F. & F. 280.

² *Ree v. Shinfield*, 14 East, 541.

³ Smith, M. & S. 192; *Foord v. Morley*, 1 F. & F. 496; *Alfred v. Fitzjames*, 3 Esp. 3; *Hulse v. Hulse*, 25 L. J. C. P. 177.

⁴ Wood, Law of Master and Servant, pp. 115, 121; Macd. M. & S. 145; and see *Davies v. Davies*, 9 C. & P. 87.

⁵ *Bradshaw v. Hayward*, Carr. & M. 591.

⁶ *Monkman v. Shepherdson*, 11 A. & E. 411.

⁷ *Parker v. Ibbetson*, 27 L. J. C. P. 236; *Lake v. Campbell*, 5 L. T. 582.

⁸ *Eurl of Mansfield v. Scott*, 1 Cl. & F. 319.

Payment of wages must be stipulated for.

When servant entitled on a *quantum meruit*.

Servant cannot claim additional wages for additional services.

contract to that effect; so, where A comes as a servant into B's household, consisting of seven persons, and B increases his household to ten, thereby throwing additional work on A, A in the absence of an agreement to that effect is not entitled to an increase of wages.¹

The Truck Act,² which prohibited "the payment in certain trades of wages in goods, or otherwise than in the current coin of the realm," does not apply to domestic servants; and, as a matter of fact, in some poorer households, young domestic servants are paid by being boarded, lodged, and clothed. When a considerable period has elapsed from the date of the wages having become due to the time when the claim is made, the courts will presume, as a rule, that all the wages have been paid,³ or that the services were rendered on the footing that no payment was to be made.⁴ Claims for wages are within the Statute of Limitations,⁵ and are barred after a lapse of six years.

Truck Act does not apply to domestic servants.

When wages presumed to have been paid.

On the bankruptcy of the master, which does not of itself put an end to the contract of hiring and service,⁶ though it puts an end to the contract of apprenticeship, servants under a binding contract of service,⁷ in the employment of the master, are entitled to priority over the other creditors in the payment of their wages due for a period of time not exceeding four months,⁸ and for an amount not larger than £50.⁹ The creditors, or the official receiver of a bankrupt's property, cannot insist upon the fulfilment of the contract by the servant.¹⁰

Priority of servants' wages on the bankruptcy of master.

Wages are a specified reward for specified purposes; and therefore, if the specified work has been done, the full specified reward or remuneration is due, unless by some arrangement the servant has agreed that some deduction shall be made from the full amount due and payable. Accordingly, a master, in the absence of some special agreement, cannot set off to a claim for wages money paid for medical attendance on a servant,¹¹ or for advances made by him to a servant under age for the purchase of non-necessaries, nor coach fare paid by him for her mother.¹² Nor can he deduct from the servant's wages any loss he may have sustained (as by breakages) through the accident, or even the negligence, of the servant,¹³ unless he has expressly so stipulated at the time of the hiring.¹⁴ If, however, he can prove negligence, in such a case

What wages are.

¹ *Bell v. Drummond*, Peake, 45; *Frazer v. Hatton*, 26 L. J. C. P. 226.

² 1 & 2 Wm. IV. c. 37.

³ *Sellen v. Norman*, 4 C. & P. 80.

⁴ See *Gough v. Findon*, 7 Exch. 48 (per Parke, B., p. 50).

⁵ 21 Jac. I. c. 16.

⁶ *Thomas v. Williams*, 1 A. & E. 685.

⁷ *Ex parte Glover*, 1 Mont. & Gr. Dig. Bkpt. Laws, 178.

⁸ See *Ex parte Fox*, *Re Smith*, 17 Q. B. D. 4.

⁹ 46 & 47 Vict. c. 52, s. 40, 1 (b).

¹⁰ See *Gibson v. Carruthers*, 8 M. & W. 343.

¹¹ *Sellen v. Norman* (*ubi sup.*).

¹² *Hedgeley v. Holt*, 4 C. & P. 104. For coach fare, railway fare would now be substituted.

¹³ *Le Loir v. Bristow*, 4 Camp. 134.

¹⁴ *Cleworth v. Pickford*, 7 M. & W. 320, per Lord Abinger.

he may either pay the wages in full and sue the servant for the loss; or leave the servant to sue for the wages, and then in the action counterclaim for the loss.¹ The servant is entitled to wages for the period in which he is temporarily ill, though unable to perform his duties, unless the contract of service is rescinded at the time he falls ill.²

A servant is entitled to be properly discharged either by due notice or payment in lieu of notice, and if he is discharged improperly he is entitled to all wages earned up to the moment of his quitting the service, and in addition compensation for the wrongful discharge to the amount of the wages for the period of notice to which he is legally entitled, which in the case of domestic servants is one month. A servant so discharged without notice should sue for damages for breach of contract by the wrongful dismissal, otherwise he could not recover damages, only wages earned and due.³

A servant who has been properly discharged before the expiration of the time for which he was engaged, forfeits the wages he may have earned during the unexpired term. The contract of service is indivisible, and must be fully completed before the servant is entitled to be paid.⁴ Thus, where a domestic servant is hired, wages are by custom paid monthly; and the contract may be determined by a month's notice, and if the servant is rightly discharged during a current month, he forfeits the wages of that month. So if he discharge himself by leaving without notice, he forfeits his wages for the current period of service,⁵ and is liable to damages (one month's wages) at the suit of his master. A servant so discharged is, however, entitled to wages which have already accrued due but have not been paid.⁶

There is considerable misapprehension among many persons on the subject of board wages. Servants on discharge on the payment of a month's wages in lieu of the customary notice, often ask for, and sometimes obtain, a sum which is called "board wages." This claim is quite unfounded, unless there has been a special agreement to that effect, which is not very probable.⁷ Board wages, properly speaking, is a weekly sum which is allowed them for their maintenance where the master does not provide for them. In some households masters do not provide food, &c., for their servants, but pay them this weekly sum, called "board wages," for their own convenience, as well as to prevent the servants from dealing on their credit with tradesmen. As above

¹ This remedy is available in the County Court as well as the High Court.

² *Cuckson v. Stones*, 28 L. J. Q. B. 25.

³ *Fewings v. Tisdal*, 1 Exch. 295; *Archard v. Hornor*, 3 C. & P. 349.

⁴ *Spain v. Arnott*, 2 Stark. 256; and see *Ridgway v. The Hungerford Market Co.*, 3 A. & E. 171.

⁵ See *Walsh v. Walley*, L. R. 9 Q. B. 367.

⁶ See *ante*, p. 870.

⁷ *Gordon v. Potter*, 1 F. & F. 644; *Winstone v. Linn*, 1 B. & C. 460.

Servant
entitled to
proper
discharge.

Forfeiture of
current wages
on dismissal.

Contract of
service ind-
visible.

Board wages.

Servant not
entitled to
them on dis-
charge.

stated, wages are the remuneration for the work and labour supplied, and if the servant is discharged with his month's wages in lieu of his notice of a month (during which time he would have had to work unless summarily dismissed), he has got all to which he is entitled. A master is bound to support and provide for a servant only so long as the latter is in his service, and that obligation ceases on the expiry of the service. Again, it may be that the servant obtains a new master the day after he is discharged by the old; consequently, if board wages are paid him, he will obtain a sum of money which he will never need.

If the servant, on leaving his service, has not been paid his proper wages, the County Court is the fitting tribunal to which he should have recourse for their recovery, if they do not exceed £100 in amount. The consent of parties will give the court jurisdiction over a larger sum. If the servant bring his action in the superior court, and he recover less than £20, he is not entitled to his costs, unless the judge at the trial specially gives them to him.¹

Recovery of wages: If not exceeding £100, to be recovered in County Court.

The Councils of Conciliation Act, 1867,² which was passed to adjust differences between masters and workmen, does not extend to domestic servants, or servants in husbandry.³

The Councils of Conciliation Act, 1867, does not apply to domestic servants.

A justice of the peace has no power to hear and determine any dispute that may arise between master and servant as to the contract of hiring; for by the Employers and Workmen Act, 1875,⁴ which gives courts of summary jurisdiction the power as courts of civil jurisdiction to hear and determine certain disputes between employers and workmen, domestic servants are expressly excluded from its operation.

Courts of summary jurisdiction have no power over disputes between master and domestic servant.

The duty of a master to supply his servant with food does not exist at common law, but is the result of a contract, whether express or implied, between the hirer and hired. The breach of it formerly was the ground of a civil action only, except in the case of an infant servant of tender years,⁵ that is, one under sixteen years of age,⁶ in which case it was an indictable misdemeanour.⁷ Where the master has means of providing food for his servant, being one of tender years,⁸ and neglects to do so, and the servant dies of starvation, the master may be indicted for murder, for the law casts a duty upon him of providing food and sustenance for him.⁹ If a master refused to supply food for his apprentice, he could be indicted at common law.¹⁰ To cure the defects of the law the Act of 1851¹¹ was passed. This in its

Duty of master to supply servant with food &c., the result of a contract.

¹ 30 & 31 Vict. c. 142, s. 5; 45 & 46 Vict. c. 57, s. 4. Jurisdiction up to £100 was conferred upon County Courts by 3 Edw. VII. c. 42, s. 3. ² 30 & 31 Vict. c. 105.

³ Sect. 17.

⁴ 38 & 39 Vict. c. 90, s. 10.

⁵ *Rev v. Ridley*, 3 Camp. 650.

⁶ *Reg. v. Sloane et uxor*, 33 Sess. Pap. (Cent. Crim. Ct.) 482.

⁷ *Rev v. Friend*, R. & R. C. C. 22.

⁸ *Reg. v. Chandler*, 24 L. J. M. C. 109.

⁹ See *Reg. v. Marriott*, 8 C. & P. 425.

¹⁰ *Reg. v. Gould*, 1 Salk. 381.

¹¹ 14 & 15 Vict. c. 11.

turn was repealed but practically re-enacted by the Act of 1861,¹ which provided that

How duty enforced.

"whosoever, being legally liable either as a master or a mistress to provide for . . . any servant necessary food, clothing, or lodging, shall wilfully and without lawful excuse refuse or neglect to provide the same, or shall unlawfully and maliciously do or cause to be done any bodily harm to any such . . . servant, so that the life of such servant shall be endangered, or the health of such . . . servant shall have been or shall be likely to be permanently injured, shall be guilty of a misdemeanour, and being convicted thereof shall be liable . . . to be kept in penal servitude for five years, or be imprisoned for any term not exceeding two years, with or without hard labour."

So also, by a later Act,² it is provided that

"where a master, being legally liable to provide for his servant or apprentice necessary food, clothing, medical aid, or lodging, wilfully and without lawful excuse refuses or neglects to provide the same, whereby the health of the servant or apprentice is or is likely to be seriously or permanently injured, he shall on summary conviction be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding six months, with or without hard labour."

When master indictable for manslaughter.

If a master neglect to supply food, &c., to a servant who is so enfeebled and helpless that he cannot provide for or take care of himself, and is unable to withdraw himself from his master's control, and the death of the servant is attributable to such neglect, the master may be indicted for manslaughter; but a wife is not equally liable with her husband for these offences, unless she has been supplied with money for the support of the servant, and she has wilfully neglected to afford it.³

Master not bound to provide medicine, &c., for servant.

A master is not legally bound to provide medicine for his sick servant,⁴ or surgical attendance for one who has met with an accident, though it is otherwise in the case of an apprentice.⁵ In an early case,⁶ it is true that Lord Kenyon held that a master was bound to provide medicine for his servant whilst living under his roof, but that is no longer the law. He is not liable even on an implied contract when a medical man is called in by one of the servants to attend him or her.⁷ But slight evidence is sufficient to fix him with liability; thus, where a servant became ill in consequence of a service away from her master's family, and called in a surgeon, and after that the master sent his own doctor, and his wife knew of the first surgeon's attendance and expressed no dis-

¹ 24 & 25 Vict. c. 100, s. 26.

² 38 & 39 Vict. c. 86, s. 6. By section 11 it is provided that the husbands and wives of the respective parties to the contract of service shall be considered as competent witnesses.

³ *Ree v. Saunders*, 7 C. & P. 277.

⁴ *Wrennall v. Adney*, 3 B. & P. 247.

⁵ *Reg. v. Smith*, 8 C. & P. 153.

⁶ *Searman v. Castel*, 1 Esp. 270.

⁷ *Cooper v. Phillips*, 4 C. & P. 581. In this case the surgeon was not the regular doctor of the defendant's family.

approbation, the master was held liable to pay for the attendance of the surgeon called in by the servant.¹ The servant who is taken ill or injured becomes legally chargeable to the union in which he is stricken down.²

The master has cast upon him the duty of indemnifying his servant from the consequences of obeying his lawful orders. The principle upon which this duty is cast upon the master is, that a principal is bound to indemnify his agent who acts on his behalf and carries out his orders. It is, of course, a requisite that the orders shall be lawful, for if the servant perpetrates even on his master's behalf that which is clearly a crime or a wrong, he does so at his own risk, and cannot expect to be indemnified, for he ought not to have carried them out, and there is no contribution among tort-feasors. It has been held that where the servant in obeying his master's orders commits a *malum prohibitum*, then the master must indemnify the servant; but where the servant commits a *malum in se*, of which he was perfectly aware, then there is no obligation on the master to indemnify him. If the above proposition has ever been the law it cannot be deemed to be so now. The true principle would seem to be that if a servant obeying the orders of his master does an unlawful act through ignorance of fact and suffers loss or damage in consequence of such obedience, he is entitled to be indemnified by his master in respect of such loss, for in such a case he could not rightly be held to be a joint tort-feasor. If the servant, as a matter of fact, thought he had a right to do what he was ordered to do, he ought to be held harmless for the consequences of his obedience. Thus, if A sell his horse to B and send his servant C (who is ignorant of the sale) to get back the horse from B's stable, and C has it delivered up to him, and the horse is injured on the road and C is sued and cast in damages, C is entitled to maintain an action for indemnity against A.³ But if the servant act with the full knowledge of the facts and carries out the illegal orders of his master, even though they may not appear to him to be illegal, he cannot maintain an action for indemnity in such a case. It stands to reason that if the servant acting *contrary* to his master's orders is damnified, he alone must bear the loss;⁴ for no man should be made liable for the acts of another which he has neither authorized nor adopted.

It now remains to consider the important question of the liability of a master to indemnify a servant for the injuries the latter has received in his service. It must be premised that neither the Employers' Liability Act, 1880,⁵ nor the Workmen's

Duty of master to indemnify servant.

Orders obeyed must be lawful.

Liability of master for injuries received by servant in his service. Employers' Liability Act.

¹ *Cooper v. Phillips* (*ubi sup.*).

³ See *Adamson v. Jarvis*, 4 Bing. 66; *Betts v. Gibbons*, 2 A. & E. 57; *Dixon v. Fawcus*, 30 L. J. Q. B. 137.

² See *Wennall v. Adney* (*ubi sup.*).

⁴ *Grylls v. Davies*, 2 B. & Ad. 514.

⁵ 43 & 44 Vict. c. 42.

1880, and Workmen's Compensation Act, 1897, do not apply to domestic servants.

Compensation Act, 1897,¹ has any application to purely domestic servants.² The main feature of the earlier Act is to deprive the master or employer of the serviceable defence of alleging that the servant injured by another of his servants was in one common employment in cases where the injured servant was obeying the orders either of the master or of some responsible person placed in authority by the master or employer.³ But this defence still holds good in the case of domestic servants.

Gardeners within the Workmen's Compensation Acts, 1897 and 1900.

Gardeners, however, are within the provisions of the Workmen's Compensation Act, 1897, through the operation of the Workmen's Compensation Act, 1900.⁴ The principle of the Act of 1897 is that a workman within its provisions who is injured in the course of his employment without any wilful default of his own is to be compensated therefor, though the employer has not been guilty of any neglect of duty towards him, nor has employed defective plant, machinery, or works, nor has compelled him in the course of the employment to carry out the work which has led to his injury. If such workman dies in consequence of such injury, his "dependants" are entitled to compensation. A discussion of the sections of this Act, and the decisions upon them would be foreign to the scope of this work, therefore, for the method of recovering and the amount of compensation, and the general principles underlying it, the reader is referred to the different treatises on the same.

Principle of liability and immunity.

The principle of the liability and immunity of a master is the obligation cast upon him of taking all reasonable precautions to secure the safety of his servant;⁵ but at the same time the mere relation of master and servant does not imply a contract on the part of the master to take due and ordinary care not to expose the servant to extraordinary danger and risk in the course of employment.⁶ Under what circumstances the master will be held *not liable* will first be set forth; next, under what circumstances his *liability* will arise.

The master is not liable at common law to his servant for injuries inflicted by fellow servants in the ordinary discharge of their duty.⁷ A servant, when he engages to serve a master,

¹ 60 & 61 Vict. c. 37.

² Sect. 8.

³ Sect. 1.

⁴ 63 & 64 Vict. c. 22, s. 1 (3).

⁵ *Brydon v. Stewart*, 2 Macq. H. L. Cas. 30.

⁶ *Riley v. Baxendale*, 30 L. J. Ex. 87.

⁷ *Priestley v. Fowler*, 3 M. & W. 1; *Hutchinson v. Newcastle and Berwick Railway*, 19 L. J. Ex. 296; *Wigmore v. Jay*, 19 L. J. Ex. 300. This case is no longer law, except as to domestic servants. In the case of *Priestley v. Fowler*, Lord Abinger, C.B., in his judgment said: "If the master be liable to the servant in this action, the principle of the liability will be found to carry us to an alarming extent. . . . The master, for example, would be liable to the servant for the negligence of the chambermaid for putting him into a damp bed; for that of the upholsterer for sending in a crazy bedstead, whereby he was made to fall down while asleep, and injure himself; for the negligence of the cook in not properly cleaning the copper vessels used in the kitchen; of the butcher, in supplying the family with meat of a quality injurious to the health; of the builder, for a defect in the foundation of the house, whereby it fell, and injured both the master and the servant by the ruins. . . . In truth, the mere relation of the

Immunity of master in respect of injuries inflicted by fellow servants.

impliedly undertakes, as between himself and his master, to run all the ordinary risks of the service (including the risk of negligence on the part of a fellow servant when he is acting in the discharge of his duty) as a servant of him who is the common master of both, and the master is not in general bound to indemnify him against the consequences of injuries sustained in the ordinary discharge of the duties for which he was hired; that is, if the master provide competent fellow servants, and means and appliances reasonably proper and adapted to the work in hand.¹ The test of the liability or non-liability of the master is whether at the time of the injury the servant injured was or was not, so far as the injuring servant was concerned, a stranger to the master, that is, whether the risk he ran was incidental to his employment. Where the servant can be said to have received his injuries at the hands of a fellow servant, while engaged with that fellow servant in an employment common to them both on behalf of their master, then the latter is not liable. An upper servant who has the control and ordering of those under him or her is equally a fellow servant so as to render the master harmless.²

It is not, however, necessary for this purpose that the (servant) causing and the (servant) sustaining the injury should both be engaged in performing the same or similar acts; ³ so that, provided they are engaged in a common employment and with a common object, that is, with a common master,⁴ they need not be engaged in effecting the same common immediate object, but may be occupied in different departments of duty.⁵ They should, however, contribute directly to the common object of their common employer in the business which they have in hand. But it is necessary in each particular case to ascertain whether the servants are fellow labourers in the same work, because although a servant may be taken to have engaged to encounter all risks which are incident to the service which he undertakes, yet he cannot be expected to anticipate those which may happen to him on occasions foreign to his employment. Where servants, therefore, are engaged in different departments of duty, an injury committed by one servant upon the other, by carelessness or negligence, in the course of his peculiar work, is not within the exception, and the master's liability attaches in that case in the same manner as if the injured servant master and the servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself." But the extension of the master's liability to make compensation for personal injuries in the case of domestic service will come before any great length of time.

¹ Smith, M. & S. 240; *Hutchinson v. Newcastle and Berwick Railway Co.*, 19 L. J. Ex. 296.

² See *Wilson v. Merry*, L. R. 1 Sc. & Div. App. 326.

³ *Bartonshill Coal Co. v. Reid*, 3 Macq. H. L. Cas. 266; Per Lord Cranworth, C., p. 295.

⁴ *Johnson v. Lindsay*, [1891] App. Cas. 371, explaining Lord Cairns' observation in *Wilson v. Merry* (*ubi sup.*).

⁵ *Morgan v. Vale of Neath Railway Co.*, L. R. 1 Q. B. 149.

stood in no such relation to him :¹ as, for instance, a dairymaid is bringing home milk from the farm, and is carelessly driven over by the coachman ;² in this case the servant is substantially a stranger, and is entitled to the privileges of such. "Where the two servants are servants of the same master, and where the service of each will bring them so far to work in the same place and at the same time that the negligence of one in what he is doing as part of the work which he is bound to do may injure the other whilst doing the work which he is bound to do, the master is not liable to the one servant for the negligence of the other."³ The master also is not liable where the injured servant, though in the employ of another master, is his servant, and has received his hurt at the hands of one of his own servants, the two acting together on his behalf in a common employment. But what is actually a common employment must depend upon the proved facts of each individual case.

If a master does his best to obtain competent servants, that is all he is expected to do ; "he is not bound to warrant their competency" ;⁴ and in an action against a master for an injury done by one of the servants to another, the question is not whether the servant was competent, but whether the master did not exercise due care in employing him.⁵

Where the servant is well acquainted with the use and nature of the instrument or machine which he has to use in his work, and he is injured by it, his master will not be held liable, unless the injury has been caused by the personal negligence of the latter,⁶ or by his breach of a statutory duty.⁷ He also will not be liable where the dangerous and risky nature of the employment is well known to the servant.⁸ To entitle the servant to recover he must allege and prove both that his master was negligent and he himself was ignorant of the risk.⁹ The master is not liable where the servant is not bound to obey. This is cognate to the preceding rules, for a risk accepted deprives the servant of his remedy. A master is not liable to a servant for injuries sustained in the performance of orders which he was not bound to obey ; as, for example, a servant is not bound to risk his life or limb in obedience to his master's orders ; and if he does so, he must take the consequences. If an adult female servant, such as a lady's maid, were ordered to stand outside an upper window and clean it, or to hold a horse, and she were in consequence to sustain an injury, neither she, nor her

¹ Per Lord Chelmsford in *Bartonshill Coal Co. v. McGuire*, 3 Macq. H. L. Cas. 300, 307.

² See *McNorton v. Caledonian Railway Co.*, 28 L. T. 376.

³ Per Brett, L.J., in *Charles v. Taylor, Walker & Co.*, 3 C. P. D. 492, 496.

⁴ *Tarrant v. Webb*, 25 L. J. C. P. 261.

⁵ *Ibid.*

⁶ *Dynen v. Leach*, 26 L. J. Ex. 221.

⁷ See *Britton v. Great Western Cotton Co.*, L. R. 7 Ex. 130.

⁸ *Potts v. Plunket*, 33 L. T. 111.

⁹ *Griffiths v. London & St. Katherine Docks Co.*, 13 Q. B. D. 259.

Master not
liable
where com-
petent fellow
servant
employed ;

*volenti non fit
injuria.*

Where servant
not bound to
obey.

representatives in the case of her death, would be held (it is submitted) capable of maintaining an action for the injury apart from the negligence of her master, for she might be said voluntarily to have incurred the risk of injury;¹ but the mere fact of undertaking or continuing in a dangerous employment is not conclusive evidence that the servant voluntarily incurred the risk, and so in the event of injury become disentitled to recover compensation;² and if such pressure is brought to bear upon the servant by the master that he could not be said to be a free agent, then the master would be held liable.³ Where a servant contributes by his own negligent conduct to the accident which injures him, and by the exercise of ordinary care and prudence would have escaped any mishap at all, he is debarred from seeking compensation from his master.⁴ This is a principle which is not confined to the relation of master and servant, but is well recognized in other branches of the law. So, also, if the servant choose to work with an instrument or machinery which he knows to be dangerously imperfect and defective, and is injured by the defective instrument or machine, the master is not liable, on the principle of the maxim *volenti non fit injuria*;⁵ for knowing of his risk he elects to abide by it. But it has been held that if the servant discovers the defect and informs his master of it, and the latter induces him to remain at his work by promising to repair the defect, and the servant is injured, he will be entitled to recover, for he might reasonably suppose that the defect would be remedied.⁶

Contributory negligence of servant.

When master may be liable.

A volunteer, or one who does not stand to the master in the position of actual servant, who is injured by participating in the work for which he volunteers his services in process of its accomplishment by the servants of the master, cannot, because he is in the position of a stranger and not hired servant, stand in any better position than the hired servants whom he was assisting, and so impose a more onerous burden upon the master than he ever undertook to bear.⁷ The volunteer is for the time being acting in the common employment of the master whom he seeks to fix with liability. But where the injured person is not a mere licensee or volunteer, but has an interest in common with the master of the servant, then he will be entitled to compensation for the injuries inflicted on him.⁸

Person injured a volunteer.

¹ *Thomas v. Quartermaine*, 18 Q. B. D. 685; *Yarmonth v. France*, 19 Q. B. D. 647; *Membery v. G. W. Railway Co.*, 14 App. Cas. 179.

² *Smith v. Baker*, [1891] App. Cas. 325.

³ See *Thruswell v. Handyside*, 20 Q. B. D. 359.

⁴ *Senior v. Ward*, 28 L. J. Q. B. 139. See *Blenkinsop v. Ogden*, [1898] 1 Q. B. 783.

⁵ *Senior v. Ward* (*ubi sup.*); *Skipp v. Eastern Counties Railway Co.*, 23 L. J. Ex. 23.

⁶ *Holmes v. Clark*, 31 L. J. Ex. 356, affirming 30 L. J. Ex. 135. See *Smith v. Baker* (*ubi sup.*).

⁷ *Degg v. Midland Railway Co.*, 26 L. J. Ex. 171; *Potter v. Faulkner*, 31 L. J. Q. B. 30.

⁸ *Wright v. London and North-Western Railway Co.*, L. R. 10 Q. B. 298; 1 Q. B. D. 252; *Bachelor v. Fortescue*, 11 Q. B. D. 474.

Liability of
the master.

Personal
interference
of master.

Appliances for
labour and
premises out
of order and
unsafe.

Ignorance of
servant of
their unsafe
state.

Obedience to
orders of
superior ser-
vant.

Servant not
acting in
master's ser-
vice injured
by fellow
servant.

Where the master by advice, or personal presence and interference, takes part in the work or labour, during the course of which the servant is injured through the negligent interference of the master, the latter is held liable.¹ So where the master works with the servant as a fellow servant, and injures him in the course of the employment by his negligence, he is liable.²

If a master by his negligence permits his machinery or other appliances to be in a state of disrepair and unsafety, and while knowing of its defects orders a servant to use it who has no means of knowing of its insecurity, and is injured, the servant can recover compensation.³ The same principle would apply to premises which were known to the master to be in a state of disrepair, and a servant in consequence received injuries. But where a domestic or household servant brings an action of negligence against his master for personal injuries resulting from the unsafe state of the premises, he must allege not only that the master knew of their unsafe state, but that he himself was ignorant of the danger.⁴ Where a master hires young servants, and puts them under the orders and superintendence of a superior who stands in his place, and by the negligence of such deputy they are injured, in all probability the master would be held liable.⁵ But the servant who acts as his master's deputy must be placed in such a position of trust and authority as to be fairly considered as his representative in the establishment.⁶ The negligent directions of a mere superior servant resulting in injury, whose lawful orders the inferior servant was bound to obey, will not entitle the latter to compensation as against the master.⁷

Where a servant is acting out of the scope of the employment or service for which he was hired, and is injured by a fellow servant, he is in the position of a stranger, and so, it may be contended, entitled to the privileges of a stranger.⁸ A master is likewise liable for injury done by his servant to the servant of another master (unless there be contributory negligence on his part), though both servants may be working at their respective employments on premises in the joint occupation of their masters. The joint occupation of the premises does not make the employment common.⁹

¹ *Roberts v. Smith*, 26 L. J. Ex. 319; *Ormond v. Holland*, El. Bl. & El. 102.

² *Ashworth v. Stanwir*, 30 L. J. Q. B. 183.

³ *Brydon v. Stewart*, 3 Macq. H. L. Cas. 30; *Williams v. Clough*, 27 L. J. Ex. 325; *Murphy v. Phillips*, 35 L. T. 477.

⁴ *Griffiths v. London and St. Katherine's Dock Co.*, 13 Q. B. D. 259.

⁵ *O'Byrne v. Burn*, 16 Sec. Ser. 1025 (Scotch Reports). It is clear that as regards the employed affected by the Employers' Liability Act, 1880, the master would be liable; but in the case of domestic servants, the argument by analogy can alone be used, that the orders of the deputy were the orders of the master.

⁶ *Murphy v. Smith*, 12 L. T. 605.

⁷ *Feltham v. England*, L. R. 2 Q. B. 33.

⁸ *Hutchinson v. York, Newcastle and Berwick Railway Co.*, 19 L. J. Ex. 296.

⁹ *Vose v. Lancashire and Yorkshire Railway Co.*, 27 L. J. Ex. 249.

The master is also personally liable if he do not exercise reasonable care in selecting his servants.¹ If one incompetent servant injure another, the latter may recover against his master because of his negligence, if brought home to him, and not on the ground of the incompetency of his fellow servant. If the servant was aware of the incompetency of his fellow servant, and yet remained on, and was injured by him, he would find it difficult to maintain the action against his master.²

When a servant is killed under circumstances which, if he had survived, would have entitled him to maintain an action against the master, Lord Campbell's Act³ enables his personal representative (wife, husband, parent, child, executor, or administrator, as the case may be) to bring an action to recover damages within twelve months from his death.

Master negligent in selecting servants.

Rights of servant's personal representative under Lord Campbell's Act.

¹ *Hutchinson v. York, Newcastle and Berwick Railway Co.* (*ubi sup.*).

² See *Saxton v. Hawksworth*, 26 L. T. 851.

³ 9 & 10 Vict. c. 93.

CHAPTER VIII.

RELATIONS OF MASTER TO THIRD PERSONS CREATED BY ACTS OF THE SERVANT.

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In this chapter it is proposed to deal with the relations of the master towards third persons constituted by the acts of his servant. The principle on which a master can be made liable for the acts or conduct of his servant is that which underlies the relations of principal and agent, namely, *qui facit per alium facit per se*. The mere relation of master and servant does not clothe the latter with a capacity to pledge the former's credit against his consent, or even without his knowledge; and if a servant take up goods on credit without the leave of his master, no liability on the transaction attaches to the latter. If a master hold out a servant as his authorized and accredited representative, it is only right and just that he should accept responsibility for his acts. The master, however, is at times liable even

Master liable
as principal
for acts of
agent.

when he cannot rightly be said to hold out his servant as his agent.¹

The subject-matter of the chapter will be thus divided :

- (1) The liability of the master on contracts entered into by the servant.
- (2) The liability of the master for the tortious acts of the servant.

(1) The liability of the master on the contracts entered into by the servant may arise in three ways:

Liability of master on contracts entered into by servant.

- (a) By adoption by the master of the servant's contracts.
- (b) By giving express authority to servant to contract.
- (c) By creating an implied authority to servant to contract.

(a) If a servant enter into a contract in his master's name, which is adopted and ratified by the master, the latter will be liable on it ; for *omnis ratihabitio retrotrahitur et mandato priori æquiparatur*.² It is necessary that the adoption should go to the whole of the contract, and not only part of it ;³ and that such contract should have been made expressly by the servant as agent.⁴

By adoption of servant's contract.

(b) Express authority to contract may be given by deed, writing, or word of mouth, and may be either of a *general* or *special* nature ; and when of the latter, is confined to a particular instance or object. When the authority of the servant to contract is established, the master at once becomes liable.⁵ To bind the master the servant must confine himself within the scope of his authority, and not enter into dealings which are beyond it. If the terms of the authority are reduced into writing, but little difficulty can arise as to the scope of the servant's powers ; but in the ordinary every-day relation of master and domestic servant, the terms would never be declared by a deed, and but rarely reduced into informal writing, they would be most frequently given by word of mouth. The effect of such orders will be best described in the next section.

By giving express authority to servant to contract.

(c) Where the authority of a servant to bind his master upon contracts arises merely by implication, the general rule is, that the authority of a servant is co-extensive with his usual employment and the scope of his authority is to be measured by the extent of his employment.⁶ The authority to pledge his credit may be assumed from the conduct of the master. Where a master, by a course of dealing, holds out his servant as his agent, he will become responsible and liable for the acts done within the scope

By creating an implied authority to servant to contract.

¹ See *post*, p. 918.

² Story on Agency, s. 239.

³ See *Ferguson v. Carrington*, 9 B. & C. 59 ; *Ramazotti v. Bowring*, 29 L. J. C. P. 30.

⁴ *Ramazotti v. Bowring* (*ubi sup.*).

⁵ *Langan v. Great Western Railway Co.*, 30 L. T. 173.

⁶ Smith, Merc. Law, 136.

of his authority and agency. Previous dealings with any particular servant are not necessary; but if his master hold him out as his agent, and send him into the world as his servant, and he enters into a bargain, the benefit of which accrues to the master, the latter will be deemed to have given that servant an implied authority to enter into such a bargain, unless the servant shall have represented to the third person that he was contracting in his own name.¹ If a master permits a servant to purchase goods for him on credit, and the servant receives money from him to purchase goods of a similar nature, and the servant embezzles the money, but orders the goods, the master will be liable to pay for their price.² If a servant is commissioned to transact business for his master, but has no particular instructions given to him, nor any particular means to carry out his master's orders, he is usually deemed invested with the proper powers and appropriate means to carry out the business intrusted to him; thus, if a servant be sent by his master to purchase goods on his behalf, but is not furnished by him with money, he will in all probability be deemed clothed with an authority to pledge his master's credit.³ The liability and non-liability of the master may be thus illustrated: where the servant is in the habit of buying goods upon credit, and the master is not in the habit of paying ready-money for such goods, and the master on a particular occasion furnishes his servant with the money to purchase the goods, and the servant either loses or steals the money, but orders the goods, the master is liable by reason of the previous course of dealing.⁴ But where the master is in the habit of supplying his servant with the money to pay for the goods he orders, and the servant steals or loses the money, but orders the goods, he is not liable.⁵

The implied authority to pledge the master's credit is, however, limited to the particular business, and cannot be extended to collateral transactions,⁶ or to matters which are clearly outside of and not incidental to the scope of the servant's employment.⁷ A servant, acting within the scope of his employment, may be treated as the general agent of his employer for all purposes connected with the employment, and will bind him;⁸ that is, where he is put into a position of trust and responsibility, he can, in

¹ *Rimell v. Sampayo*, 1 C. & P. 254.

² See *Nickson v. Brohan*, 10 Mod. 109; also *Wayland's Case*, 3 Salk. 234; and *Rusby v. Searlett*, 5 Esp. 76.

³ *Tobin v. Crawford*, 12 L. J. Ex. 690; *Miller v. Hamilton*, 5 C. & P. 433; see also *Smith v. M'Guire*, 3 H. & N. 563.

⁴ See *Nickson v. Brohan* (*ubi sup.*); *Hazard v. Treadwell*, 1 Stra. 506.

⁵ See *Stubbing v. Heintz*, Peake, N. P. 66.

⁶ *Howard v. Chapman*, 4 C. & P. 508.

⁷ *Cox v. Midland Counties Railway Co.*, 18 L. J. Ex. 65.

⁸ *Walker v. Great Western Railway Co.*, L. R. 2 Ex. 228; *Howard v. Sheward*, L. R. 2 C. P. 148; but see *Knight v. North Metropolitan Tramway Co.*, 78 L. T. 227.

Where master
liable and not
liable.

Implied authority
limited to
particular
business.

his representative capacity, bind his master by orders and directions given by him within the scope of his trust.¹ As a result, the servant of a horse-dealer has been held capable of binding his master by giving a warranty,² though he had received strict orders not to give it, on the ground of an authority of necessity, for without such power he could not carry out the transactions he was employed to negotiate.³ But the servant must not exceed his authority, and if he does, his master is not bound by his representation or course of conduct;⁴ and where a servant's authority is specially limited by his master, his agency is a special one, and only within the limits of such agency will his acts bind his master.⁵ What is the extent of the servant's authority is in each case a question for the jury.⁶

Servant must not exceed his authority.

If the master holds the servant out as his general agent, he will be liable for contracts entered into by the servant within the scope of his employment, though against his orders. His liability cannot be limited or controlled by any private arrangement or agreement between himself and his servant; and a master was held liable under the following circumstances: He had entered into an agreement to allow his groom so much a year for providing shoes and medicine for his horses, but the groom spent the money in other things; the farrier sent in his bill, and sued him for the amount of his debt. Lord Kenyon held in the case that unless the farrier knew of the agreement, and expressly trusted the groom, the agreement was no defence to the action, for a tradesman has nothing to do with any private agreement between the master and servant.⁷ It is otherwise where the tradesman or person dealing with the servant is aware of the private arrangement between him and his master, for if he trusts him, he relies on the servant's and not the master's credit.⁸

Liability of master not limited by private arrangement.

No liability on the part of the master for the servant's contracts exists where he has not given the servant express or implied authority to pledge his credit, or where he has terminated with notice the servant's authority to pledge it. If a master neither expressly nor impliedly authorizes his servant to pledge his credit, he is not liable for any contracts which the servant

Non-liability of the master where no express or implied authority on part of servant.

¹ *Richardson v. Cartwright*, 1 C. & K. 328; *Langan v. Great Western Railway Co.*, 30 L. T. 173. In this case a sub-inspector of railway police was held capable of binding his employers for the board, lodging, and necessities supplied to persons injured by an accident on their line. But in *Cox v. Midland Counties Railway Co.* (18 L. J. Ex. 65), a stationmaster was held not capable of binding the company in respect of orders given by him to a surgeon to attend injured passengers. The case is, however, irreconcilable with the general principle of the law and the later case, and would doubtless not now be followed.

² *Alexander v. Gibson*, 2 Camp. 555; and see *Baldry v. Bates*, 52 L. T. 620.

³ *Howard v. Sheward* (*ubi sup.*).

⁴ *Helyear v. Hawke*, 5 Esp. 72.

⁵ *Ward v. Eans*, 2 Lord Raym. 928; *Waters v. Brogden*, 1 Y. & J. 457.

⁶ *Reynell v. Lewis*, 16 L. J. Ex. 55.

⁷ *Precious v. Abel*, 1 Esp. 350; see also *Rimell v. Sampayo*, 1 C. & P. 254; but see to the contrary, *Wright v. Glyn*, [1902] 1 K. B. 745.

⁸ *Howard v. Braithwaite*, 1 V. & B. 209.

may make in his name, for liability in such a case would be contrary to all principles of law and justice.¹ Sir William Blackstone² says on this point: "If I usually deal with a tradesman by myself, or constantly pay him ready-money, I am not answerable for what my servant takes upon trust; for here is no implied order to the tradesman to trust my servant." The succeeding cases illustrate the relations of masters to third persons created by the acts of their domestic servants. The defendant contracted with the plaintiff to be served by him with meat at a certain price for ready-money; his cook was accustomed to order the meat, and when the bill amounted to a few shillings or a guinea, used to pay it, generally on Monday morning, and the defendant always gave her the money to pay; this course of dealing continued for a long time till the defendant got a cook who embezzled the money, and did not pay the plaintiff's bills; under these circumstances the defendant was held not liable for their amount.³ A butler ordered brandy in his master's name, which was consumed by him and the cook, without the master being privy to the order, delivery, or consumption, and there was no evidence that the servant had authority to order the goods; the master was held not liable.⁴ The defendant ordered of a tailor two suits of livery a year for her coachman, and the tailor supplied one; but, at the desire of the coachman, supplied plain clothes instead of the other; she was held only liable for the livery actually supplied, and entitled to set off against a subsequent account for clothes the price of a suit, of livery which had been supplied and paid for, but taken back by the tailor from the coachman.⁵ Again, a servant injured his master's carriage, and without acquainting or waiting for the orders of his master, left it at a coachmaker's, a stranger to his master, and the coachmaker refused to give up the carriage without being paid the price of his repairs; the master was successful in an action for the recovery of the carriage, and the coachmaker was held to have no claim against him for the amount of his bill.⁶ The mere fact of a master's using the goods obtained by the servant will not of itself render him liable to pay for them, where the course of dealing by the master did not amount to an authority to the servant to pledge his credit. It is, however, strong *prima facie* evidence against him, unless he can show that credit was given to the servant, or that the latter received money from him to buy the goods, and so had no authority from him to pledge his credit.⁷ Where a servant is left in charge of children with a sufficient allowance for their support, he has no authority to pledge

Mere user of
goods will
not create
liability.

¹ *Wright v. Glyn*, [1902] 1 K. B. 745.

² 1 Com. 430.

³ *Stubbing v. Heintz*, Peake, 66; see also *Pearce v. Rogers*, 3 Esp. 214.

⁴ *Maunder v. Conyers*, 2 Stark. 281.

⁵ *Hunter v. Dowager-Countess of Berkeley*, 7 C. & P. 413.

⁶ *Hiscox v. Greenwood*, 4 Esp. 174.

⁷ *Pearce v. Rogers*, 3 Esp. 214.

his master's credit for necessities or goods supplied for their support.¹ Further, a master is not liable for the contracts of his servants when they have an express authority and exceed their powers; or where they have an implied authority, and act beyond the scope of their employment.² Neither is he liable when the person transacting business with the servant knows who the master is, yet gives credit to the servant.³

When the authority of a servant to act as agent for his master ceases, the power to bind the master by his dealings ceases also; and those who contract with the servant knowing of the cessation and determination of such authority, contract with him on his credit, and at their peril. This proposition holds good not only in such cases where the authority of the servant is express, but where it is implied. If a master has by his acts given his servant implied authority to pledge his credit to a tradesman, and subsequently notifies to that tradesman his revocation of the servant's authority, he will not be held liable for any subsequent credit transactions effected in his name by the servant with the tradesman.⁴ Notice of the revocation must be brought home personally to the third person;⁵ and mere notice of withdrawal to the servant alone would be insufficient to protect the master.⁶

Servant's authority to pledge credit terminated with notice.

Notice must be brought home to third party.

Constructive notice, however, may be evidenced by such facts as lapse of time, not sending in accounts, from which knowledge of the want of authority on the part of the servant might be inferred.⁷ The discharge of the servant, unless known to the third person, would not seem to be an exoneration of the master;⁸ though the lapse of a considerable period from the last order would raise a presumption of discharge.⁹ The death of a master operates as a revocation of the servant's authority, and any acts of the servant after the death of the master would not bind the representatives of the latter.¹⁰

Servant's authority revoked by death of master.

(2) The principle that he who employs another to transact his business should be affected with responsibility for the acts of his agent as though they were his own, renders a master liable for the tortious acts of his servant, if done as his servant, and in the course of his employment, or as incidental to his employment;¹¹ for a master is bound to indemnify the public against the wrongful or negligent acts of himself or his servants;¹² for the

Liability of master for tortious acts of servant.

¹ Per Cockburn, C.J., in *Atkins v. Pearce*, 26 L. J. C. P. 252.

² See *Cor v. Midland Counties Railway Co.*, 18 L. J. Ex. 65.

³ See *Thomson v. Davenport*, 9 B. & C. 78.

⁴ *Chappell v. Bray*, 30 L. J. Ex. 24.

⁵ *Gratland v. Freeman*, 3 Esp. 85; *Summers v. Solomon*, 7 El. & Bl. 879.

⁶ *Trueman v. Loder*, 11 A. & E. 589. ⁷ *Starely v. Uzielli*, 2 F. & F. 30.

⁸ *Anon. v. Harrison*, 12 Mod. 346; *Aste v. Montague*, 1 F. & F. 264.

⁹ *Starely v. Uzielli* (*ubi sup.*).

¹⁰ See *Smout v. Ilbery*, 12 L. J. Ex. 357.

¹¹ *Ruddiman v. Smith*, 60 L. T. 708.

¹² *Michael v. Alestree*, 2 Lev. 172; *Bartonshill Coal Co. v. Reid*, 3 Macq. H. L. Cas. 266.

master chooses the servant and gives him the order which he is bound to obey.¹ The relationship of master and servant must be clearly ascertained and proved; but when once proved the master is liable for the servant's negligence. Where the negligence of a servant is the effective cause of damage to another person, the master is liable though the actual proximate cause is the negligence of some third person, for whose acts the master might not be *prima facie* liable.²

The principle of the maxim *respondeat superior* applies to this liability of the master; but there seems to be a double element in this liability. The master is liable not only as principal for the acts of his agent, but even under circumstances in which the servant could in no sense be called his agent, as where the servant was acting contrary to his commands, but was engaged in his service. In such a case his liability, it is suggested, would seem to be based upon the natural justice of the principle that where one of two innocent persons must sustain a loss, he who enabled the loss to be brought about should be the party to sustain it.³ The liability of the master is not confined only to the negligent acts of his servant, but also to his frauds, if committed within the scope of his authority. The principle of his liability has been rested on the ground that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved.⁴ Another ground has been suggested, namely, "that every person who authorizes another to act for him in the making of any contract, undertakes for the absence of fraud in the execution of the authority given."⁵ Knowledge of the servant has been held to be knowledge of the master so as to bind him.⁶ Yet another ground has been suggested, namely, the negligence of the master; in other words, the master has been guilty of a breach of duty towards his neighbour; for it is the duty of every person in the pursuit of his own affairs to take care that he inflicts no injury upon the persons or property of others, and the principle of the maxim *sic utere tuo ut alienum non lædas* should apply.⁷

His liability is twofold: (i) Civil; (ii) Criminal.

(i) A master is liable for the act of his domestic or menial servant, whether it be one of omission or commission, whether negligent,⁸ fraudulent, or deceitful, or even if it be an act of

Grounds for
liability of
the master.

Civil liability.

Act done in
course of
employment;

¹ *The Halley*, L. R. 2 P. & D. 193.

² *Engleheart v. Farmer and Lipton*, [1897] 1 Q. B. 240.

³ See *Coupé Co. v. Maddick*, [1891] 2 Q. B. 417.

⁴ Per Willes, J., in *Barwick v. English Joint-Stock Bank*, L. R. 2 Ex. 259, 265.

⁵ Per Bramwell, B., in *Weir v. Bell*, 3 Ex. D. 238, 245.

⁶ *Baldwin v. Cassella*, L. R. 7 Ex. 325.

⁷ Rob. & Wall. Duty and Liability of Employers, 2.

⁸ See *Abraham v. Bullock*, 86 L. T. 796.

positive malfeasance or misconduct, if it be done in the course of his employment;¹ or with the express or implied direction or assent of his master, however much the servant may abuse his authority.² He may be liable if false and defamatory words are spoken by the servant with his authority and consent;³ but such authority must be direct.⁴ He is in general liable for all the consequences that may arise from the misconduct of his servant.⁵ But apart from his own negligence he is not liable for the criminal acts of his servant if such are done out of the ordinary scope of his employment;⁶ thus the mere relation of master and servant does not operate as an implied warranty of the honesty of the servant.⁷ He is also liable for the acts of servants who are selected or appointed by him, but who are not under his immediate control.⁸ In cases of sudden necessity or emergency a servant would seem to have the implied authority to appoint another person to act as his master's servant; and the master would be rendered liable for any negligent act of the person so appointed as his servant.⁹ It sometimes happens that it is a question of great nicety to decide who is the master of the person employed, whose act has given rise to the alleged liability. A fair test of the question is the exclusive and permanent control exercised over the servant; he who has the permanent and exclusive control over the servant would in most instances be deemed to be the master, though at the particular moment of the act complained of the servant was under the control and orders of a temporary employer. It was not settled law for some time that a coachman with a carriage or horses on the job was *not* the servant of the hirer. In an early case in which the point arose, *Laugher v. Pointer*,¹⁰ the judges were equally divided; and it was not until *Quarman v. Burnett*¹¹ that the point was set at rest. In *Laugher v. Pointer*, the defendant, the owner of a carriage, hired of a stable-keeper a pair of horses to draw it for a day, and the owner of the horses provided a driver, through whose negligent driving an injury was done to a horse belonging to the plaintiff. In *Quarman v. Burnett*, the defendants were the owners of a carriage, who were in the habit of hiring horses from the same person, to draw it for a day or a drive, and the owner of

or with his express or implied assent.

Servant must, as a rule, be under his immediate control.

¹ Story, Agency, 452.

² *Bayley v. Manchester, Sheffield and Lincolnshire Railway Co.*, L. R. 8 C. P. 148.

³ Odger's Lib. & Sl. 411-415.

⁴ *Harding v. Greening*, 8 Taunt. 42.

⁵ But see *Greenland v. Chaplin*, 19 L. J. Ex. 293.

⁶ *Cheshire v. Beilby*, [1905] 1 K. B. 237; and see *Sanderson v. Collins*, [1904] 1 K. B. 628.

⁷ *Cheshire v. Beilby* (*ubi sup.*).

⁸ *Pitts v. Kingsbridge Highway Board*, 25 L. T. 195. The American law seems to be the same on this point: *Lowell v. Boston Railway Co.*, 23 Pick. 24. See also *Booth v. Mister*, 7 C. & P. 66, in which a master was held liable for the acts of a stranger whom his servant had requested to act in his place.

⁹ *Guilliam v. Twist*, [1894] 1 Q. B. 567.

¹⁰ 5 B. & C. 547.

¹¹ 6 M. & W. 499. In this case the opinion of Abbott, C.J., and Littledale, J., in *Laugher v. Pointer*, was adopted.

the horses provided a driver, through whose negligence an injury was done to the plaintiff. In this case it was held to make no difference that the defendants had always been driven by the same driver, he being the only regular coachman in the employ of the owner of the horses, or that they had always paid him a fixed sum for each drive; or that they had provided him with a livery which he left at their house at the end of each drive, and that the injury in question was occasioned by his leaving the horses while so depositing the livery in their house. This decision was grounded on the principle that where the relation of master and servant does not exist, the liability from that relation cannot arise.¹ If, however, the temporary *dominus* orders, or sanctions, or adopts the act of his servant for the time being, he renders himself liable for the result of his conduct.² Occasional employment of the servant will render the master liable;³ or where the relationship is constituted for a particular and limited purpose, as under the Metropolitan Hackney Carriage Acts for the protection of the public, under which Acts the true relationship would be rather that of bailor and bailee.⁴ But if a person lends his servant temporarily to another for a particular employment, the servant for anything done in that particular employment must be considered as the servant of the man to whom he is lent, though he remains the general servant of the person who lent him.⁵

Master liable
for fraud of
servant.

The master is liable for the fraud of his servant committed in the ordinary course of his employment, but not where it is committed outside the scope of his authority.⁶

General
liability of
the master.

A master is liable for every wrong of his servant committed by him in the course of the service, and for the master's benefit, though no express command or privity of the master be proved; and there is no distinction between fraud and any other wrong.⁷ If the servant, to further the interests of his employer, and substantially in the execution of his orders, commits a tortious act in the course of his employment, and exceeds his instructions, or altogether departs from them, the master is not relieved by reason of his having given orders that the servant should do his work properly, and should not cause injury to other persons.⁸ The giving such orders is quite immaterial; but if the master

¹ This decision was approved and followed in *Jones v. Corporation of Liverpool*, 14 Q. B. D. 890; and see *Waldock v. Winfield*, [1901] 2 K. B. 596.

² *McLaughlin v. Prior*, 4 M. & G. 88.

³ *Goodman v. Bennett*, 3 C. & P. 167.

⁴ *Venables v. Smith*, 2 Q. B. D. 279; *King v. London Improved Cab Co.*, 23 Q. B. D. 281; *Keen v. Henry*, [1894] 1 Q. B. 292, overruling *King v. Spurr*, 8 Q. B. D. 104; *Gates v. Bill & Son*, [1902] 2 K. B. 38.

⁵ *Donovan v. Laing, &c., Syndicate*, [1893] 1 Q. B. 629.

⁶ *Coleman v. Riches*, 24 L. J. C. P. 125.

⁷ *Mackay v. Commercial Bank of New Brunswick*, L. R. 5 P. C. 31; *Weir v. Bell*, 3 Ex. D. 238; *Cargill v. Bower*, 10 Ch. D. 502. See *Dyer v. Munday*, [1895] 1 Q. B. 742.

⁸ *Betts v. De Vitre*, L. R. 3 Ch. App. 441.

has enjoined his servant not to do a particular act, and the servant not in the course of his employment or duty does it, and thereby causes injury to another, the former will not be liable.¹ The master has been held liable in the following instances for the acts of his servant done or suffered to be done by him in the course of his employment; where a servant is driving a horse which runs away and does damage;² where he executes his master's orders with reasonable care and does damage;³ where he does an injudicious act and damage results;⁴ where he drives a cart on business of his master, then makes a *détour* for purposes of his own and does damage.⁵ He is liable even where the conduct of the servant acting within the scope of his employment is wanton, violent, and causes injury.⁶ He, too, is liable where being bailee of an article, his servant by his negligence injures it, though the injury is caused by an act of the servant done contrary to his master's orders.⁷ The drunkenness of the servant is equivalent to the negligence of the master, for which he will incur liability.⁸ He is also liable if he expressly order the servant to commit a trespass, or the trespass is the natural or necessary consequence of the act ordered to be done;⁹ and in such a case, the presence or absence of the master at the time of the committing of the trespass would be immaterial. But his presence or absence would become material where the servant has committed a trespass, or done any wrongful act without his orders; for, if he be absent he is not responsible; and unless there is evidence of the concurrence of his master's will in the act of the servant, he cannot be treated as a trespasser for the act of his servant.¹⁰ But if he be present, his presence may be taken to presume concurrence, for knowing his servant was about to commit a trespass, yet he forebore to exercise his power and control over him.¹¹ It is, then, the wrongful or negligent act of the servant while engaged in some employment or service on behalf and in consequence of the orders of his master, that creates the responsibility of the latter; and in cases involving this question, the most serious dispute is as to whether the servant was or was not acting on behalf and with the authority of his master, and it is rightly the province of the jury to determine the matter.¹²

Drunkenness of servant equivalent to negligence of master.

Master liable where the servant was acting on his behalf and with his authority; but not otherwise.

The principles of the law on this subject, so far as they are

¹ *Stevens v. Woodward*, 6 Q. B. D. 318.

² *Chandler v. Broughton*, 1 C. & M. 29.

⁴ *Croft v. Alison*, 4 B. & Ald. 500.

⁶ *Seymour v. Greenwood*, 30 L. J. Ex. 327.

⁷ *Coupe Co. v. Maddick*, [1891] 2 Q. B. 413.

⁸ *Wanstall v. Pooley*, 6 Cl. & Fin. 910 n.

⁹ *Gregory v. Piper* (*ubi sup.*)

¹¹ See *Chandler v. Broughton* (*ubi sup.*).

¹² *Patten v. Rea*, 26 L. J. C. P. 235.

³ *Gregory v. Piper*, 9 B. & C. 591.

⁵ *Joel v. Morrison*, 6 C. & P. 501.

In this case the guard of an omnibus, in removing therefrom a passenger whom he deemed to be drunk, forcibly dragged him out, and threw him upon the ground, whereby he was seriously injured.

¹⁰ *M'Manus v. Crickett*, 1 Eas^t, 106,

within the scope of this treatise, are well illustrated by the cases dealing with the negligent and improper driving of servants. The distinction between the liability and non-liability of the master for his servant's act has been thus laid down: If a servant driving a carriage, in order to effect some purpose of his own *wantonly* strike the horses of another person, and produce the accident, the master will *not* be liable. But if, in order to perform his master's orders, he strikes but *injudiciously*, and in order to extricate himself from a difficulty, that will be negligent and careless conduct, for which the master will be *liable*, being an act done in pursuance of the servant's employment.¹ If a servant, being on his master's business, take a *détour* with a carriage for some purpose of his own (as to see a friend, or do shopping for himself), and drive negligently, and cause damage, the master *must answer* for his act, on the ground that as he has intrusted the servant with the control of the carriage, it is no answer that he acted improperly in the management of it.² But the *détour* or deviation must occur on a journey on which the servant has originally started on his master's business;³ in other words, he must be in the employ of his master at the time of committing the tortious act.⁴ He will be *exonerated* if his servant, "on a frolic of his own," take his carriage without his consent or knowledge, and use it so negligently as to be productive of loss and damage.⁵ A master is also liable for the tortious acts of his servant which he adopts and ratifies;⁶ but the acts must be done for his use and benefit.⁷ No rule of law can be laid down as governing the liability in such cases of the general master or the particular master of the servant; it is really a question of fact in each case. There is one important test, however, and that is the right to exercise control over the servant at the time of the accident; if it exists in the general master then the particular master is not liable for the consequences of the servant's negligence.⁸

The liability of the master is not boundless, but has limits dictated by justice and common sense. If the relationship of master and servant was alone sufficient to create a liability on the part of the former towards third persons for the acts of the latter under all circumstances and at all times, it would be both unjust and inexpedient. A master should be liable only for those acts which he was instrumental in bringing about, or are

¹ *Croft v. Alison*, 4 B. & A. 590.

² *Joel v. Morrison*, 6 C. & P. 501; *Booth v. Mister*, 7 C. & P. 66.

³ *Sleath (or Heath) v. Wilson*, 9 C. & P. 607.

⁴ See *Mitchell v. Crassweller*, 22 L. J. C. P. 100.

⁵ *Joel v. Morrison* (*ubi sup.*); *Mitchell v. Crassweller* (*ubi sup.*).

⁶ See *Wilson v. Tummon*, 6 Scott, N. R. 894.

⁷ *Wilson v. Barker*, 4 B. & Ad. 614.

⁸ *Jones v. Scullard*, [1898] 2 Q. B. 565; and see *Rourke v. White Moss Colliery Co.*, 2 C. P. D. 205.

Liability for
acts of servant
adopted by
him.

Limits of
liability.

within the fair scope of the servant's authority;¹ to render him responsible for acts done out of his service, and not for his benefit, or for wilful acts done without his direction or assent, and not on his behalf, would be unjust, for it would render him answerable for that over which he had no control; and inexpedient, because it would tend to make the master employ servants of an inferior class; and all parties would be rendered more careless and less circumspect. The principle of the law is that no master is chargeable with the acts of his servant but when he acts in the execution of the authority given him.² A master is not liable for the dishonesty of his servant, if he has been guilty of any misfeasance, for he does not insure the honesty of his servant;³ neither is he liable for a fraudulent act of his servant, where the latter was acting beyond the scope of his authority or ordinary course of employment;⁴ in other words, where the act of the servant is not within the scope of his authority or incident to the ordinary duties of his employment, and no negligence is shown on the part of the master, then he will not be held liable;⁵ thus, he is not liable where the servant exceeds or departs from his instructions, and does an act unnecessary for the protection of his property.⁶ Again, it has been held that a wilful injury inflicted by a servant, though done in the course of his employment,⁷ or a wilful or illegal and unauthorized⁸ act of the servant, will not render the master responsible for its consequences.⁹ Where a housemaid set fire to a smoky chimney in order to clean it, whereby she burnt down the house and caused damage, her master was held not liable.¹⁰ But this statement must be qualified by the fact that if the wilful and criminal act is done by the servant in the course of his service to further the interests and for the benefit of his master, the latter is liable.¹¹ He is not liable where the tort or injury was the result of an accident on the part of the servant.¹²

Non-liability
of master.

¹ *Bayley v. Manchester, Sheffield and Lincolnshire Railway Co.*, L. R. 8 C. P. 148.

² Per Holt, C.J., in *Middleton v. Fowler*, 1 Salk. 282.

³ *Holder v. Souby*, 29 L. J. C. P. 246. This was a case of a lodging-house keeper. But see *Dansey v. Richardson* (3 El. & Bl. 144), where the court was equally divided on the question whether a boarding-house keeper was liable for the negligence of his servant. The undoubted responsibility of an innkeeper for the honesty of his servants is based upon his common law insurance of the safety of the goods of his guests.

⁴ *Coleman v. Riches*, 24 L. J. C. P. 125.

⁵ *Sterens v. Woodward*, 6 Q. B. D. 318.

⁶ *Allen v. L. & S. W. Ry. Co.*, L. R. 6 Q. B. 65; *Charleston v. London Tramways Co.*, 36 W. R. 367; *Sterens v. Hinshelwood*, 55 J. P. 341; *Hanson v. Waller*, [1901] 1 Q. B. 390.

⁷ *Gordon v. Rolt*, 18 L. J. Ex. 432.

⁸ *Lyons v. Martin*, 8 A. & E. 512; *Richards v. West Middlesex Waterworks Co.*, 15 Q. B. 660.

⁹ *M'Nanus v. Crickett*, 1 East, 106.

¹⁰ *Mackenzie v. Macleod*, 10 Bing. 385.

¹¹ See *Limpus v. London General Omnibus Co.*, 32 L. J. Ex. 34; *Munday v. Dyer*, [1895] 1 Q. B. 742.

¹² *Harding v. Barker*, 37 W. R. 78.

Servant acting independently of authority and employment of master.

It is not always an easy matter to determine when the act of the servant is independent of the authority and employment of his master, and the cases are not absolutely clear and unmistakable on the point. It would seem to be more in accordance with justice and the ordinary necessities of life that the master's liability should not be extended beyond the limits of his employment and service of the servant, for within such he may be deemed to insure and indemnify the public at large against the acts of his servant. In the next two cases the master was held not liable for the negligence of his servant. The defendant's carman, having finished his day's work, returned home with his horse and cart, and got the key of the stable, which was close by, but instead of going there at once and putting the horse up, drove off with a fellow servant, and in so doing ran over and injured the plaintiff. The carman was held not to have been at the time of the accident engaged in the business of his master, who was held not responsible for his unauthorized act.¹ A wine merchant sent a clerk with his carman to deliver wine at some distance off; the carman's duty was to bring back empties, and to put up the horse and cart. About a quarter of a mile from home, the clerk asked the carman to drive him in an opposite direction to that in which they were then going; the carman did so, and in driving about two miles out of the way, seriously injured the plaintiff.² Cockburn, C.J., said in this case: "I think the law as laid down in *Mitchell v. Crassweller* presents us with a true view of the case. I cannot adopt the proposition of Erskine, J., in *Sleath v. Wilson*,³ that whenever the master has intrusted the servant with the control of the carriage it is no answer that the servant acted improperly in the management of it. I think a servant can only be said to be acting in the employment of his master so long as he is doing some act with his master's assent." A case was decided in the Court of Common Pleas during the year before, in which a master was held liable for the acts of his servant under the following circumstances:⁴ The master was a contractor executing certain public works; his servant was in charge of a horse and cart; the servant was specially enjoined not to go home to dinner; the servant on one occasion did go for dinner to his home, which was a quarter of a mile from his work, and took the horse and cart with him; he left the horse outside of his house unattended; the horse ran away, and injured some railings belonging to the plaintiff. This case does not seem to conflict with the two previous ones, for the servant's going home to dinner, though contrary to orders, was a

¹ *Mitchell v. Crassweller*, 22 L. J. C. P. 100.

² *Storey v. Ashton*, L. R. 4 Q. B. 476.

³ 9 C. & P. 607.

⁴ *Whatman v. Pearson*, L. R. 3 C. P. 422.

mere temporary stoppage of the work which he was doing on behalf of his master; and so if any accident arose through the servant's negligence, the master would be liable, for the servant was still engaged in his employment and service. The master is not liable where the servant commits the tort before he has re-entered upon his duties.¹ A master has also been held irresponsible for the tort of his servant where the latter was contracting within the ordinary scope of his employment, though, as a matter of fact, he did some service for his master who adopted it.² If a servant in the course of his master's employ do a wilful injury, the servant and not the master is liable; for, under ordinary circumstances, the authority of the agent is limited to that which is lawful. If in seeking to carry out the purpose of his employment he oversteps the law, he outruns his authority, and his principal will not be bound by what he does.³

The mere doing of some service for the master does not render him liable.

A master is liable for the acts of his servant within the scope of the latter's employment,⁴ however wrongful and negligent such acts may be,⁵ but is not responsible for the wrongful act of his servant, unless that act be done in the execution of the authority given by him, and in the course of his employment.⁶ Beyond the scope of his employment he is as much a stranger to his master as any third person, and his act, therefore, cannot be regarded as the act of his master;⁷ and where there is no implied authority on the part of the servant to do the act,⁸ or the act of the servant is an act of his own, and to effect a purpose of his own, the master is free from liability.⁹ Of course a master is not liable for the injurious act of his servant unless it be wilful, or the result of negligence.¹⁰

Summary.

(ii) It is clear that the master may also be criminally liable for all acts of a criminal nature which he has expressly authorized his servant to commit. When a criminal act has been committed by persons who stand to each other in the relation of master and servant, in the eye of the law that relation ceases, and as regards the offence they are on the same level, and are treated as such; each must stand or fall by his own act. If a master order a servant to do an illegal act, the servant may justifiably refuse to carry out his orders; and if he elect to obey them, he does so at his own risk. To make a master criminally liable for the acts of his servant, he must have expressly ordered them, or personally co-operated in their commission. So, if a master employ a servant

Criminal liability. Acts of servants authorized by master.

When master not liable.

¹ *Rayner v. Mitchell*, 2 C. P. D. 357.

² *Cormick v. Digby*, 9 Ir. R. C. L. 557.

³ *Wilson v. Rankin*, 35 L. J. Q. B. 87.

⁴ *Burns v. Poulson*, L. R. 8 C. P. 563.

⁵ *Whiteley v. Pepper*, 2 Q. B. D. 276.

⁶ See *Mitchell v. Crassweller*, 22 L. J. C. P. 100; *Storey v. Ashton*, L. R. 4 Q. B.

476.

⁷ *Olding v. Smith*, 16 Jur. 497.

⁸ *Lord Bolingbroke v. Swindon New Town Local Board*, L. R. 9 C. P. 575.

⁹ *Limpus v. London General Omnibus Co.*, 32 L. J. Ex. 34.

¹⁰ *Holmes v. Mather*, L. R. 10 Ex. 261; *Budd v. Lucas*, [1891] 1 Q. B. 408.

to do a thing which may be done in several ways, criminal and innocent, and the servant does it in a criminal way, the master is not liable, for no man who is an agent for a legal purpose can make the principal responsible for an illegal act, unless the principal has, in some way directly or indirectly, authorized it.¹ But where a master employs a servant to carry on his work, who carries it on at a profit, the former may be rendered criminally liable for the acts of the latter if done contrary to statutory provisions, though such statutory offence may be in breach of his own orders, and committed without his knowledge.²

Liability of master to penalties under the Licensing Acts.

Domestic or menial servants not infrequently render their masters liable to penalties, *quasi*-criminal in their nature, such as are inflicted under the Licensing Acts.³ The act of the servant, when within the usual scope of his employment, is considered to have been done by the implied command of the master, and the latter is criminally responsible for it, though he is perfectly ignorant of its commission; indeed, personal knowledge on the part of the master is not necessary to constitute the offence.⁴ But some evidence of actual or constructive knowledge on the part of the master that his premises were being used contrary to the Act is necessary.⁵ If the servant conniving at the commission of the statutory offence is in charge of the premises the master will be held liable for the breach of the law;⁶ even though he has given orders against the commission of such offence.⁷ But where the servant is not in charge of the premises and permits the commission of the offence of which the master himself is personally ignorant, then the latter will not be rendered responsible.⁸

Negligence of master necessary for criminal liability.

Exceptions: Sale of Food and Drugs Act, 1875.

But where the negligent doing of a particular thing is made a statutory offence, the negligence of the servant will not render the master criminally liable, unless it can be shown that the latter was negligent in the user.⁹ But under the Sale of Food and Drugs Act, 1875,¹⁰ a master has been held responsible when the servant, while acting within the scope of his employment

¹ *Cooper v. Slade*, 6 H. L. Cas. 793.

² *Reg. v. Stephens*, L. R. 1 Q. B. 702.

³ 35 & 36 Vict. c. 94.

⁴ *Mullins v. Collins*, L. R. 9 Q. B. 292; *Cundy v. Le Cocq*, 13 Q. B. D. 207; *Bond v. Evans*, 21 Q. B. D. 249.

⁵ *Bosley v. Davies*, 1 Q. B. D. 84.

⁶ *Mullins v. Collins* (*ubi sup.*); *Redgate v. Haynes*, 1 Q. B. D. 89; *Bond v. Evans* (*ubi sup.*); and see *Bosley v. Davies* (*ubi sup.*).

⁷ *Commissioners of Police v. Cartman*, [1896] 1 Q. B. 655; *Collman v. Mills*, [1897] 1 Q. B. 396. This case was a conviction under a by-law which made it an offence for the licensed occupier of a slaughter-house to slaughter sheep in the pound of the slaughter-house or in view of other sheep. During the absence of the occupier his foreman, in direct disobedience of his orders and to save himself trouble, slaughtered a sheep in the pound and in view of other sheep. This conviction is an instance of modern socialistic views which would compel the individual to make any sacrifice for the good of the community.

⁸ *Somerset v. Hart*, 12 Q. B. D. 360; but see *Bond v. Evans* (*ubi sup.*).

⁹ *Chisholm v. Doulton*, 22 Q. B. D. 736; but see *Reg. v. Stephens* (*ubi sup.*).
¹⁰ 38 & 39 Vict. c. 63.

(as by selling an article of food), does an unlawful act, though he (the master) not only does not connive at such act but is ignorant of the fact of its existence, and has given orders against its commission;¹ but where the servant in doing the illegal act travels outside the scope of his employment, he will not render his master responsible for it.² So, too, under the Pharmacy Act, 1868,³ the person on whose behalf any sale of poisons is made by any apprentice or servant is to be deemed the seller. These provisions are, of course, for the protection of the public.

¹ *Brown v. Foot*, 61 L. J. M. C. 110.

² See *Newman v. Jones*, 17 Q. B. D. 132; *Kearley v. Tonge*, 60 L. J. M. C. 159.

³ 31 & 32 Vict. c. 121, s. 17.

CHAPTER IX.

RELATIONS OF SERVANTS TO THIRD PERSONS CREATED BY ACTS DONE ON BEHALF OF THE MASTER.

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In the last chapter it was seen that the liability of the master for the acts of his servant was that of a principal who employed an agent to transact his business, and whose acts, within certain limits, were deemed to be as his own; for where a principal obtains a benefit through his agent, there also should he be responsible for loss occasioned by that agent. A servant can, like any other agent, so act as to render himself liable, though when acting ordinarily, as an agent for his master, he is not liable.

A servant may render himself liable (i) on contracts made on behalf of the master; (ii) for torts committed on behalf of the master.

(i) *On Contracts made on behalf of the Master.*—A servant will render himself liable when, on entering into the contract, he does something wrong, or omits to do something right; thus, if he exceed his authority, or fraudulently misrepresent it, he will be held personally responsible;¹ provided the person with whom he contracts is unaware of his agency.² The servant can also render himself liable by contracting in his own name,³ and it may not be a useless caution to servants to remind them that if they are contracting in their own names, they should use apt words to describe their procuratorial capacity, as “agent for,” or “*per procurationem*” (*per proc.*). A servant having an authority to contract which is revoked without his knowledge, as by the death of the master, would not be liable on a contract which was within the scope of his authority.⁴

Liability on contracts made on behalf of master.

Servant not bound when revocation of authority unknown.

¹ See *Smout v. Ilbery*, 12 L. J. Ex. 357.

² *Paterson v. Gandasequi*, 15 East, 62; 2 Sm. L. C. 378.

³ *Smout v. Ilbery* (*ubi sup.*); *Blades v. Free*, 9 B. & C. 167.

⁴ *Cherry v. Colonial Bank of Australasia*, 38 L. J. P. C. 49.

The remedy against a servant who has contracted without authority, is either an action for the deceit, as a tort, or on an implied warranty that he possessed the authority he professed to have,¹ on the principle that "persons who induce others to act on the supposition that they have authority to enter into a binding contract on behalf of third persons, on it turning out that they have no such authority, may be sued for damages for the breach of an implied warranty of authority."²

(ii) *For Torts committed on behalf of the Master.*—The servant is not in general liable for acts of negligence or non-feasance, or omissions of duty on his part in the course of his employment.³ But the principle of law that in torts all the tort-feasors are principals, renders a servant responsible for mis-feasances on his part; and in an action against him for the tort it is no defence to urge that he acted under the orders and for the benefit of his master; for in torts there is no question of degrees of blame and liability.⁴ In respect of non-feasances, or mere neglects in the performance of duty, the responsibility must therefore form some express or implied obligation between parties standing in privity of law or contract with each other, and no man is bound to answer for any such violations of duty or obligation except to those to whom he has become directly bound or amenable for his conduct.⁵ Where a servant converts goods for the benefit of his master, he will be liable for the wrongful conversion;⁶ but he has been held quit of liability on making a qualified refusal to deliver up goods to the true owner, and referring him to his master, for such mere refusal was held not to amount to a conversion.⁷ So also, a servant is no doubt liable for a joint fraud committed by him with his master.⁸ The latter is clearly liable, and seemingly the former is likewise. In the case of *Cullen v. Thompson's Trustees*,⁹ it was asked by Lord Westbury: "Can it be maintained as a proposition of law that a servant who knowingly joins with and assists his master in the commission of a fraud is not civilly responsible for the consequences. All persons directly concerned in the commission of a fraud are to be treated as principals. No party can be permitted to excuse himself on the ground that he acted as the servant of another; and the reason is plain, for the contract of agency or of service cannot impose any obligation on the agent or servant to commit or assist in committing a fraud."

Remedy against the servant.

Liability for torts committed on behalf of the master.

Liability for conversion.

Liability for joint frauds with master.

¹ *Polhill v. Walter*, 3 B. & Ad. 114.

² Per Cockburn, C.J., in *Richardson v. Williamson*, L. R. 6 Q. B. 276, 279.

³ *Lane v. Cotton*, 12 Mod. 472, 488; Story, Agency, s. 308.

⁴ *Sands v. Child*, 3 Lev. 352; *Lane v. Cotton* (ubi sup.); *Perkins v. Smith*, 1 Wils. 328; *Stephens v. Elwell*, 4 M. & S. 459.

⁵ Story, Agency, s. 309.

⁶ *Cranch v. White*, 1 Scott. 314.

⁷ *Mires v. Solebay*, 3 Mod. 342; *Lee v. Robinson*, 18 C. B. 599; *Lee v. Bayes*,

25 L. J. C. P. 249.

⁸ See *Cullen v. Thompson's Trustees*, 4 Macq. H. L. Cas. 424.

⁹ P. 432.

Principle of
liability.

The servant is liable, if he *knowingly* commit a fraud in his master's business, to answer for it to the party injured, and cannot shelter himself under his master's responsibility, although authorized by his master to commit the fraud; for, as observed by Mr. Justice Story,¹ it is an illegal act, and contrary to sound morals. It is indeed laid down in Rolle's Abridgment² that if the servant of a tavern sell bad wine knowingly, no action lies against him, for he only did it as a servant. But that proposition has been frequently doubted by text-writers, and would seem to be contrary to the principle that the command of the master has been held no justification of a *misfeasance* on the part of the servant.³ But if a domestic servant not in charge of a weak and impotent person obeys his or her master in an act of *non-feasance*, e.g., not supplying the person with proper food and medicine, and in consequence of neglect the person dies, he not having committed a breach of any legal duty, would not be liable to conviction for murder or manslaughter.⁴

Criminal
liability of
servant.

In crimes as well as torts, it may be laid down as a general proposition that all are equally liable for their acts, and cannot shift upon the shoulders of others the burden of responsibility. If a man knowingly engage in the commission of a crime, it does not lie in his mouth to say he was only a servant, and acting under his master's direction and orders; for, *ex hypothesi*, such were illegal, and need not have been obeyed. Thus, if a nurse, in carrying out the orders of her master or mistress, knowingly cause the death of a child, she may be convicted of murder or manslaughter, as the circumstances of the case are proved. But if the servant be an innocent agent for the commission of an act which is not palpably illegal, and which he honestly carries out in the discharge of the directions of his master, and acts *bonâ fide* in obedience to those orders which he deems himself bound to obey, he will not, it is submitted, be personally answerable.⁵ In such a case it is sometimes a matter of difficulty to decide whether the act of the servant is altogether that of his master, or independent of him; if the former, the servant is irresponsible,⁶ but the contrary, if it is one that may be deemed the act of the servant alone.⁷ If a servant actively participate with his master in the commission of an offence, as, for instance, harbouring prostitutes in a place of public resort, of course he may be committed as an aider and abettor.⁸

¹ Agency, s. 310.

² 1 Roll. Abr. fol. 95.

³ Smith, M. & S. 421.

⁴ See *Reg. v. Stanton and Rhodes*, Times, November 9, 1877.

⁵ *Reg. v. James*, 8 C. & P. 131; *Reg. v. Bleasdale*, 2 C. & K. 768.

⁶ *Rex v. Taylor*, 15 East, 460.

⁷ *Ex parte Sylvester*, 9 B. & C. 61.

⁸ *Wilson v. Stewart*, 8 L. T. 277.

CHAPTER X.

OFFENCES BY SERVANTS.

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It has been deemed not out of place to append a short chapter on the more frequent offences committed by servants against the property of their masters; for though the criminal law has hitherto found no place in these pages, except incidentally, yet it is more intimately concerned with the relations of master and servant, for the latter are often placed in positions which sorely try their honesty, and in which they yield to their temptations.

The commonest offence dealt with in any court of justice is theft; and a large number of thefts or larcenies are committed by servants, not excepting domestic or menial servants. There is also another offence, which is not of infrequent occurrence, namely, embezzlement, which can only be committed by one in the position of a clerk or servant. The law on this subject is intricate, confused, and obscure; at times it is difficult and almost impossible to say with certainty whether the offence of larceny or embezzlement has been committed; but owing to a wise provision of the law, to which allusion will be made hereafter,¹ it is now a matter of less moment than it was formerly, though not without its importance. There is no difficulty when the thing stolen has remained up to the time of the theft in the possession and custody of the master; but when the goods have been delivered to the servant by the master, questions may arise whether the mere custody of the goods, or something more, has passed to the servant; thus raising doubt whether theft or breach of trust has been committed.

Larceny has been defined to be "the wrongful or fraudulent taking (*contrectatio*), and carrying away (*asportatio*), by any person

Definition of
larceny.

¹ *Post*, p. 934.

of the mere personal goods of another, from any place, with a felonious intent to convert them (*animus furandi*) to his (the taker's) own use, and make them his own property, without the consent of the owner.¹

There is no satisfactory definition of embezzlement, and the following is but an attempt to describe it, namely, a fraudulent deprivation by a clerk or servant of his master's personal goods received by such clerk or servant for or on account of his master before they have reached the latter's possession. As applicable to servants, the distinction between the two offences may be said to be, that theft or larceny is the felonious taking of property *out of the possession* of the master, whether actual or constructive; and embezzlement is the fraudulent misappropriation of property received for or on account of the master *before it reaches his possession*, whether actual or constructive. In some instances confusion and doubt seem to arise from the non-appreciation of what looks like an economic fallacy, that goods sold and the price paid for them are not virtually one and the same thing in different shapes; as, for example, if a master send his servant to market with certain commodities, and his servant misappropriate them on the road, the latter can in most instances be indicted for larceny. But should he effect a sale, and receive the price of the goods, which he improperly appropriates to his own use, he cannot be so indicted; as though there was any valid distinction between the relations of his master to the goods delivered *by* him to the vendee, and the goods, whether in specie or in kind, delivered *to* him by the vendee; for on delivery of the goods by the vendee to the servant on behalf of his master, the rights of the latter over them at once become identical with the rights he claimed to exercise over the goods which had just ceased to be his property by the operation of the sale and delivery. Again, if a servant is sent by his master to get change for a bank-note, gets it, and embezzles the change, he is not liable at common law for *larceny*, but should be indicted for embezzlement, as his master never had possession of the change;² but if he steal the note, it is larceny, for of that he only had the custody and not the possession.³

The clear maxim of the common law, established by a variety of cases, is where a party has only the bare charge or custody of the goods of another, the legal possession remains in the owner and the party may be guilty of trespass and larceny in fraudulently converting the same to his own use. This rule appears to hold universally in the case of servants, whose possession of their

Distinction
between
larceny and
embezzlement.

Where the
servant has
bare custody,
the offence is
larceny.

¹ 2 East, P. C. c. 16, s. 2, p. 553.

² *Reg. v. Sullens*, 1 Moo. C. C. 129; *Reg. v. Reynolds*, 2 Cox, C. C. R. 170.

³ *Rex v. Bass*, 2 East, P. C. 566; *Reg. v. Goode*, C. & M. 582.

master's goods, by their delivery or possession, is the possession of the master himself,¹ and it is immaterial whether the servant conceived the felonious intent (*animus furandi*) at the time he received them, or subsequently. A few cases will be given to illustrate this proposition, in which the offence was held to be larceny: A servant who takes his master's goods to his master, and, on the pretence that the goods were sent by a person with whom the master dealt, endeavours to induce him to purchase them, intending to retain the money.² A servant sent with money given by his master to get changed, applies it to his own use.³ A servant sent with his master's cart to a railway station for coals, which are put in the cart; on the way home the servant, without authority from his master, disposes of some of them.⁴ A servant receiving goods from his master on account of the latter, wrongfully appropriates them.⁵ A cook, out of alleged compassion, gives certain articles belonging to her master to a person who receives them.⁶ Formerly the offence of clandestinely taking the master's oats by a servant, though for the purpose of being given to the master's horses, was an indictable felony. It is not so now, but is punishable on summary conviction before two justices either by imprisonment or by penalty.⁷

But where a master parts not only with the *custody*, but also with the *possession* of goods to a servant, and the servant converts them to his own use, it is not larceny, unless he had a felonious intent (*animus furandi*) at the time he received them.⁸

When a clerk or servant, or person employed in the capacity of Embezzlement. a clerk or servant, commits theft by converting any chattel, money, or valuable security delivered to, or received, or taken into possession by him for or in the name or on account of his master or employer, his offence is embezzlement, and on conviction shall be liable to the same punishment as for larceny by a servant.⁹ As before pointed out, the distinction between embezzlement by a clerk or servant and other kinds of theft, is that in ordinary theft the property stolen is taken out of the possession of the owner, whereas, in embezzlement by a clerk or servant, the property embezzled is converted by the offender whilst it is in the offender's possession on account of his master, and before that possession has been changed into a mere custody.¹⁰ The offence of embezzlement

¹ 2 Russ. Cr. 310.

³ *Reg. v. Goode*, C. & M. 582.

⁵ *Reg. v. Hawkins*, 4 Cox, C. C. R. 274.

⁶ *Reg. v. White*, 9 C. & P. 344. See *Reg. v. Kerr*, 8 C. & P. 176.

⁷ 26 & 27 Vict. c. 103.

⁸ For illustrations of this, see the cases of drovers intrusted with cattle to sell and receive the purchase-money: *Rex v. Hughes*, 1 Moo. C. C. R. 370; *Reg. v. Goodbody*, 8 C. & P. 665; *Reg. v. Hey*, 3 Cox, C. C. R. 582; *Milligan v. Wedge*, 12 Ad. & E. 737.

⁹ Steph. Dig. Cr. Law, 220; 24 & 25 Vict. c. 96, s. 68.

¹⁰ *Reg. v. Wilson*, 9 C. & P. 27; *Rex v. Abraham*, 2 East, P. C. 569; *Rex v. Bazeley*, 2 East, P. C. 671.

² *Reg. v. Hall*, 2 C. & K. 947.

⁴ *Reg. v. Reed*, 1 Dears, C. C. 168, 257.

cannot be committed by the appropriation of property which does not belong to the master of the alleged offender, although such property may have been obtained by such alleged offender by the improper use of the property intrusted to him by his master; but property which does belong to the master of the offender may be embezzled, although the offender received it in an irregular way.¹

There are three factors which go to make up the offence of embezzlement:—

(i) The person charged must be a clerk or servant, or employed for the purpose or in the capacity of a clerk or servant.

(ii) He must receive or take into his possession some chattel, money, or valuable security, for or in the name or on account of his master or employer.²

(iii) He must fraudulently embezzle the same or a part thereof. Unless these are combined the offence is not embezzlement, but may be simple larceny, or larceny by a servant, or by a bailee, or it may amount to no more than a breach of trust, for which there would only be a civil remedy. To support the charge of embezzlement of money, evidence must be produced not only of a mere receipt and non-payment of the money, but also a positive refusal to account, for an omission to account is not inconsistent with innocence.³

By 24 and 25 Vict. c. 96, s. 72, if a person indicted for embezzlement or fraudulent application or disposition of property is proved to have been guilty of larceny, he is not entitled to be acquitted, but may be convicted of larceny; and *vice versa* if indicted for larceny. This alteration of the law has conduced much to the better administration of justice, and the prevention of guilty persons escaping the consequences of their wrongful acts. But notwithstanding this, there is a substantial difference between the two offences, for if a person be indicted for and *convicted* of the one offence upon evidence which proves the other, the conviction may be quashed.⁴

The law draws a distinction between larceny by a servant and by one who is not the servant of the owner of the goods, for in the former case the punishment meted out to the offender is much more severe, in order to discourage the commission of offences which are committed with greater ease from the position and opportunities of the parties. Another reason is that modern social life cannot be carried on without those in a higher sphere placing much confidence in those who minister to their wants;

¹ *Reg. v. Cullum*, L. R. 2 C. C. R. 28; *Reg. v. Gale*, 46 L. J. M. C. 146; *Reg. v. Wilson*, 9 C. & P. 27.

² For apparently dissimilar constructions put upon the words "on account of his master," see *Reg. v. Beaumont*, 23 L. J. M. C. 53; *Reg. v. Thorpe*, 27 L. J. M. C. 264.

³ *Reg. v. Jones*, 7 C. & P. 833.

⁴ *Reg. v. Gorbutt*, 26 L. J. M. C. 47.

What constitutes embezzlement.

Person indicted for embezzlement may be convicted of larceny, and *vice versa*.

Larceny by a servant a more serious offence than simple larceny.

and it is but just and right that the abuse of this confidence should be severely punished. This, however, casts upon masters the corresponding duties of being careful in their choice of servants, and in not exposing them to temptations which may be too strong for them. The penalty for larceny by a clerk or servant is provided for by the Consolidating Act of 1861, section 67,¹ which enacts that,

Punishment
for larceny by
a servant.

24 & 25 Vict.
c. 96.

“whosoever, being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, shall steal any chattel, money, or valuable security belonging to or in the possession or power of his master or employer, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than (three) years,² or to be imprisoned for any term not exceeding two years with or without hard labour, and with or without solitary confinement, and if a male under the age of sixteen years with or without a whipping.”

When a master has missed some of his goods, and suspicion falls on a servant of having taken them, a claim of right is often made to search the boxes of the suspected servant. If the servant allows the search to take place, there is nothing irregular or illegal in the act, but where he does not assent to or refuses permission for the search to be made, and the master insists on it, then the latter is guilty of a trespass and may be cast in damages, for there is nothing in the relation of master and servant that confers that right and privilege on the master. If he has good ground for suspecting that the servant is dishonest and has concealed the stolen articles in his or her box or other receptacle, then the right course for the master to pursue is to go before the proper magistrate and lay an information and apply for a search warrant; and if he has acted with *bona fides* in his application he would be able to defend successfully an action for trespass at the suit of the servant.³ The master might also call in the aid of a police officer, and allow him to take such course as he thinks fit on the information afforded him, for an officer of the law is more readily protected, if reasonable evidence of suspicion is forthcoming.⁴ In any other case the permission of the servant should be obtained in a free and proper manner. An allegation in the information of reasonable suspicion of larceny is sufficient, and it is not necessary to state in so many words that a larceny has been committed, or to specify the particular goods for which the warrant is sought.⁵

No privilege
of master to
search boxes
of servant.

Application
for search
warrant.

¹ 24 & 25 Vict. c. 96.

² The original minimum period of three years was re-enacted by the Penal Servitude Act, 1891 (54 & 55 Vict. c. 69, s. 1 (1)).

³ See *Brown v. Chapman*, 6 C. R. 365.

⁴ See *Grinham v. Whitley*, 4 H. & N. 496; *Davis v. Russell*, 5 Bing. 354.

⁵ *Jones v. German*, [1897] 1 Q. B. 374.

Burglary by
servants.

The offence of burglary, which is the breaking and entering of a house in the night with intent to commit a felony, may be committed by a servant, though living in his master's house, and "the opportunity afforded him of doing it with greater ease rather aggravates than extenuates the guilt."¹ Thus, where a servant conspired with a thief to rob his master, and let him into the house by night for that purpose, both servant and stranger were held rightly convicted of burglary.² It is not necessary that the breaking should be from the outside on the part of the servant; and if he attempt in the night-time to open a secured door of one of the rooms for the purpose of committing a felony, whether it be with intent to commit a rape,³ or larceny, he may be convicted of burglary.

¹ 4 Bl. Com. 227.

² *Rex v. Cornicall*, 2 Stra. 881; but see *Reg. v. Johnson*, C. & M. 218.

³ *Rex v. Gray*, 1 Stra. 481.

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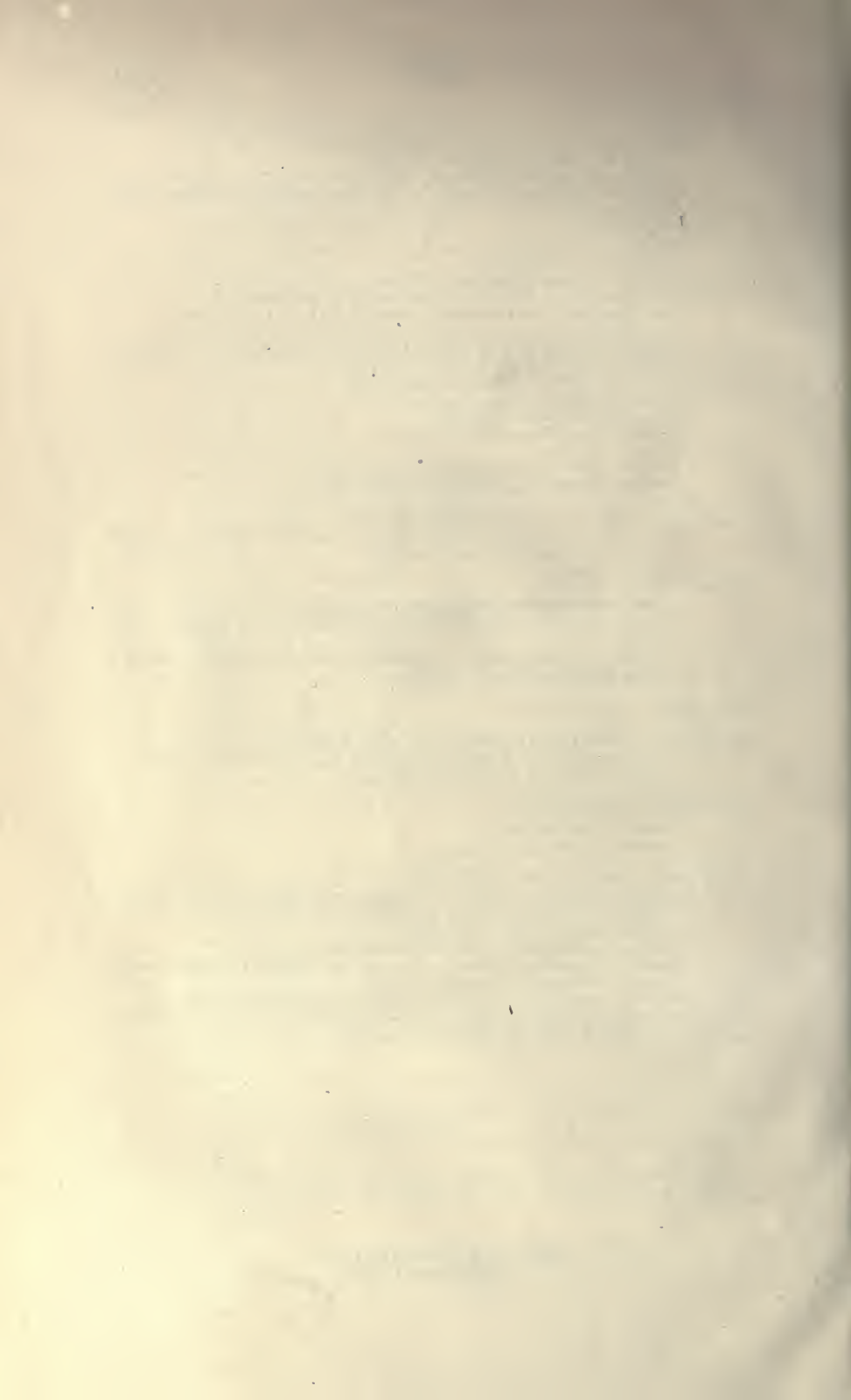
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